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

FINDINGS AND RECOMMENDATIONS

Matter: **Protest of Aydin Displays, Inc.**
Under Solicitation No. DTFAWA-11-R-00006

Docket No.: **11-ODRA-00578**

Appearances:

For the Protester: Jessica C. Abrahams, Esq., and Virginia M. Gomez, Esq., of McKenna, Long & Aldridge, LLP

For the FAA Program Office: Kristin Kane, Esq.

Aydin Displays, Inc. ("Aydin") filed this protest ("Protest") against the award to Barco, Inc. ("Barco") of contract number DTFAWA-11-D-00033 ("Contract") under Solicitation No. DTFAWA-11-R-00006 ("Solicitation"). Under the Solicitation and resulting Contract, the Federal Aviation Administration ("FAA") will purchase liquid crystal displays to replace its existing current Sony cathode ray tube ("CRT") Main Display Monitors ("MDM"). *Finding of Fact* ("FF") 3, *infra*. Aydin challenges the "fail" scores that it received under evaluation factors one and two of the Evaluation Plan, as well as the "high risk" rating it received under the risk evaluation criteria. Other grounds of this Protest include issues involving the Buy American Act, waiver of specification requirements, and the low price determination. Barco did not intervene in the Protest. For the reasons discussed below, the ODRA recommends that the Protest be denied in its entirety.

I. Findings of Fact

A. The Solicitation

1. The Solicitation was issued on November 17, 2010. *Protest* at 6; *AR* at 2.

2. The Solicitation was amended four times. *AR* Tabs 6, 8-10.

3. As amended, the Solicitation explained the purpose of the procurement as:

> 1.0 Introduction
> The Federal Aviation Administration will replace the current Sony cathode ray tube (CRT) Main Display Monitors (MDMs) with new 20" by 20" Liquid Crystal Display (LCD) Monitors for Plug-Compatible Installation into Existing Air Traffic Control Consoles. The units must provide viewing-plane form, fit and functional replacement for existing 20" by 20" CRT) [sic] MDMs used in the Standard Terminal Automation Replacement System (STARS) terminal controller workstations (TCWs). The units similarly must provide replacement for the same CRTs used in the Automated Radar Terminal System (ARTS) Color Display (ACD) workstations. In addition the Government will have the option to procure additional displays for other FAA programs or other Government agencies.

   AR Tab 8, § C 1.0.

4. The successful offeror under the Solicitation would receive an indefinite delivery, indefinite quantity (IDIQ) contract for the MDMs based on the offeror's fixed unit prices. *AR* Tab 5, § B.1.

5. Section C 3.0 required that each "MDM unit furnished by the Contract must be in accordance with the specification requirements." *AR* Tab 8, § C. 3.0.

6. The Solicitation called for the delivery of commercial-off-the-shelf ("COTS") MDMs, stating specifically:

> **3..2.1 Display Design**
> The replacement MDM must be Commercial-Off-the-Shelf (COTS) hardware to meet the Contract requirements. The Contractor must propose and obtain approval from the FAA for the use of any noncommercial items or modified COTS hardware. The Contractor must ensure that all hardware, software, and documentation required for the operation and support of replacement MDM is provided as part of the supplies and services provided.

AR Tab 8, § C. 3.2.1.

7. The Solicitation contained *Acquisition Management System ("AMS") Clause* 3.6.4-2, "Buy American Act – Supplies (July 2010)." *AR* Tab 5, § I.1.

8. The final revision to the technical specifications in section J, attachment 1, was issued in Amendment 0003 to the Solicitation. *AR* Tab 9.

9. Paragraph 1.4. of the technical specifications addressed "Electrostatic Discharge" ("ESD"), and stated:

> **1.4 Electrostatic Discharge**
> No system failures or service interruptions shall occur due to electrostatic discharge to the equipment case under the following conditions:
>
> a. While in a non-operating state, when subjected to either a voltage discharge of 12kV, as stored in a 100 picofarad (pF) capacitor and discharged to the case through a series impedance of 100 ohms, or a transient current with an energy content of 7.2 millijoules (mJ). .
>
> b. During operation, when subjected to either a voltage discharge of 7kV, as stored in a 100 pf capacitor and discharged to the case through a series impedance of 500 ohms, or a transient current with an energy content of 2.45 mJ.

AR Tab 9, § J., *Attachment* 1, ¶ 1.4.

10. Paragraph 1.13 of the technical specifications provided in part, "The display [ ] shall not exceed 65 pounds when ready to be mounted in console and connected to cables." *AR* Tab 9, § J., *Attachment* 1, ¶ 1.13.

11. Paragraph 1.16.1 of the technical specifications required:

> **1.16.1 Luminance and Contrast**
> a. The display shall be capable of producing a luminance of min 225+ cd/m^2.
> b. Luminance shall not vary by more than 1.5:1 from the center to the edge of the display.
> c. The display contrast shall not change by more than 20% when viewed at +/- 20 degrees.
> d. The display shall provide contrast ratio of at least 450: 1.

AR Tab 9, § J., *Attachment* 1, ¶ 1.16.

12. Paragraph 1.18 of the technical specifications required:

> **1.18 Glare Control**
> a. The use of anti-glare treatments shall not cause the display to violate the requirements for luminance, contrast, and resolution that may impact task performance.
> b. Surfaces adjacent to the display shall have a dull, matte finish.

AR Tab 9, § J., *Attachment* 1, ¶ 1.18.

13. Section J contained Exhibit L001, a table entitled "Performance Matrix; Main Display Monitor (MDM)." *AR* Tab 9, § J. The table listed each specification requirement in the first three columns, and required offerors to verify with a "Y" or an "N" whether their MDM complied. The table appeared as follows:

Spec. Para.	Spec. Page	Description	Comply Y/N*	Comments
1	2	MDM Characteristics		
1.1	2	Installation		
...	…	…	…	…
1.22.2	6	Power Input		
1.23	6	Tools		

*Note: Any instances of non-compliance or incompleteness with respect to the Matrix must be noted and explained in detail. Use a continuation sheet if necessary. The Offeror must provide documented evidence for compliance; the Offeror is also required to indicate if their MDM does or does not comply with any and all of the above performance requirements.

AR Tab 9, § J – Exhibit L001 (underline in the original). The underlined portion called attention to the changes made in amendment 0003. *Id*. Notably, the SF-30 forwarding amendment 0003 also stated on the front page, in underlined text, "The Offeror must provide document evidence for compliance; the Offeror is also required it indicated if their MDM unit does or does not comply with any and all of the above performance requirements." *Id.*, at cover page (SF-30), block 14.

14. The instructions to the Offerors included section L.3.7., which stated:

> **L.3.7 COMPLIANCE WITH INSTRUCTIONS**
> It is critical that each Offeror is fully compliant with the requirements of this SIR, without exception to any provision, and that all information must be clear and complete.
>
> The FAA will review all responses to ensure completeness, response to all elements, and adherence to requirements of this SIR.
>
> Responses that do not meet these requirements will not be considered. The resultant Contractor is responsible for compliance with the entire SIR and all attachments.
>
> When evaluating an Offeror's capability to perform the prospective contract, the FAA will also consider compliance with these instructions. The FAA will consider an Offeror's noncompliance with all these instructions as indicative of the quality of work the FAA may expect from the Offeror during contract performance. Any noncompliance with these instructions may be considered indicative of a quality problem.

AR Tab 10, § L.3.7.

15. Offerors were to provide their proposals in four distinct volumes. *AR* Tab 10, § L. 4.1. The instructions to the Offerors provided the format for the four volumes and included an opening instruction found section L.4., which stated:

> **L.4 GENERAL SIR PROPOSAL INSTRUCTIONS**
> Replies to this SIR must be in conformance with the outlines or instructions as identified in this as well as other paragraphs of Section L.
>
> Offerors must submit factual and concise written information as requested. Proposals should be specific enough to provide the FAA evaluators with enough information to be able to judge the capabilities of each Offeror to perform the SIR requirements.
>
> Omissions or unacceptable responses to the requirements of this solicitation may render a proposal incomplete, as it relates to the requirements of the solicitation, and therefore, may eliminate it from further consideration.

AR Tab 10, § L.4.

16. Section L.6 required offerors to provide two MDMs for evaluation that were consistent with the technical specifications attached to the Solicitation. *AR* Tab 10, § L.6. More specifically, the Solicitation stated:

> **L.6 VOLUME II – FACTOR 1 – DELIVERY, DEMONSTRATION AND EVALUATION OF MDMs**
> The Offeror must provide two (2) standard commercial main display monitors to the Government - at a time and date to be announced, at the William J. Hughes Technical Center (WJHTC) in Atlantic City, NJ - and install them in accordance with the terms and conditions defined in this SIR. <u>Both main display monitors must be consistent with the MDM Technical Specifications (in Section J of this SIR as, MDM_SIR_Sec_J_J001_TechSpecs.doc) and all information provided in the Offeror's response to the MDM Performance Matrix (in Section J of this SIR).</u> The two (2) MDM products will remain installed for a period not to exceed six (6) months.

> The Contract Specialist will notify the Offerors of the installation date and time. The Offerors will have approximately fifteen (15) calendar days advance notice of the requirement to install.
>
> The Offeror will be expected to provide a detailed briefing, before the FAA's evaluation begins, which explains the appropriate set-up, installation, and test procedures for each MDM unit. As a part of this briefing, the Offeror must perform the following activities:
>
> • The Offeror must install the main display monitor products on the date(s) (time, day(s) month and year), specified by the FAA, at the William J. Hughes Technical Center (WJHTC) in Atlantic City, NJ. The Offeror must setup, power up, align, test, verify, and validate that their respective MDM Units are in proper working order. Then they will power down their MDM Units and exit the evaluation area. All Offerors will be required to sign a form which confirms that they have installed their MDM unit and that it is ready for evaluation.
>
> • Provide "In-Briefing," to include the following: Demonstration of product setup, procedures and processes explained as necessary
>
> • Offerors are to provide copies of any and all alignment procedures, as well as any special or proprietary tools that are required for installation and maintenance.
>
> • The Offeror will be notified when they must uninstall and remove the MDM products from the WJHTC at the completion of the evaluation. MDM products will remain installed for a period not to exceed six (6) months.
>
> • **Offerors will not be allowed to observe FAA evaluations.** Therefore, it is critical that each Offeror provide a thorough and detailed briefing before the FAA's evaluation begins.

AR Tab 10, § L.6 (underline added).

17. Offerors were required to complete and submit the MDM Performance Matrix, Section J – Exhibit L001, as part of Volume III. *AR* Tab 10, § L. 7.1.

18. As provided in section M.1.1, the award was to "be made to that technically acceptable and responsible Offeror who offers to the Government the lowest evaluated price." *AR* Tab 8, § M. 1.1. "This lowest cost-technically acceptable

approach will also take into consideration the FAA's characterization of risk and does not require that award be made to the Offeror being assessed as having a 'high' risk even though the Offeror submitted a technically acceptable proposal with the lowest reasonable evaluated price." *Id*. Moreover, the offerors were "cautioned not to minimize the importance of a detailed adequate response in any of the [evaluation] factors." *Id.* Eligibility for the Award was also addressed in section M.1.3, which stressed that "[t]o be eligible for award, the Offeror must meet all the requirements of the SIR." *AR* Tab 8, § M.1.3. Nevertheless, "the FAA reserve[d] the right … to waive any requirements, minor irregularities and discrepancies, if it would be in the best interest of the FAA to do so." *Id*.

19. Section M also stated:

> **M1.2 EVALUATION ORDER OF IMPORTANCE**
>
> First, Factors 1 through 5 (listed in M.3) must be technically acceptable with each factor receiving an evaluated score of pass. Secondly, the evaluated price (Factor 6) for each Offeror's proposal will be compared to all other Offerors that have been determined to be technically acceptable. The outcome of the comparison of the evaluated price of all technically acceptable Offerors will be the determining factor for contract award. The Offeror who is deemed technically acceptable and has the lowest reasonable evaluated price will receive the award. However, a risk assessment of High may render the proposal unacceptable.

AR Tab 8, § M. 1.2.

20. The evaluation team was to assess "risk" as follows:

> **M2 EVALUATION PROCESS**
>
> …
>
> After all the teams complete their evaluations, an assessment of the overall risk will be determined for each Offeror's proposal. Risk assessment is the Government's estimates [sic] as to the Offeror's ability to perform successfully in light of the Government's evaluation of the Offeror's proposal.
>
> The evaluation teams will then compile the results from all evaluation factors and present their findings to the Source Selection Official (SSO), who will select that technically

> acceptable Offeror who offers to the Government the lowest reasonable evaluated MOM unit price. A risk characterization of High may render the proposal unacceptable.

AR Tab 8, § M. 2.

21. Aydin challenges the Product Team's evaluation under the first and second evaluation factors. *Protest* at 1. The first evaluation factor was defined in the Solicitation as follows:

> **M3.1 FACTOR 1: DELIVERY, DEMONSTRATION, AND EVALUATION OF MDMs**
>
> This factor will be scored on a pass/fail basis as evidenced by the operational evaluation of the MDM Unit and any related hardware, if applicable. To pass, the Offeror's proposed product must be delivered, as per the instructions in Section L, in a timely manner and in a technically acceptable condition for operational evaluation. That is, the Offeror's product must satisfy the form, fit, and function requirements being defined as:
>
> > **Form** - The unique and relevant physical characteristics (shape, size, mass) that characterize a part for a particular use.
> >
> > **Fit** - The ability of a part to physically mate with, interconnect to, or become integrated with another part.
> >
> > **Function** - The action that a part is expected to perform in fulfilling its purpose.
>
> This entails that the Offeror's submitted product must meet all technical specifications in accordance with the MDM Technical Specification (in Section J of this SIR).

AR Tab 8, § M. 3.1.

22. Evaluation Factor Two was described as follows in the Solicitation:

> **M3.2 FACTOR 2: COMPLIANCE WITH MDM PERFORMANCE REQUIREMENTS**
>
> This factor will be scored on a pass/fail basis as evidenced by the completed MDM Performance Matrix requirements (in Section J of this SIR) submitted by the Offeror. To pass, the Offeror's proposed product must meet all requirements identified in the MDM Performance Matrix. Any instances of non-compliance or

> incompleteness with respect to the MDM Performance Matrix must be noted and explained in detail by the Offeror.

AR Tab 8, § M. 3.1.

23. The Solicitation described the risk evaluation criteria as follows:

> **M4 RISK ASSESSMENT**
> Risk assessment analysis serves to assess and evaluate potential risks to the Government associated with the selection of each Offeror's overall proposal for fulfilling the requirements of the SIR. The primary criteria to be used in the assessment of risk will be the degree to which the Offeror substantiates the ability to meet schedule and maintain quality as provided for in the SIR. The evaluation of risk will also focus on whether each proposal volume supports and is logically consistent with information supplied in other volumes. It will also examine any unsubstantiated representations made in any proposal volume.
>
> Based on the risk assessment analysis, an overall adjectival rating describing the risk inherent in each Offeror's proposal will be assigned. Risk will be adjectivally rated as follows:
>
> > **High Risk**: Some or great potential exists for serious performance problems including, but not limited to, schedule disruptions and quality problems, even with special emphasis and close monitoring.
> >
> > **Low Risk**: Minimal or no potential exists for performance problems, including, but not limited to, schedule disruptions and quality problems. Any difficulties that may exist will be overcome with normal emphasis and monitoring.

AR Tab 8, § M.4.

24. Amendment 0002 included responses to various questions by potential offerors. Question 39, and the FAA's response, stated:

> **39. Industry Question/Comment:** Paragraph M3.1 (Factor 1 evaluation) identifies an operational evaluation of the MDM unit and a "pass" score will be granted if the unit is delivered in a timely manner and in a technically acceptable condition for operational evaluation. This paragraph further defines that the MDM unit must satisfy the form, fit and function requirements, which appear to entail physical installation and interconnection to the required systems. Does this evaluation factor also entail that the FAA will perform a paragraph-by-

paragraph verification test to confirm that each product meets all technical requirements in Section J of the SIR?

FAA Response: Yes, the Offeror's proposed MDM product will be verified as whether it meets all technical specifications in accordance with the MDM Technical Specification (in Section J of this SIR).

AR Tab 8, at 7.

25. Question 40, and the FAA's response, found in Amendment 0002 stated:

40. Industry Question/Comment: Paragraph M3.2 (Factor 2 evaluation) identifies that this factor will be scored as evidenced by the completed MDM Performance Matrix submitted by the Offeror. Does the Factor 2 evaluation also include any verification testing to be performed on each MDM unit by the FAA at the WJHTC?

FAA Response: No, verification of testing will be evaluated in Factor 1: Delivery, Demonstration, and Evaluation of MDMs.

AR Tab 8, at 7.

26. The Evaluation Plan defined the scores of "pass" and "fail" as follows:

• **Pass** is defined as:

1. To undergo or complete successfully
2. To cause or permit to complete successfully
3. To go unheeded, unchallenged, or unremarked on

Furthermore, "pass," as it is used in the SIR, is a determination that one or more elements of an Offeror's proposal did meet specific requirements set forth in the solicitation. For an Offeror to receive a "passing" score on one or more elements of its proposal, their proposal must be complete and sufficient in all elements, rendering them able to successfully meet all individual SIR requirements.

• **Fail** is defined as:

1. T[o] fall short of success or achievement in something expected, attempted, desired, or approved
2. To receive less than the passing grade or mark
3. To be or become deficient or lacking; be insufficient or absent; fall short

Furthermore, "fail," as it is used in the SIR, is a determination that one or more requirements of an Offeror's proposal did not meet specific requirements set forth in the solicitation. For an Offeror to

> receive a "failing" score on one or more elements of its proposal, their proposal must be incomplete or deficient in one or more elements, rendering them unable to successfully meet all individual SIR requirements.

AR Tab 13, at 8.

27. The Evaluation Plan also described how the evaluation would be conducted for Factors One and Two:

> Factors 1 and 2 will be evaluated by the same evaluators:
>
> > For Factor 1, the evaluators will check and compare the Offeror's actual proposed MDM Unit against the requirements in the Technical Specifications (Attachment to Section J) and the Statement of Work (Section C). All passing and failing scores will be annotated and accompanied by detailed descriptions and explanations. Insofar as this is a "lowest-reasonable evaluated price, technically acceptable" procurement, the proposed product either meets or does not meet the objective criteria set forth in the SIR; therefore, exhaustive written justifications or supporting rationale will not be required as long as all findings are objectively annotated.
> >
> > For Factor 2, the evaluators will check the completed MDM Performance Matrix submitted by the Offeror. To pass, the Offeror's proposed product must *completely state that* it *does* meet all requirements that are identified in the MDM Performance Matrix. Any instances of noncompliance or incompleteness with respect to the MDM Performance Matrix must be noted.

AR Tab 13, at 11.

B. Aydin's Proposal

28. Aydin was one of four offerors who submitted timely proposals. *AR* Tab 28, "*Report to the Source Selection Official,*" at 1.

29. In response to the requirement found in section L.6., Aydin [DELETED] each of its sample units into a "jig" that the Product Team had provided for the evaluation. *AR* Tab 41, *Rymond Decl.* ¶ 5. The jig held each MDM at the proper angle so that it would operate as expected in the Terminal Controller

Workstations or ARTS Color Display into which the production units under the Contract would be installed. *Id.* at ¶ 3.

30. The parties concur that the units Aydin submitted for evaluation weighed more than the 65 lb. limit found in paragraph 1.13 of the technical specification. *Protest* at 14 (citing Aydin's Proposal at A-3); *AR* Tab 17, Vol. III, Section 2 documents, tab A, at A-3; *AR* Tab 42, *Casey Decl.* ¶ 3. Whereas the evaluators' measurements indicated that Aydin's sample weighed [DELETED], Aydin represented that they weighed [DELETED]. *Compare AR* Tab 42, *Casey Decl*. ¶ 3 *with AR* Tab 17, Vol. III, Section 2 documents, tab A, at A-3. The ODRA finds the difference to be immaterial.

31. The notice that Aydin provided regarding the weight of its demonstration units was included, as stated above, in the portion of its proposal found at *AR* Tab 17, Vol. III, Section 2 documents, tab A, at p. A-3. That document purports to be Aydin's completed version of Exhibit L001 in the Solicitation, i.e., the table entitled "Performance Matrix; Main Display Monitor (MDM)." *See* FF 13, *supra*. Aydin's version, however, differs materially from the version required in the Solicitation. Specifically, Aydin's table appeared with added columns as follows:

Spec. Para.	Spec. Page	Description	Comply Y/N*	[redacted]	Comments
...	…	…	…		…
1.4	2	Electrostatic Discharge	[DELETED]		[DELETED]
...	…	…	…		…
1.13	3	Interface Requirements	[DELETED]	[DELETED]	[DELETED]
...	…	…	…		…
1.16.1	4	Luminance and Contrast	[DELETED]		[DELETED]
...	…	…	…		
1.18	5	Glare Control	[DELETED]		[DELETED]
...	…	…	…		…

** *Note: Any instances of non-compliance or incompleteness with respect to the Matrix must be noted and explained in detail. Use a continuation sheet if necessary. The Offeror need not provide evidence for compliance; however, the Offeror is required to indicate if their MDM unit does or does not comply with the above performance requirements.

AR Tab 17, Vol. III, Section 2 documents, tab A (immaterial entries omitted; underline added). Additionally, the note at the bottom mistakenly repeated

language (underlined) from the Solicitation as initially released. *Compare id.*, *with AR* Tab 5, at § J – Exhibit L001. Unlike the initial version of the note quoted by Aydin, amendment 0003 required that "the Offeror must provide documented evidence for compliance." FF 13, *supra*. Volume III of Aydin's proposal does not clearly include or reference supporting documentation demonstrating the compliance with each specification paragraph. *AR* Tab 17, Volume III.

32. Aydin's version of the Performance Matrix had [DELETED], *supra. AR* Tab 17, Vol. III, Section 2 documents, tab A.

33. Aydin also provided an introduction to its Performance Matrix. It stated:

    [DELETED]

    AR Tab 17, Vol. III, Section 2 documents, tab A. at A-1 (underline added).

34. Volume III of Aydin's proposal included a document called, "Factory Acceptance Test and Evaluation Plan." *AR* Tab 17, Vol. III, Section 2 documents, tab D(i), "Factory Acceptance Test and Evaluation Plan; Model 30281-M102, DWG No. 297-7293. With regards to the Electrostatic Discharge requirement, the plan only stated:

    [DELETED]

    Id. at 12. The ODRA finds that this merely restates the requirements of the Solicitation, and does not provide meaningful information on how to conduct a test to ensure that the MDMs satisfy the electrostatic discharge requirements stated in the Solicitation.

35. Aydin's total proposed price in response to the Solicitation was $[DELETED] whereas Barco's total proposed price was $[DELETED]. *AR* Tab 28, at 11.

C. The Technical Evaluation

36. The Report to the Source Selection Official describes the evaluation process for Factors One and Two as follows:

> As described in the Evaluation Plan, Factors 1 and 2 were evaluated by the same evaluators. Evaluators for Factors 1 and 2 were divided into an Engineering/Technical Team and a Human Factors Team whereby they evaluated requirements relevant to their expertise.
>
> For Factor 1, the evaluators checked and compared the offeror's actual proposed MDM Unit against the requirements in the Technical Specifications (Attachment to Section J) and the Statement of Work (Section C). All passing and failing scores were annotated and accompanied by detailed descriptions and explanations. Insofar as this is a "lowest-reasonable evaluated price, technically acceptable" procurement, the proposed product either meets or does not meet the objective criteria set forth in the SIR; therefore, written justifications or supporting rationale were not required as long as all findings were objectively annotated.
>
> For Factor 2, the evaluators checked the completed MDM Performance Matrix submitted by the offeror. To pass, the offeror's proposed product must have completely stated that it meets all requirements that are identified in the MDM Performance Matrix. Any instances of non-compliance or incompleteness with respect to the MDM Performance Matrix must have been noted.

AR Tab 28, at 3.

37. The Evaluation Team analysis under Factor One found that Aydin's MDM failed to pass four of the thirty-nine requirements in the specification. *AR* Tab 28, at 6. These included:

Spec. Para.	**Type of Requirement**	**Description**
1.4	Engineering	Electrostatic discharge
1.13	Engineering	Interface requirements
1.16.1	Human Factor	Luminance and contrast
1.18	Human Factor	Glare control

Id.

38. The Engineering Evaluation Team initially interpreted Aydin's "Performance Matrix; Main Display Monitor (MDM)" (*see* FF 29, *supra*) as indicating that Aydin "has conducted tests on Electrostatic Discharge," and on February 16, 2011, the Contract Specialist sent emails requesting copies of the specific test results. *AR* Tabs 21 and 22.

39. Aydin's Contracts Manager replied that "[DELETED]," and that [DELETED]. *AR* Tab 25.

40. The stated verification method for the ESD requirement, under Factor One, was listed on the evaluators' worksheets as "Vendor Documentation." *AR* Tab 30, at page "1 of 3" on the several worksheets. The evaluators determined under Factor One that Aydin failed to demonstrate that the unit met the electrostatic discharge requirement found in specification section 1.4. They described three specific issues:

> **Issue #1**: The ESD testing was expected to be completed prior to FAA evaluation. No proof of any ESD testing is available as per [DELETED].
>
> **Issue #2**: Section J - The Compliance Form was modified to add a [DELETED]. The purpose of this documentation was for the offeror to state whether they believed their product passed or failed each item in the Performance Matrix.
>
> **Issue #3**: [DELETED], however, no ESD test steps were found in the factory acceptance test procedure ([DELETED]) provided. Even if this test is performed in the future, it is unclear that any ESD testing would be covered.

AR Tab 29, at 2-3.

41. As discussed in FF 30, *supra*, Aydin's demonstration MDMs weighed more than 65 lbs., which Aydin attributed to [DELETED]. Evaluator Michael Rymond initiated a call with Aydin's technical representative, [DELETED], to discuss concerns regarding how the unit fit into the evaluation jig that was designed to

simulate the consoles wherein the proposed MDMs would replace the existing Sony displays. *AR* Tab 41, *Rymond Decl.* ¶ 5. Multiple employees from both the FAA and Aydin[1] participated in the call. *Id.* Mr. Rymond asked the Aydin employees if they would like [DELETED] removed for evaluation, and received a negative reply. *Id.*

42. The Product Team's Contract Specialist followed up with a telephone conversation of his own placed to Aydin's Contract Manager. *AR* Tab 19. Afterward, he diligently sent an email to Aydin's Contract Manager, which stated in material part:

> Just to recap our phone call from a few minutes ago:
>
> Yesterday afternoon, FAA technical personnel placed a phone call to Aydin technical personnel. The purpose of this call was to address technical concerns regarding the evaluation of Aydin's MDM units with the [DELETED] on. The FAA would like to know if it is Aydin's intent to have their MDM evaluated with the [DELETED] on or off? And if the [DELETED] is to be removed, would Aydin prefer the FAA to remove it, or would Aydin prefer to come to WJHTC and remove it?

Id. at 1-2.

43. Aydin's Contract Manager responded to the concerns regarding the [DELETED] by stating in an email:

> <u>Aydin Displays requests the units be evaluated with the [DELETED] in place</u>. [DELETED]

AR Tab 20 (emphasis added).

44. The engineering evaluators rationally determined that Aydin's demonstration MDMs exceeded the weight limitation of 65 lbs, and therefore failed to meet the specification requirement in paragraph 1.13. *AR* Tab 29; *see also* FFs 30 and 31, *supra*. The evaluators also noted three specific issues:

[1] Including Mr. [DELETED] from Aydin. *Aydin Comments, Attachment C,* [DELETED] *Decl*. ¶ 8.

> **Issue #1**: The Offeror B monitor weighs [DELETED] and does not meet the weight requirements (requirement per "MDM SIR, section J, par. 1.13" shall not exceed 65 lbs). Offerors A, C and D met the weight requirements, weighing [DELETED] pounds, [DELETED] pounds and [DELETED] pounds respectively. Offeror B's Compliance document is contradictory in that it states the monitor [DELETED], while at the same time stating [DELETED].
>
> **Issue #2**: The comment section of the compliance document, item 1.13 #1, relating to weight, states in part,"... [DELETED]." The MDM Evaluation Team expressed concerns about this statement, in that [DELETED] was delivered for evaluation.
>
> **Issue #3**: The particular display that Offeror B delivered to the government for evaluation [DELETE]. The [DELETE] does not meet the FAA's requirements [DELETE]. Furthermore, the evaluation team reiterated concerns about [DELETED].

AR Tab 29, at 3-4.

45. The Product Team also found that Aydin's proposal failed under Factor One to satisfy the technical specification paragraph 1.16.1, "Luminosity and Contrast," and paragraph 1.18, "Glare Control." *AR* Tab 28, at 6. For reasons stated later in these Findings and Recommendations, no further Findings of Fact are necessary to address these aspects of the technical evaluation. *See infra* Part III.B.3.

46. The technical evaluation team assigned a "Fail" score to Aydin for Factor Two. The Report to the Source Selection Official explained this score as follows:

> The SET determined [Aydin] and [another offeror] failed Factor 2 in that, while their documentation asserted [DELETED], the evaluation results indicated otherwise. Specifically, [Aydin] failed performance requirements 1.4 – Electrostatic Discharge, 1.13 - Interface Requirements, 1.16.1 - Luminance and Contrast and 1.18 - Glare Control.
>
> …
>
> The SET determined [other offerors] passed all of the performance requirements, which was consistent with the assertions in the documentation provided.

AR Tab 28, at 7.

47. Aydin's offer was also evaluated as "High Risk due to [its] proposal[] being found technically unacceptable." *AR* Tab 28, at 13. The Source Evaluation Team Chairman elaborated on this finding in a declaration:

> 8) The evaluation team, team leads, along with the CO considered all factors when determining the overall risk, and it was identified that the evaluation team was especially and specifically concerned that Aydin had indicated that it would [DELETED] in order to meet our requirements. The fact that Aydin did not deliver the displays for evaluation which [DELETED] raised concerns regarding whether Aydin would be able to deliver a display that met our requirements. This along with the technical factors they failed as identified in the SSO report made their candidate display delivered for evaluation "high risk" as determined by the team. All risks were indentified, discussed and agreed to by the whole team, and the evaluation team leads.
>
> 9) The evaluation team was also concerned that Aydin's claim to provide ESD testing results [DELETED] would put the government at risk in that the Government would have to take the Risk [sic] that Aydin's display would pass all ESD testing [DELETED].

AR Tab 41, *Source Evaluation Team Chairman Decl*. ¶¶ 8 and 9.

48. The Report of the Source Selection Official recommended that the award be made to Barco as the only offeror with a technically acceptable proposal, and further, as an offeror that was rated as having an overall Low Risk rating. *AR* Tab 28, at 1, 13-14.

49. Given that the evaluation process found that only Barco's product met the requirement, the FAA waived the Buy American Act requirements found in *AMS Clause* 3.6.4-2, "Buy American Act – Supplies (July 2010)," on the ground that the supplies in question "are not produced in sufficient and reasonable available quantities and of a satisfactory quality." *AR* Tab 34, at 2-3.

50. The Source Selection Official reviewed the Report to the Source Selection Official, concurred in its assessments, and adopted its rational to make the award to Barco. *AR* Tab 35.

51. On May 5, 2011, the Contracting Officer posted notice on the FAA Contract Opportunities website that award had been made to Barco. *AR* Tab 36. On the same day, the Contracting Officer sent an email notice to Aydin advising that Aydin did not receive the award. *AR* Tab 37.

52. Aydin filed this Protest with the ODRA on May 25, 2011, after receiving a debriefing on May 18, 2011. *AR* at 9; *Protest* at 1 and 4.

II. Burden and Standard of Proof

As the Protester in this matter, Aydin bears the burden of proof, and must demonstrate by substantial evidence (i.e., by the preponderance of the evidence), that the designated evaluation and source selection officials failed in a prejudicial manner to comply with the Acquisition Management System ("AMS"). *Protest of Adsystech, Inc.,* 09-ODRA-00508. Under the AMS, source selection decisions must be supported by a "rational basis." *AMS Policy* §§ 3.2.2.3.1.2.5. The ODRA, however, will not substitute its judgment for that of the "designated evaluation and source selection officials as long as the record demonstrates that their decisions had a rational basis, were consistent otherwise with the AMS, the evaluation plan, and the award criteria set forth in the underlying solicitation." *Adsystech, supra* (citing *Protest of Ribeiro Construction Company, Inc.*, 08-TSA-031).

III. Discussion

Aydin's Protest raises six general issues:

- First, Aydin challenges the "fail" determination under evaluation factor number one.
- Second, Aydin argues that the evaluation team applied the second evaluation factor in a manner that improperly duplicated the evaluation conducted under the first evaluation factor.
- Third, Aydin argues that a waiver of its technical deficiencies was merited.
- Fourth, Aydin asserts that the Risk evaluation was flawed.
- Fifth, based on the foregoing, the award decision was flawed, and

- Sixth, that the Product Team should have assessed a "premium" against the awardee in accordance with the Buy American Act.

As the record amply demonstrates, Aydin's demonstration units did not meet the weight requirements of the specification, and Aydin failed to show that its units satisfied the ESD specification. As the ODRA recently stated,

> It is an offeror's responsibility to ensure both that its offer is clear and complete, and that it satisfies the express requirements of the Solicitation. [citations omitted] Moreover, it is an offeror's responsibility to submit a proposal that complies with the SIR instructions and provides equally adequate detailed information to allow a meaningful review by the Agency.

Protest of Systems Research and Applications Corp., 10-ODRA-00562. Aydin failed in these responsibilities despite repeated communications from the Product Team seeking clarifications, and the Product Team's low scoring of Aydin's proposal had a rational basis that was not arbitrary, capricious or an abuse of discretion. The ODRA recommends that the Protest be denied in its entirety.

A. Evaluation Factors One and Two Described in the Solicitation

The evaluation process stated in the Solicitation and Evaluation Plan consisted of five technical evaluation factors, a sixth factor to compare the prices of the technically acceptable offers, and finally, a risk analysis factor. FF 19. Of preliminary importance in this Protest are the first two technical evaluation factors, which took different approaches to verify that the offerors had proposed units that could meet the performance specification found in Section J, Attachment 1.

For Factor One, the evaluators had access to two sample COTS units provided as part of "Volume II" from each offeror. FFs 16 and 21. Consistent with section M.3.1. and with the response to Industry Question 39, the Evaluation Plan stated that "the evaluators will check and compare the Offeror's actual proposed MDM Unit against the requirements in the Technical Specifications (Attachment to Section J) and the Statement of Work (Section C)." FF 21, 24, and 27. Section L.6 required the test units of Volume II to "be

consistent with the MDM Technical Specification … and all information provided in the Offerors' response to the MDM Performance Matrix." FF 16. Thus, evaluation under Factor One compared the actual units supplied for testing with the technical specifications, the Statement of Work, and the information provided under the MDM Performance Matrix.

Factor Two focused not on the units themselves, but rather, upon *the representations of compliance* found in the MDM Performance Matrix itself. Again, consistent with section M.3.2 of the Solicitation, the Evaluation Plan stated that "[f]or Factor 2, the evaluators will check the completed MDM Performance Matrix submitted by the Offeror." FFs 22 and 27. "To pass, the Offeror's proposed product *must completely state* that it does meet all requirements that are identified in the MDM Performance Matrix." FF 27 (emphasis in the original). Notwithstanding the awkward phrasing, the expectation clearly was that the Offeror, through the document being checked, i.e. the MDM Performance Matrix, must completely state the unit presently meets all of the performance requirements. Moreover, the unaltered version of the Performance Matrix required the offerors to provide "documented evidence for compliance" to support the representations in the Performance Matrix. FF 13. Interpreting the documentation as a whole, the clear intent of the evaluation process was to ensure that an offeror's representations of compliance were based on sound evidence included with the offer.

Factors One and Two, from different perspectives, provided standards to determine if the proposed COTS MDMs satisfied the technical requirements of the Solicitation. Whereas Factor One focused on the demonstration units themselves, Factor Two evaluated the affirmative representations of compliance stated in the Performance Matrix. Overall, it is clear that the intent of this evaluation scheme was to ensure that the proposed COTS products met the performance criteria established in the Solicitation, as summarized in the Performance Matrix. Equally clear, especially in light of the COTS nature of the procurement, the language of the Solicitation and the Evaluation Plan envisioned the submission and evaluation of *existing* technical data. Aydin's approach of [DELETED] could not satisfy the Solicitiation.

B. Aydin's Failures under Evaluation Factors One and Two

The Product Team issued "fail" evaluations for Aydin under both Factor One and Factor Two. FFs 37, 40, 44-46. Both evaluations derived from the same technical requirements, i.e.:

Spec. Para.	Description
1.4	Electrostatic discharge (ESD)
1.13	Interface requirements (weight)
1.16.1	Luminance and contrast
1.18	Glare control

Id. A failure to satisfy "one or more" specific requirements, including those cited above, would justify a "fail" score under the evaluation criteria for both Factors One and Two. FF 26. As discussed below, the ODRA finds that the evaluation deficiencies associated with both weight and ESD provide a rational basis for the evaluation scores of "fail" under Factors One and Two. Given that conclusion, the ODRA need not reach the questions regarding luminance, contrast, and glare control.

1. Weight

Aydin's sample MDMs weighed more than the 65 lb. limit established by the specification. FFs 10 and 30. The evaluators actually weighed the test unit as part of the Factor One evaluation (FF 30), which provides a rational basis for the conclusion that Aydin's unit failed to meet the specified requirement as part of the Factor One evaluation. Moreover, Aydin's own Performance Matrix [DELETED]. (FF 31), and provides a rational basis for the conclusion that Aydin's Performance Matrix failed to meet the specified requirement as part of the Factor Two evaluation. Thus, a "fail" score for both Factor One and Factor Two is unquestionably rational. Perhaps to avoid the mathematic certainty that [DELETED][2] exceeds 65 pounds, Aydin builds an argument around the opportunity for offerors to provide comments on the Performance Matrix. *Protest* at 14; *Aydin's Comments* at 15-19; *see also* FF 13 (table with comments field).

[2] Aydin's figure. FF 31.

Aydin centers its argument on its own comments in the Performance Matrix, which contains [DELETED]. FF 31. According to Aydin's Performance Matrix, "[DELETED]." *Id.* When the Product Team offered Aydin the opportunity to come to the testing lab to remove [DELETED], Aydin declined [DELETED], and reiterated that it would like its units evaluated with the [DELETED].[3] FFs 41-43. According to Aydin, "Presumably, the FAA asked offerors to provide explanations for any 'non-compliances' or 'incompleteness' for the very purpose of allowing the FAA to ascertain how significant the issue may be and whether it is correctable." *Protest* at 14. Under Aydin's remarkable presumption, offerors could propose any non-compliant unit, promise to fix the problem, and still be *entitled* to a "pass" evaluation. Aydin's interpretation, however, ignores provisions in both sections L and M of the Solicitation requiring that the units submitted for evaluation presently "must be consistent with the MDM Technical Specifications" (FF 16 (citing *AR* 10, § L.6)), and "meet all technical specifications."[4] FF 21 (citing *AR* 8, § M3.1.)). Moreover, the ODRA does not view opportunities to provide comments on the Performance Matrix as conflicting or compromising the requirement for the demonstration units to meet the specifications; the AMS encourages the exchange of information between the parties to ensure full understanding of a proposal.[5] *Cf. AMS Policy* § 3.2.2.3.1.2.2 (addressing communications with offerors). Finally, an offeror that decides not to submit a demonstration unit – or in this case, a sample that it knows does not conform to the specification – assumes the risk that the

[3] [DELETED] indicated that he did not believe that the direction to evaluate the displays with [DELETED] "was a concession that the displays were not compliant with the weight requirement." *Aydin Comments, Attachment C,* [DELETED] *Decl.* ¶ 15. Regardless of his belief, [DELETED]. *See* FF 31.

[4] When Aydin modified [DELETED] in the Performance Matrix to explain its proposal (FF 31), it also unwittingly highlighted the flaw in the interpretation it now states. Unchanged, the Performance Matrix asked for verification of present compliance with the specification, not [DELETED]. FF 13.

[5] [DELETED] *AR* Tab 18, Vol. III. Aydin's Performance Matrix [DELETED], but contained the wrong footnote, i.e., it contained a superseded footnote stating that supporting documents were not required rather than the revised footnote that required supporting documents to be attached. FF 31.

offer will be found nonresponsive or technically unacceptable. *See, e.g., Cannon U.S.A., Inc.*, B-249521, December 02, 1992.[6]

The ODRA recommends that this aspect of the Protest be denied.

2. Electrostatic Discharge

As explained above, the Product Team's evaluation process under Factor One was to "check and compare the Offeror's actual proposed MDM Unit against the requirements in the Technical Specifications (Attachment to Section J) and the Statement of Work (Section C)." FF 21. For the ESD requirement, however, the Evaluation Factor 1 Worksheets found in AR Tab 30, showed that the "Verification Method" for the ESD requirement was "Vendor Documentation." FF 40. Examining documentation, however, is not a comparison of the Offeror's actual proposed MDM unit to the technical specifications. It was, however, the appropriate analysis to conduct under Factor Two, which as also discussed above, examined "the documented evidence for compliance" with the Technical Specification. *See supra* Part III.A.1. Thus, Aydin correctly observes that the Product Team's approach to the ESD evaluation, "*as applied*," constituted duplicative evaluation criteria. *Aydin Comments* at 13. In theory, and as suggested by Aydin, this is not consistent with the portion of the AMS Policy that discourages the use of duplicative evaluation criteria. *Protest* at 16 (citing *AMS Policy* § 3.2.2.3.1.2.3). The fact remains, however, that the Product Team had a rational basis to conclude that Aydin's documentation did not demonstrate that Aydin's proposed product met the ESD requirements. Thus, the Product Team's approach of providing a rationale for Factor Two as part of its Factor One analysis was not prejudicial in any way to Aydin. *See e.g., Protest of All Weather, Inc.*, 04-ODRA-00294.

Many parts of the Solicitation required offerors to provide documentary evidence to show that their product satisfied the ESD requirements stated in paragraph 1.4 of the technical

[6] Although not bound by the precedents of the Government Accountability Office or the Court of Federal Claims, the ODRA will consider those decisions as persuasive when the underlying procurement regulations or policies in question are similar. *See e.g., Protest of International Services, Inc.*, 02-ODRA-00224.

specification. Section L.4. specifically advised offerors that they must "submit factual and written information as requested" in sufficiently specific detail so that the evaluators could "judge the capabilities of each Offeror to perform the SIR requirements." FF 15. Furthermore, "[o]missions or unacceptable responses to the requirements … may render a proposal incomplete … and therefore, may eliminate it from further consideration." *Id.* Moreover, it was Aydin's responsibility under section L.6 to provide a "detailed briefing, before the FAA's evaluation begins, which explains the appropriate set-up, installation, and test procedures for each MDM unit." FF 16. Finally, the note at the bottom of "Performance Matrix; Main Display Monitor (MDM)," required all offerors to "provide documented evidence for compliance." FF 13. Thus, the burden of supplying information to support the evaluation of the proposal fell squarely on Aydin.

The record shows that Aydin did not fulfill its burden to provide the necessary documentation. Specifically, Aydin:

- Failed to provide the required supporting documentation to support its "Performance Matrix; Main Display Monitor (MDM)" (FF 31);
- Failed to provide supporting documentation after the Product Team made a specific request for clarification on this point (FFs 38 and 39); and
- Modified the "Performance Matrix; Main Display Monitor (MDM)" to [DELETED] the ESD requirement (FFs 31-33).

In light of these problems with the proposal, Aydin now relies on a post hoc declaration to argue that the display would surely have met the requirement as "a matter of physics." *Aydin's Comments* at 22, n.8 (citing [DELETED] *Decl.* at ¶ 34). The ODRA disregards this declaration statement inasmuch as the deadline for providing information to support the proposal expired well before Aydin filed Comments in this Protest.

Given the lack of information from Aydin, the evaluators reported three specific "issues" to conclude that Aydin's proposal failed to demonstrate that its product would meet ESD requirement. First, they noted that the ESD testing "was expected to be completed prior to FAA evaluation," but "no proof of any ESD testing is available." FF 40. Second, the evaluators noted that Aydin's modification to the Performance Matrix ([DELETED]),

essentially defeated the purpose of the document, which was to have offerors "state whether they believed their product passed or failed" each technical requirement. FF 40. Third, the evaluators observed that even [DELETED], Aydin did not provide any test procedures. *Id.*; *see also* FFs 34 and 40.

Aydin attempts to escape the consequences of its failures to provide information by charging that the Solicitation was ambiguous. *Aydin Comments*, at 20-22. The ODRA finds that the Solicitation was not ambiguous, but even if it were, Aydin's modification of the Performance Matrix to suit its own need shows that Aydin's strained ambiguity was patent rather than latent. In such circumstances, Aydin had a duty to raise the matter as a pre-bid inquiry. *Protest of B&M Lawn Maintenance, Inc.*, 03-ODRA-00271. Aydin does not assert, nor does the record reveal, that Aydin made the requisite inquiry. Accordingly, Aydin has not met its burden of proof to support its allegation of ambiguity.

A final argument from Aydin rests on language found in section L.3.7, which provided that the Product Team may consider an "[o]fferor's noncompliance with all of these instructions as indicative of the quality of work the FAA may expect from the [o]fferor during contract performance." *Aydin Comments* at 22-23 (citing Solicitation § L.3.7.). According to Aydin, its failures to follow the instructions should simply be a part of an assessment of overall quality. *Aydin Comments* at 23. The argument is without merit when § L.3.7. is read with the other provisions, such as sections L.4 and M.3.1, which permitted rejection of a proposal from further reconsideration or the "pass/fail" determination, respectively. FFs 15 and 21. Thus, a quality downgrade under section L.3.7. was not the exclusive consequence of a failure to comply with the instructions, and does not give reason to question the Product Team's judgment.

Accordingly, and notwithstanding the Product Team's approach in conducting the ESD evaluation under Factor One, its evaluation and rationale amply support the results under Factor Two. In short, Aydin's documentation failed to show that its proposed product met the ESD specification as required under Factor Two. Any evaluation errors under

Factor One therefore are non-prejudicial, and the ODRA recommends that this aspect of the Protest be denied.

3. Luminosity, Contrast and Glare Control Failures are Non-prejudicial

Given that Factors One and Two were conducted as "pass/fail" evaluations, and further given that Aydin fails to establish that the evaluation was irrational with regards to both the weight and ESD requirements, the remaining issues under Factor One and Two need not be considered further. Specifically, even if Aydin is correct in its challenge to the FAA's luminosity, contrast, and glare control evaluations, these issues cannot be prejudicial given Aydin's other "fail" scores under Factor One and Factor Two. The ODRA recommends that these issues in the Protest be denied.

C. The "High Risk" Evaluation

Aydin also protests that the evaluation of its proposal as "high risk" was unreasonable because it relied on the allegedly flawed technical evaluation. *Protest* at 19. Aydin also asserts that the risk evaluation was not based on an articulated evaluation criteria. *Id.* at 20. Both arguments are meritless.

The express intent of this Solicitation was for the FAA to acquire COTS displays that fit into existing console mounts that hold antiquated Sony displays. FFs 3, 5, and 6. Aydin indicated in its proposal, however, that it intended to "[DELETED]." FF 31. Moreover, Aydin did not provide the testing documentation as required by the Solicitation and discussed at length above. *Id*. These created the basis for the risk assessment, as explained by the Source Evaluation Team Chairman:

> 8) The evaluation team, team leads, along with the CO considered all factors when determining the overall risk, and it was identified that the evaluation team was especially and specifically concerned that Aydin had indicated that it would [DELETED] in order to meet our requirements. The fact that Aydin did not deliver the displays for evaluation which [DELETED] raised concerns regarding whether Aydin would be able to deliver a display that met our requirements. This along with the technical factors they failed as identified in the SSO

> report made their candidate display delivered for evaluation "high risk" as determined by the team. All risks were indentified, discussed and agreed to by the whole team, and the evaluation team leads.
>
> 9) The evaluation team was also concerned that Aydin's claim to provide ESD testing results [DELETED] would put the government at risk in that the Government would have to take the Risk [sic] that Aydin's display would pass all ESD testing [DELETED].

FF 47 (citing *AR* Tab 41, *Source Evaluation Team Chairman Decl.* ¶¶ 8 and 9). These observations are entirely consistent with the contemporaneous record and the risk evaluation criteria. Specifically, the risk assessment criteria in section M4 of the Solicitation included examination of "any unsubstantiated representations made in any proposal volume," such as those relating to Aydin's [DELETED] rather than during proposal evaluation. Further, according to the Solicitation, a "high risk" rating was appropriate for "serious performance problems" and "schedule disruptions." FF 23 (citing *AR* Tab 8, § M4). Aydin's [DELETED], as well as its failure to provide documentary evidence showing compliance with the performance requirements, provide rational grounds for the Product Team to anticipate serious performance problems or schedule disruptions. In short, the assessment of Aydin as a "high risk" was entirely consistent with the Solicitation criteria and the short-comings in Aydin's proposal.

As to Aydin's argument that the Solicitation did not articulate a Risk evaluation criteria, this argument fails factually given that the criteria is stated in section M4 of the Solicitation. FF 23. Moreover, to the extent Aydin protests the terms of the Solicitation, its challenge is untimely. 14 C.F.R. § 17.15(1) (requiring filing before the time set for receipt of proposals).

The ODRA recommends that this ground of the Protest be denied.

D. Waiver

Aydin argues that the Product Team should have waived the weight requirements given that Aydin [DELETED]. *Protest* at 17-19. It should be noted preliminarily that Aydin

did not ask for such a waiver, and in fact, asked the Product Team to evaluate the demonstration units with [DELETED] in place. FFs 41-43. Furthermore, none of the GAO cases cited by Aydin stand for the proposition that the agency must consider – or issue – a waiver in the absence of such a request. *See AllWorld Language Consultants, Inc.*, B-298831, Dec. 14, 2006, 2006 CPD ¶ 198; *Martin Warehousing & Distribution, Inc.*, B-270651, Apr. 25, 1996, 96-1 CPD ¶ 205; and, *Corporate Jets, Inc.*, B-246876, May 26, 1992, 92-1 CPD ¶ 471. Rather, as in the present Solicitation and under the AMS, the Product Team is *permitted* but not required to issue a waiver if it is in its best interest and without prejudice to other offerors. *AMS Policy § 3.2.2.3.1.2.4;* FF 18. Furthermore, Aydin's citation to the *Protest of Royalea'L Aviation Consultants*, 04-ODRA-00304, is distinguished by the fact that the terms of the solicitation in that case specifically sought deviation requests that the Agency was obligated to consider.

In the present Protest, Aydin presents no basis for the ODRA to conclude that the Product Team failed to comply with the AMS, the Solicitation, or other requirements vis-à-vis the application of waiver principles. Indeed, given the ESD deficiencies noted under Factor Two, a waiver would be difficult to justify. Even further, the presence of the ESD deficiencies shows that Aydin has not been prejudiced by the absence of the waiver.

The ODRA therefore recommends that this aspect of the Protest be denied.

E. Buy American Act Issues

Aydin seeks to add "a price premium" to the awardee's units based on the Buy American Act clause in the contract, i.e., *AMS Clause* 3.6.4-2, "Buy American Act – Supplies (July 2010)." *Protest* at 22. This argument, however, is misplaced. Under the clause, the agency increases the evaluated price on foreign products by six or twelve percent when the "lowest acceptable domestic offer exceeds the lowest acceptable foreign offer, inclusive of duty … ." *AMS Clause* 3.6.4-2, "Buy American Act – Supplies (July 2010)," at ¶ (c)(4)(1). Even assuming that Aydin's MDM is a domestic end product, the addition of a premium would not be appropriate given that Aydin's proposed price was already

less than Barco's price (FF 35), and further, Aydin's product was not "acceptable" under the quoted exception.[7] Notably, Aydin did not press these issues as "outcome determinative" in its Comments to the Agency Response. *Aydin Comments* at 1. Moreover, given the prior discussion of other deficiencies in the proposal, Aydin cannot demonstrate prejudice with regards to the Buy American Act issues.

The ODRA recommends that this aspect of the Protest be denied.

F. Price Evaluation

Under the Solicitation, the award was to be made to the "technically acceptable and responsible Offeror who offers to the Government the lowest reasonable evaluated price." FF 18. Aydin – assuming success as to its challenges to the disqualifying negative evaluations under Factor One, Factor Two, and risk – asserts that the Product Team failed to conduct a proper price evaluation because it did not compare Aydin's lower overall proposed price to Barco's higher price. *Protest* at 21. Under these circumstances, the Product Team was not obligated to conduct a price comparison involving Aydin. Given that Aydin failed above to demonstrate that the Product Team made prejudicial mistakes in the technical evaluation process, the ODRA finds no error by the Product Team in determining the lowest priced, technically acceptable offeror.

The ODRA recommends that this aspect of the Protest be denied.

IV. CONCLUSION

The ODRA finds no material errors in the actions of the Product Team in this procurement action. To the contrary, the responsibility for Aydin's loss in this competition falls squarely on Aydin itself. Not only did Aydin unjustifiably modify the

[7] Another exception is for products that "are not mined, produced or manufactured in the United States in sufficient and reasonably available commercial quantities of satisfactory quality." *AMS Clause* 3.6.4-2, "Buy American Act – Supplies (July 2010)," at ¶ (c)(2). Given that the evaluation process found that only Barco's product met the requirement and justifiably found Aydin's product unacceptable, the FAA appropriately waived the BAA requirements for Barco's products. FF 49.

Performance Matrix and [DELETED] decline to provide current supporting documentation, Aydin also declined Product Team's invitations to address disqualifying weight and ESD issues prior to the Factor One and Two evaluations. The ODRA recommends that this Protest be denied in its entirety.

_____/s/_____
John A. Dietrich
Dispute Resolution Officer
FAA Office of Dispute Resolution for Acquisition

APPROVED:

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