

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

FINDINGS AND RECOMMENDATIONS

Matter: **Protest of WX Solutions, Inc.**
 Under Solicitation No. DTFAWA-12-R-08591

Docket No.: **13-ODRA-00647**

Appearances:

For the Protester:

Jonathan T. Williams, Esq.
of Pileromazza PLLC

For the FAA Product Team:

Gregory C. Carter, Esq. and
JoAnn Wang, Esq.

I. INTRODUCTION

This matter arises from a bid protest (“Protest”) filed with the Federal Aviation Administration (“FAA”) Office of Dispute Resolution for Acquisition (“ODRA”) by WX Solutions, Inc. (“WX”) under Solicitation DTFAWA-12-R-08591 (“Solicitation”), docketed as 13-ODRA-00647, challenging the Contracting Officer’s Size Determination (“Size Determination”) as to WX’s size status and eligibility for award and lack of due process in the Contracting Officer’s size status investigation. *Protest* at 1-2. Through the Solicitation, the FAA intended “to acquire the services of weather observer personnel who will provide augmentation and/or back up to the Automated Observing Systems, and to take manual observations as necessary.” FF 2. The Solicitation sought services in 17 geographical areas, which have been sub-divided into those in which the awards will be

set aside for small businesses and those for 8(a) businesses. FF 11. The Product Team intended to make 17 awards under the Solicitation. FF 12.

Diversified Management Solutions, Inc. (“DMS”) brought an initial protest, docketed as 13-ODRA-00633 (“DMS Protest”), which challenged the planned award of Groups 7 and 10 by the Product Team to WX on the grounds that the awardee is affiliated under the small business rules with its proposed subcontractor, Control Systems Research, Inc. (“CSR”), which would make WX ineligible for award pursuant to the terms of the Solicitation. *DMS Protest*. Counsel for the Product Team filed a Motion to Move the Protest to the Inactive Docket (“Motion”) with the ODRA, stating that the Product Team would conduct a “fact-finding and determination regarding [the] Offeror’s eligibility.” *Motion* at 1. In response, without objection, the ODRA deferred the adjudication of the matter. *ODRA Letter* dated January 16, 2013. Counsel for the Product Team filed a Memorandum from the Contracting Officer, dated March 29, 2013, finding that WX was ineligible for award because it is affiliated with CSR. WX then filed the instant Protest.

In its Comments, WX raises additional Protest grounds: (1) the Product Team arbitrarily and capriciously evaluated the 90-day financing requirement; (2) the Product Team changed its interpretation of the 90-day financing requirement in the Size Determination, and should have provided WX an opportunity to respond; and (3) the Product Team disparately treated WX from other Offerors in the evaluation of the 90-day financing requirement and communications with other Offerors. These issues address the 90-day financing requirement as a definitive responsibility criterion, and whether the Product Team acted in accordance with its own Solicitation terms when it assessed WX’s financial ability as well as the evaluation of other offerors. Because the ODRA finds that WX is ineligible for award as a small business, these issues need not be addressed. For the reasons discussed herein, the ODRA finds that the Contracting Officer’s Size Determination and disqualification were supported by substantial evidence, had a rational basis and was not arbitrary, capricious or an abuse of discretion. The ODRA recommends that the Protest be denied.

II. FINDINGS OF FACT

A. The Solicitation

1. The CWO Product Team issued Solicitation DTFAWA-12-R-08591 for Contract Weather Observation (“CWO”) services on May 3, 2012, and posted four subsequent Amendments to the Solicitation. *Agency Response* (“AR”) Tabs 1-5.
2. The Solicitation’s purpose is “to acquire the services of weather observer personnel who will provide augmentation and/or back up to the Automated Observing Systems, and to take manual observations as necessary.” AR Tab 1 at C1.1.
3. Section 1.2 “Background” states:

The Federal Aviation Administration (FAA) is responsible for providing aviation weather observation services at selected airports throughout the United States. FAA intends to satisfy this responsibility in part, through the use of Automated Observing Systems, FAA employees, and contract weather observer (CWO) personnel.

AR Tab 1 at C1.2.

4. Section 1.4 “Automated Observing Systems Functional Capabilities” states:

There are two types of Automated Observing Systems installed in the locations listed in Section J: 1) Automated Surface Observing System (ASOS) and 2) Automated Weather Observing System (AWOS). The Functional Capabilities are listed below:

1.4.1 **ASOS Functional Capabilities**. ASOS is a modular computerized system, designed to automatically collect, process, and archive weather sensor measurement data. The ASOS weather report is readily available to a variety of users at both local and remote locations on a 24-hour basis. The ASOS weather report is

disseminated into the Weather Message Switching Center Replacement (WMSCR), is also broadcast locally via a radio transmitter, and can be accessed by telephone. National Weather Service (NWS) personnel via an ASOS Operations and Monitoring Center (AOMC) remotely monitor the operation and performance of ASOS....

1.4.2 **AWOS Functional Capabilities** The AWOS is a modular computerized system that automatically measures one or more weather parameters, analyzes the data, archives the data, prepares a weather observation that consists of the parameters measured, and broadcasts the observation to the pilot using an integral very high frequency (VHF) radio or an existing navigational aid (NAVAID) which may provide long-line dissemination of the observations....

AR Tab 1 at C1.4.

5. Section C.4.5 “Senior Weather Observer Assignment” states:

The contractor must designate a senior employee at each site as “Senior Weather Observer.” The contractor must assign the DOL Senior Weather Observer employee class to the Senior Weather Observer. An individual designated as “Senior Weather Observer” must possess, at a minimum, one year experience as an NWS certified Weather Observer performing weather observations. The Senior Weather Observer must be the contractor’s on-site representative and as such must be the contractor’s initial point of contact (POC) at each site by the COTR/TOR, CO, and/or NWS representative. At a minimum, the Senior Weather Observer must be able to discuss and act on behalf of the contractor in the following areas: site staffing/work and leave schedule, implementation and continuation of the contractor’s Quality Assurance Management Plan, and initial POC for any NWS or FAA site inspections.

AR Tab 1 at C.4.5.

6. Section H.1 TYPE OF CONTRACT (AMS 3.2.4-1) states that “[t]he FAA intends to award a firm fixed price contract(s) with an economic price adjustment resulting from this screening information request (SIR). This is a Small Business Set-Aside, with three groups set aside for 8a. AR Tab 2 at H.1 (emphasis in original).

7. Section H.13 “WAGE RATE DETERMINATION” states:

H.13.1 The wage determination issued under the Service Contract Act of 1965 by the Department of Labor (DOL) for Occupation Code 30621, Weather Observer, Upper Air and Surface shall apply to this contract. Any and all wage determinations that are applicable to weather observation services are attached and made a part of hereof and must be adhered-to by the contractor and/or subcontractor(s). However, this provision must not relieve the contractor or any subcontractor of any obligation under any State minimum wage law which may require the payment of a higher wage. THE WAGE RATES INCORPORATED UNDER CONTRACT FOR OR DURING A FISCAL YEAR WILL BE THE SAME WAGE RATES, APPLICABLE (FOR ALL COUNTIES UNDER THAT WAGE DETERMINATION) FOR THE ENTIRE FISCAL YEAR.

AR Tab 1 at H.13 (emphasis in original).

8. Section H.24 “Key Personnel and Facilities AMS 3.8.2-17 (May 1997)” states:

(a) The personnel and/or facilities as specified below are considered essential to the work being performed hereunder and may, with the consent of the contracting parties, be changed from time to time during the course of the contract. (b) Prior to removing, replacing, or diverting any of the specified personnel and/or facilities, the Contractor shall notify in writing, and receive consent from, the Contracting Officer reasonably in advance of the action and shall submit justification (including proposed substitutions) in sufficient detail to permit evaluation of the impact on this contract. (c) No diversion shall be made by the Contractor without the written consent of the Contracting Officer. (d) provides space to fill in The key personnel and/or facilities under this contract are: . . . ***Key Personnel is the Senior Weather Observer.*** (End of clause).

AR Tab 1 at H.24 (emphasis added).

9. Section H.25 “NORTH AMERICAN INDUSTRY CLASSIFICATION SYSTEM CODE (NAICS) AND SMALL BUSINESS SIZE STANDARD” states that “[t]he

NAICS for this acquisition is 541990 –Other Professional, Technical and Management Services. The small business size standard under the above NAICS code is \$7.0 million in annual average gross revenue of the concern over the last three fiscal years.” AR Tab 1 at H.25.

10. Section I.12 “AMS CLAUSE 3.6.2-40 NONDISPLACEMENT OF QUALIFIED WORKERS (APRIL 2009)” states:

(a) The contractor and its subcontractors must, except as otherwise provided herein, in good faith offer those employees (other than managerial and supervisory employees) employed under the predecessor contract whose employment will be terminated as a result of award of this contract or the expiration of the contract under which the employees were hired, a right of first refusal of employment under this contract in positions for which employees are qualified. The contractor and its subcontractors must determine the number of employees necessary for efficient performance of this contract and may elect to employ fewer employees than the predecessor contractor employed in connection with performance of the work. Except as provided in paragraph (b), there must be no employment opening under this contract, and the contractor and any subcontractors must not offer employment under this contract, to any person prior to having complied fully with this obligation. The contractor and its subcontractors must make an express offer of employment to each employee as provided herein and must state the time within which the employee must accept such offer. In no case must the period within which the employee must accept the offer of employment be less than 10 days.

(b) Notwithstanding the obligation under paragraph (a) above, the contractor and any subcontractors:

(1) May employ under this contract any employee who has worked for the contractor or subcontractor for at least 3 months immediately preceding the commencement of this contract and who would otherwise face lay-off or discharge;

(2) Are not required to offer a right of first refusal to any employee(s) of the predecessor contractor who are not service employees within the meaning of the Service Contract Act; and

(3) Are not required to offer a right of first refusal to any employee(s) of the predecessor contractor whom the contractor or

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any of its subcontractors reasonably believes, based on the particular employee's past performance, has failed to perform suitably on the job.

(c) The contractor must, not less than 10 days before completion of this contract, furnish the Contracting Officer a certified list of the names of all service employees working under this contract and its subcontracts during the last month of contract performance. The list must contain anniversary dates of employment of each service employee under this contract and its predecessor contracts either with the current or predecessor contractors or their subcontractors. The Contracting Officer will provide the list to the successor contractor, and the list must be provided on request to employees or their representatives.

(d) If it is determined, pursuant to regulations issued by the Secretary of Labor (Secretary), that the contractor or its subcontractors are not in compliance with the requirements of this clause or any regulation or order of the Secretary, appropriate sanctions may be imposed and remedies invoked against the contractor or its subcontractors, as provided in Executive Order 13495, the regulations, and relevant orders of the Secretary, or as otherwise provided by law.

(e) In every subcontract entered into in order to perform services under this contract, the contractor will include provisions that ensure that each subcontractor will honor the requirements of paragraphs (a) through (b) with respect to the employees of a predecessor subcontractor or subcontractors working under this contract, as well as of a predecessor contractor and its subcontractors. The subcontract must also include provisions to ensure that the subcontractor will provide the contractor with the information about employees of the subcontractor needed by the contractor to comply with this clause. The contractor will take such action with respect to any such subcontract as may be directed by the Secretary as a means of enforcing such provisions, including the imposition of sanctions for non-compliance; however, if the contractor, as a result of such direction, becomes involved in litigation with a subcontractor, or is threatened with such involvement, the contractor may request that the United States enter into such litigation to protect the interests of the United States.

AR Tab 1 at I.12.

11. Of the 18 intended awards, three were set aside for 8(a) firms while fifteen were reserved for small businesses. ATTACHMENT J-3 “GEOGRAPHICAL MAPS AND DESCRIPTIONS” provides the details:

The following areas are Small Business set-asides:

- Area 1: Florida and Puerto Rico
- Area 2: Alabama, Georgia, Mississippi, and South Carolina
- Area 3: Tennessee, Kentucky, West Virginia, and North Carolina
- Area 4: Virginia, District of Columbia, Maryland, Delaware, Pennsylvania, and Western New York State,
- Area 5: Maine, New Hampshire, Connecticut, Vermont, Massachusetts, Rhode Island, and Eastern New York State
- Area 7: Texas
- Area 8: New Mexico, Oklahoma, Kansas, Arkansas, and Louisiana
- Area 9: North Dakota, South Dakota, Nebraska, Minnesota, Iowa, and Missouri
- Area 10: Wisconsin, Illinois, and Indiana
- Area 11: Michigan and Ohio
- Area 13: California and Hawaii
- Area 14: Nevada, Arizona, Utah, Colorado, Wyoming, Montana, Idaho, Washington, and Oregon
- Area 16: Alaska Peninsula and Gulf Coast Alaska
- Area 17: Gulf Coast and South East Alaska
- Area 18: North Slope and North Central Alaska

The following areas are 8a set-asides:

- Area 6: Maine
- Area 12: Ohio
- Area 15: California and Nevada

AR Tab 5 at Attachment J.3.

12. Provision L.3 NUMBER OF AWARDS states:

Of the eighteen (18) possible awards under this SIR (i.e. 1 award per group), three groups are set aside for 8a businesses. No more than two groups may be awarded to:

- (a) a single business concern that is a potential prime contractor, whether (1) by itself, (2) as part of a joint venture (as defined in AMS clause 3.2.2.7-8) or (3) in a subcontracting arrangement, or

(b) a single mentor, whether as part of a joint venture, or in a subcontracting arrangement.

AR Tab 1 at L.3. The number of intended awards was changed to 17.

13. Provision L.8 “NORTH AMERICAN INDUSTRY CLASSIFICATION SYSTEM CODE (NAICS) AND SMALL BUSINESS SIZE STANDARD” states:

The NAICS for this acquisition is 541990 –Other Professional, Technical and Management Services. The small business size standard under the above NAICS code is \$7.0 million in annual average gross revenue of the concern over the last three fiscal years. To be eligible for award as a small business, the offeror must meet the small business size standard at the time of proposal submission and through award. Joint ventures are permitted but Mentor-Protégé joint ventures are not permitted.

For size determination purposes, the FAA will consider a company’s affiliation with another entity under the SBA general principles of affiliation. Small businesses may be required to provide organizational documents, organizational charts, and joint venture agreements (if applicable), and must disclose any affiliated relationships.

AR Tab 1 at L.8.

14. Provision L.10 “MINIMUM QUALIFICATION” states:

To be eligible to compete for this procurement, the offeror must have, as a minimum requirement, the experience or capabilities identified below. **FAILURE TO PROVIDE THE REQUESTED INFORMATION WITH THE PROPOSAL SUBMISSION WILL MAKE THE OFFEROR INELIGIBLE FOR CONSIDERATION OF AWARD.**

1. Provide documentation that show the offeror’s ability to cover payroll and other operating and administrative expenses to accommodate Government "in arrears" payments for work performed for period of ninety (90) days. The amount of money

required to cover expenses needs to be sufficient enough to cover 90 days of the base year sites (one quarter of the firm fixed price) for the two highest dollar value groups being proposed; or if only one group is proposed, for that group. If the offeror has an existing CWO contract, the required ninety days of funding should be separate from the offeror existing operating funds.

2. Provide a copy of the NWS Certificate that shows that each proposed Senior Weather Observer is a certified weather observer. Additionally, provide a resume(s) that shows the Senior Weather Observer has a minimum of one (1) year's experience in performing weather observations.

3. Provide a complete proposal, including Volume 1 - Offer and Other Documents, Volume II - Technical Proposal, Volume III - Past Performance and Relevant Experience and Volume IV - Price Proposal.

4. Provide an affidavit disclosing any affiliated relationships pursuant to AMS Clause 3.2.2.3-3 Affiliated Offerors. At the FAA's request, small businesses may be required to provide documentation relating to affiliation, including but not limited to, organizational documents, organizational charts and joint venture agreements (if applicable).

The offeror is required to submit, along with the proposals, a summary (no more than two pages) which clearly demonstrates that the offeror has the minimum qualification requirements as addressed. To validate subparagraph (1) above, financial documentation, certified by the financial institution, must be attached to support this requirement.

AR Tab 1 at L.10 (emphasis in original).

15. Provision L.12 "COMPLIANCE WITH INSTRUCTIONS" states that "[w]hen evaluating an offeror's capability to perform the prospective contract, the FAA will also consider compliance with these instructions included in the SIR. The FAA will consider an offeror's non-compliance with all instructions as indicative of conduct the FAA may expect from the offeror during contract performance."

AR Tab 1 at L.12.

16. Provision L.20 VOLUME III – “PAST PERFORMANCE AND RELEVANT EXPERIENCE,” states, in part, that “[i]f an offeror’s proposal includes a subcontractor, the subcontractor’s past performance and relevant experience may be evaluated. All offerors must list all their management level personnel who have relevant contracts and subcontracts experiences.” *AR* Tab 1 at L.20.1.

17. Provision L.20.3.1 requires that:

[T]he offeror must provide the resumes of all its management level and Senior Weather Observer personnel who will have a significant role in the day-to-day management of the contract. The resume must demonstrate the personnel experience in delivering quality weather observation services. The offeror must provide a copy of the NWS Certificate that shows that each proposed Senior Weather Observer is a certified weather observer.

AR Tab 1 at L.20.3.1.

18. Provision L.21.3 requires that:

[i]n accordance with paragraph L.5, the offeror must be able to cover 90 days of contract expenses. The offeror must demonstrate that it has funds and/or a line of credit from a financial institution equal to one-quarter of the combined base year price of the two highest-priced groups being proposed; or if only one group is proposed, for that group. The offeror shall, if necessary, include in Volume IV a letter from a financial institution documenting that the offeror has satisfied this requirement. Lines of credit from credit cards for personal use may not be applied toward the satisfaction of this requirement.

AR Tab 1 at L.21.3.

19. Provision “M.1 BASIS FOR AWARD” at “M.1.1 AWARD SELECTION” states, in relevant part:

Award will be made to the technically acceptable offeror(s) whose proposal conforms to all requirements of the SIR, has acceptable

Past Performance and Relevant Experience, and offers the lowest evaluated reasonable price to the government. Technically acceptable is defined as proposals that meet all requirements of the SIR and demonstrate the technical ability to perform requirements of the Statement of Work.

* * *

The offeror who is deemed technically acceptable and has the lowest reasonable evaluated price will receive the award. However, risk assessment of high may render the proposal unacceptable and the offeror ineligible for contract award.

AR Tab 2 at M.1.

20. Subsection M.1.2 “ELIGIBILITY FOR AWARD” states: “To be eligible for award, the Offeror must meet all the requirements of the SIR. However, the FAA reserves the right to reject any and all offers if it would be in the best interest of the FAA to do so.” *AR Tab 1 at M.1.2.*

21. Subsection M.1.3 “NUMBER OF POTENTIAL CONTRACT AWARDS” states:

Of the eighteen (18) possible awards under this SIR (i.e. 1 award per group), three groups are set aside for 8a businesses. No more than two groups may be awarded to: (a) a single business concern that is a potential prime contractor, whether (1) by itself, (2) as part of a joint venture (as defined in AMS clause 3.2.2.7-8) or (3) in a subcontracting arrangement, or (b) a single mentor, whether as part of a joint venture, or in a subcontracting arrangement.

AR Tab 1 at M.1.3.

22. Provision M.2 “EVALUATION PROCESS,” at M.2.1, states that “[d]uring the evaluation process, the Government Evaluation Teams will evaluate each Offeror’s proposal using information submitted by the Offeror, (or in the case of past performance and relevant experience, obtained from outside references and

other points of contact) against evaluation factors contained in Sections M.3 through M.6.” *AR* Tab 1 at M.2.1.

23. Subsection M.2.2. requires that “[a] Technical Evaluation Team will evaluate the Offeror’s technical capabilities against the evaluation sub factors in Section M.4. An unsatisfactory rating in any one of the sub factors under Factor I, Technical Proposal, will render the offeror ineligible for further consideration in the selection process.” *AR* Tab 1 at M.2.2.

24. Under the Questions and Answers with potential offerors, the question was asked: “For purposes of proposal submittal, is it acceptable to use the term ‘Site Supervisor’ or ‘Senior Weather Observer’ interchangeably within the proposal that we submit to the FAA? ‘Site Supervisor’ is the title that FAA used in the previous RFP.”

The Product Team responded, “Answer: Please use the term Senior Weather Advisor for consistency.”

AR Tab 1 at Offeror Q&A.

25. Amended Section H.25 “NORTH AMERICAN INDUSTRY CLASSIFICATION SYSTEM CODE (NAICS) AND SMALL BUSINESS SIZE STANDARD” states: “The NAICS for this acquisition is 541990 –Other Professional, Technical and Management Services. The small business size standard under the above NAICS code is \$14.0 million in annual average gross revenue of the concern over the last three fiscal years.” *AR* Tab 2 at Amendment 1.

26. Amended Section L.8 “NORTH AMERICAN INDUSTRY CLASSIFICATION SYSTEM CODE (NAICS) AND SMALL BUSINESS SIZE STANDARD” states:

The NAICS for this acquisition is 541990 –Other Professional, Technical and Management Services. The small business size

standard under the above NAICS code is \$14.0 million in annual average gross revenue of the concern over the last three fiscal years. To be eligible for award as a small business, the offeror must meet the small business size standard at the time of proposal submission and through award. Joint ventures are permitted.

For size determination purposes, the FAA will consider a company's affiliation with another entity under the SBA general principles of affiliation. Small businesses may be required to provide organizational documents, organizational charts, and joint venture agreements (if applicable), and must disclose any affiliated relationships.

AR Tab 2 at Amendment 1 SIR at L.8 (emphasis added).

B. Contracting Officer's Size Determination

(i) Identity of Interest

27. In response to a protest filed by DMS, the Contracting Officer requested size information from WX and its proposed subcontractor, CSR. As a result of her review, the Contracting Officer issued a Size Determination finding that WX is not eligible for award. AR Tab 20.

28. The Size Determination quoting SBA regulations, 13 C.F.R. § 121.103(f) states:

Affiliation may arise among two or more persons with an identity of interest. Individuals or firms that have identical or substantially identical business or economic interests (such as family members, individuals or firms with common investments, or firms that are economically dependent through contractual or other relationships) may be treated as one party with such interests aggregated. Where SBA determines that such interests should be aggregated, an individual or firm may rebut that determination with evidence showing that the interests deemed to be one are in fact separate.

Id. at 4.

29. The Size Determination states:

WX filed its Articles of Incorporation with the California Secretary of State on August 9, 2011. [REDACTED] Section L.5 of the SIR states that a responsible prospective contractor must “[h]ave adequate financial resources to perform the contract for a period of 90 days without government funding, or the ability to obtain financial resources.” . . . As part of its proposal, WX [REDACTED] As a result, I find that WX is economically dependent upon CSR for financing.

Id. at 4-5

30. The Size Determination also states:

[REDACTED] is the sole owner, director and officer of WX. [REDACTED] is employed [REDACTED] at CSR. [REDACTED] Therefore, I find [REDACTED] role at CSR to be significant and key and believe that he has the ability to exert control or critical influence over CSR.

Id. at 5.

31. The Size Determination states:

WX identified its key management personnel in its proposal: [REDACTED] WX is a new entity (formed in 2011) [REDACTED]

Id. at 5.

32. The Size Determination also found that:

WX's proposal [REDACTED]

Id. at 5.

(ii) **Ostensible Subcontractor Rule**

33. The Size Determination, quoting SBA regulations 13 C.F.R. § 121.103(h)(4), states:

A contractor and its ostensible subcontractor are treated as joint venturers, and therefore affiliates, for size determination purposes. An ostensible subcontractor that performs primary and vital requirements (emphasis added) of a contract, or of an order under a multiple award schedule contract, or a subcontractor upon which the prime contractor is unusually reliant (emphasis added). All aspects of the relationship between the prime and subcontractors are considered, including, but not limited to, the terms of the proposal (such as contract management, technical responsibilities, and the percentage of subcontract work), agreements between the prime and subcontractor (such as bonding assistance or the teaming agreement), and whether the subcontractor is the incumbent contractor and is ineligible to submit a proposal because it exceeds the applicable size standard for that solicitation.

Id. at 6-7 (emphasis in original).

34. The Size Determination states that “CSR is currently an incumbent on the CWO contracts and is ineligible for participation in this procurement as a prime contractor because it exceeds the size restriction.” *Id.* at 7.

35. The Size Determination cites to Article 4 of the Teaming Agreement, which states that [REDACTED] . *Id.*

36. The Size Determination cites to Sections 1.02 and 1.03 of the Teaming Agreement to establish that [REDACTED]. *Id.* at 7-8.

37. The Size Determination quotes Article 4.0 of the Teaming Agreement, [REDACTED], which states:

[REDACTED]

Id. at 7-8.

38. The Size Determination references Exhibit A of the Teaming Agreement, which states that CSR's efforts are [REDACTED] and the Prime's efforts are [REDACTED]. *Id.* at 8.

39. The Size Determination states that "[f]rom the perspective of the program office and as clearly stated in the purpose or the SIR, the primary and vital requirement of the contract is to acquire the services of contract weather observation personnel at selected airports throughout the United States." *Id.* at 9.

40. The Size Determination examined the personnel proposed by WX. *Id.*

41. The Size Determination states:

The key employees identified in WX's proposal were [REDACTED]

Id.

42. The Size Determination goes on to address supervision at the Senior Weather Observer level stating:

I looked at whether the Senior Weather Observers would be employees of WX or CSR. WX's proposal states that [REDACTED].

Id. at 10.

43. The Size Determination quotes Section I of the SIR contains AMS Clause 3.6.1-7 Limitations on Subcontracting (October 2011)[,] in part:

By submission of an offer and execution of a contract, the Offeror/Contractor agrees that in performance of the contract in the case of a contract for: (a) Services (except construction). At least 50 percent of the cost of contract performance incurred for personnel shall be expended for employees of the prime contractor.

Id.

44. The Size Determination states:

Since WX submitted an offer and did not modify the terms of the subcontracting clause, it agreed to the limitation on subcontracting clause as originally written in the SIR. WX must comply with the 50% requirement and at least 50% of the personnel costs will be expended for employees of WX (which includes the Senior Weather Observers). [REDACTED]

In section M2.2, the CWO Team notified the Offerors of the identified technical capabilities that each Offeror must possess in order to be eligible for award. The Technical Evaluation Team evaluated the technical capabilities against each of the four technical subfactors under Factor I, Technical Proposal: Personnel Plan, Staffing Plans and Schedules, Quality Assurance Management Plan and Transition Plan. Further, in Section M2.2, Offerors were notified that "an unsatisfactory rating in any one of the subfactors under Factor I, Technical Proposal, will render the offeror ineligible for further consideration in the selection process."

WX states that, [REDACTED] WX's proposal states that [REDACTED]

Id. at 10-11.

45. The Size Determination further states:

There is a reference in WX's proposal to [REDACTED] After consulting with the program office and reviewing the SIR, it appears to me the primary and vital requirement of the contract is to provide the services of qualified weather observer personnel. [REDACTED] is an ancillary support function that would assist WX in performing the primary and vital requirements of the contract. From my perspective, the key personnel identified in the proposal and whether they are employed by WX or CSR is more relevant for purposes of determining whether WX or CSR will be performing the primary and vital requirements of the contract. However, given my questions arising from the fact that [REDACTED].

Id. at 11.

46. The Size Determination states:

Section L.5 of the SIR states that a responsible prospective contractor must “[h]ave adequate financial resources to perform the contract for a period of 90 days without government funding, or the ability to obtain financial resources.” In support of this requirement, Offerors were asked in Section L.10 to “[p]rovide documentation that show the offeror’s ability to cover payroll and other operating and administrative expenses to accommodate Government ‘in arrears’ payments for work performed for period of ninety (90) days. The amount of money required to cover expenses needs to be sufficient enough to cover 90 days of tile base year sites (one quarter of the firm fixed price) for the two highest dollar value groups being proposed; or if only one group is proposed, for that group. If the Offeror has an existing CWO contract, the required ninety days of funding should be separate from the offeror existing operating funds.”

Id.

47. The Size Determination further states:

[REDACTED] I looked to its other financial resources to see how it intended to satisfy the requirement. WX submitted [REDACTED]

Id.

48. The Contracting Officer found that WX and CSR are affiliated under the ostensible subcontractor rule. *Id.* at 12.

(iii) Totality of the Circumstances

49. The Size Determination states:

The totality of the circumstances may serve as a basis for affiliation where "no single factor is sufficient to constitute affiliation." The CO, based on her earlier findings, found that WX and CSR are affiliated under the totality of the circumstances rule.

Id. at 12.

C. WX Technical Proposal

50. The WX Technical Proposal is dated June 5, 2012. *AR* Tab 7 at 1.

51. The WX Technical Proposal states that [REDACTED]

52. The WXS Technical Proposal states that [REDACTED]

53. The WX Technical Proposal states:

[REDACTED]

Id. at 12.

54. The WX Technical Proposal states:

[REDACTED]

Id. at 16.

55. The WX Technical Proposal describes the Senior Weather Observer's responsibilities as follows:

[REDACTED]

Id. at 18.

56. The WX Technical Proposal describes the Senior Weather Observer's authority as follows:

[REDACTED]

Id.

57. Section A10.3.1 of the WX Technical Proposal describes the position of Senior Weather Observer as follows:

[REDACTED]

Id. at 21-22.

58. The same section proceeds to state:

[REDACTED]

Id. at 22 (emphasis added).

59. Figure 1 in Section A11-1 of the WX Technical Proposal [REDACTED]

60. The WX Technical Proposal states:

[REDACTED]

Id. at 26.

61. In the Summary, the WX Technical Proposal states:

[REDACTED]

Id. at 38.

62. The WX Technical Proposal states the role of the Senior Weather Observer under the QAMP (“Quality Assurance Management Plan”):

[REDACTED]

Id. at 53.

63. The WX Technical Proposal states that [REDACTED]

64. The WX Technical Proposal also states that

[REDACTED]

Id. at 66.

65. With respect to the transition, the WX Technical Proposal states:

[REDACTED]

Id. at 105.

66. The WX Technical Proposal states that [REDACTED]

67. The Key Management Personnel proposed in the WX Technical Proposal are:

[REDACTED]

68. The WX Technical Proposal states:

[REDACTED]

AR Tab 6 at 92.

69. The WX Technical Proposal also states:

[REDACTED]

Id.

70. As part of its Proposal, WX included [REDACTED], which states:

[REDACTED]

Id. at 93-100 (emphasis added).

71. [REDACTED]

D. WX Reliance Upon CSR's Expertise

72. The WX Technical Proposal states:

[REDACTED]

[REDACTED]

AR Tab 7 at 7.

73. The WX Technical Proposal states that [REDACTED]

74. The WX Technical Proposal discusses [REDACTED]:

[REDACTED]

Id.

75. The WX Technical Proposal discusses [REDACTED]:

[REDACTED]

Id. at 10.

76. The WX Technical Proposal states [REDACTED]:

[REDACTED]

Id. at 32.

77. The WX Technical Proposal also shows [REDACTED]. The Proposal states:

[REDACTED]

Id. at 49.

78. The WX Proposal states that:

[REDACTED]

Id. at 12.

79. The WX Proposal also states:

[REDACTED]

Id.

80. The WX Proposal emphasizes [REDACTED] as follows:

[REDACTED]

Id. at 50.

81. [REDACTED]

E. The WX and CSR Response to Contracting Officer Size Investigation

82. By letter dated January 23, 2013, WX filed its response to the Contracting Officer's small business size status investigation ("Response"). AR Tab 16.

83. The Response states: WX Solutions, Inc. ("WX") is a corporation. WX's articles of incorporation and bylaws are enclosed at Attachment 1. WX does not issue annual reports to shareholders, so no such document exists. AR Tab 16, Exhibit A.

84. The WX Response states that:

I formed WX in 2011, so WX does not have financial statements or tax returns for 2009 and 2010. I have enclosed the company's 2011 income statement and tax return at Attachment 2. [REDACTED]

Id.

85. [REDACTED] is the sole, 100% owner of WX and has continuously been the 100% owner since founded in 2011. *Id.*

86. [REDACTED] is the only officer of WX and President since August, 2011. *Id.*

87. [REDACTED] is the sole director of WX since August, 2011. *Id.*

88. FAA Question 21 and WX answer states:

In preparing the bid, was any assistance provided by an alleged or acknowledged affiliate?

WX Response: [REDACTED]

Id.

89. Pursuant to its Articles of Incorporation, On August 9, 2011, WX was incorporated in the State of California. AR Tab 16, Attachment 1.
90. WX's non-certified financial statement for the year ending December, 2011 shows [REDACTED]. AR Tab 16, Attachment 2.
91. As part of the WX Response, [REDACTED]. AR Tab 17.
92. As part of the WX Protest filing, [REDACTED]. *Protest*, Exhibit C.
93. [REDACTED] CSR, in response to the Contracting Officer's size investigation, provided the following information:

Gross sales or receipts of the affiliate for each of the most recently completed 3 fiscal years as of the date of the offer:

[REDACTED]

AR Tab 19(i).

94. [REDACTED]

III. DISCUSSION

A. Burden and Standard of Proof on the Merits

WX bears the burden of proving by a preponderance of the evidence that the Contracting Officer's Size Determination prejudicially failed to comply with the AMS; lacked a rational basis; or was otherwise arbitrary, capricious or an abuse of discretion. 14 C.F.R. § 17.21(m) (2013). Included within the foregoing standard is the AMS requirement that evaluations and awards conform to the provisions of the applicable solicitation. AMS Policy 3.2.2.3.1. In the instant case, the Solicitation requires that "[f]or size determination purposes, the FAA will consider a company's affiliation with another

entity under the SBA general principles of affiliation.” FF 13. Thus, the ODRA will look at the relevant case law of the Small Business Administration (“SBA”) Office of Hearings and Appeals (“OHA”) interpreting the applicable rules and regulations. The ODRA has held that, while the decisions of the OHA are not binding on the FAA, the ODRA will treat them as persuasive authority to the extent that they do not conflict with the AMS. *Protest of Potter Electric Company*, 13-ODRA-00657.

B. Due Process

WX asserts that the Product Team violated its right to due process in the Contracting Officer’s size investigation. WX states that it “was unaware that the FAA was investigating ostensible subcontractor affiliation until it received the Size Determination. Consequently, WX was not given a fair opportunity to submit a response on the basis of affiliation.” *Protest* at 6. WX’s argument is meritless and frivolous. WX filed a substantive response to the Contracting Officer’s size investigation. AR Tab 16. Further, the ODRA has stated:

The ODRA has exclusive authority to conduct adjudications of bid protests for acquisitions conducted under the AMS. 49 U.S.C. § 40110(d)(2) and (4). On behalf of the Administrator, the ODRA conducts its adjudicatory function pursuant to 49 U.S.C. § 46102, which requires a record and invokes the procedures found in the APA.

Protest of Adsystem, Inc., 09-ODRA-00508. As counsel for the Product Team well points out, by filing its protest with the ODRA, WX avails itself of due process. Moreover, the Contracting Officer sent emails to WX putting them on notice of the size investigation. AR Tab 15. This ground of protest is denied.

C. Identity of Interest

WX asserts that the Contracting Officer’s finding that WX and CSR are affiliated under the identity of interest rule is unreasonable. *Protest* at 10. While WX concedes the familial relationship between [REDACTED] (WX’s sole owner and president) and [REDACTED]. *Id.* The Product Team counters that SBA OHA precedent “creates ‘a

rebuttable presumption that family members have identical interests and must be treated as one person, unless the family members are estranged or not involved with each other's business transactions.” *AR* at 12.

Pursuant to the requirements of the Solicitation, the Contracting Officer applied 13 C.F.R. § 121.103(f) in determining that WX is not economically dependent upon CSR. FF 28. Under SBA regulations:

Affiliation may arise among two or more persons with an identity of interest. Individuals or firms that have identical or substantially identical business or economic interests (such as family members, individuals or firms with common investments, or firms that are economically dependent through contractual or other relationships) may be treated as one party with such interests aggregated. Where SBA determines that such interests should be aggregated, an individual or firm may rebut that determination with evidence showing that the interests deemed to be one are in fact separate.

13 C.F.R. § 121.103(f). The Contracting Officer determined that WX and CSR are affiliated under the identity of interest rule because [REDACTED], the sole owner, director, and president of WX, [REDACTED]

OHA case law interpreting 13 C.F.R. § 121.103(f) creates a rebuttable presumption that “family members have identical interests and must be treated as one person.” *Size Appeal of RGB Group, Inc.*, SBA No. SIZ-5351 (2012). “The underlying rationale for the rule is that persons will, because of their common interests, act in concert or as one.” *Id.* The presumption may be rebutted by demonstrating a fracture between the family members in question. *Size Appeal of Tech. Support Services*, SBA No. SIZ-4794 (2006). A fracture is demonstrated by the lack of a business relationship between the family members or if they are estranged. *Size Appeal of Hal Hays Construction, Inc.*, SBA No. SIZ-5217 (2011). However, the family members must have the power to control their respective entities. *See, e.g., Size Appeal of STA Technologies, Inc.*, SBA No. SIZ-4790 (2006) (“Affiliation predicated upon familial identity of interest requires the family

member to have the power to control the other concern, i.e., the concern whose size is not being challenged or protested.”).

In the instant case, the WX Proposal clearly establishes [REDACTED]¹ [REDACTED] does not have the authority to control CSR as a corporate entity. [REDACTED] is not a shareholder of CSR with power to control pursuant to Article II, Section 12 of the CSR bylaws. AR Tab 16, Attachment 1. [REDACTED] is also not the president of CSR with control over the “general and active management of the business and affairs of the corporation” under Article III, Section 3. *Id.* Thus, WX has rebutted the presumption that WX and CSR are affiliated pursuant to [REDACTED]. Thus, the ODRA finds that the identity of interest rule does not support a finding that WX and CSR are affiliated. This error in the Size Determination was not prejudicial since, as more fully discussed below, WX was properly disqualified on other grounds of affiliation.

D. Ostensible Subcontractor Rule

WX asserts that the Contracting Officer’s finding that WX is affiliated with its subcontractor, CSR, as an ostensible subcontractor lacks a rational basis. *Protest* at 8. The Product Team asserts in its Agency Response that the Contracting Officer’s determination that WX and CSR are affiliated under the ostensible subcontractor rule is supported by the record. AR at 6-11. It is not disputed that the primary and vital requirements of the CWO Contract are the weather observation services provided by the Weather Observers. AR at 8; WX *Comments* at 19;; *Size Determination* at 9. For the reasons set forth below, the ODRA finds that WX has not met its burden, and that the Contracting Officer’s conclusion that WX is affiliated with CSR as an ostensible subcontractor is supported by substantial evidence, has a rational basis and is not arbitrary, capricious or an abuse of discretion.

¹ [REDACTED]

Pursuant to the requirements of the Solicitation, the CO applied 13 C.F.R. § 121.103(h)(4) in determining that WX and CSR are affiliated under the ostensible subcontractor rule. FF 44-48. That regulation states:

A contractor and its ostensible subcontractor are treated as joint venturers, and therefore affiliates, for size determination purposes. An ostensible subcontractor that performs primary and vital requirements of a contract, or of an order under a multiple award schedule contract, or a subcontractor upon which the prime contractor is unusually reliant. All aspects of the relationship between the prime and subcontractors are considered, including, but not limited to, the terms of the proposal (such as contract management, technical responsibilities, and the percentage of subcontract work), agreements between the prime and subcontractor (such as bonding assistance or the teaming agreement), and whether the subcontractor is the incumbent contractor and is ineligible to submit a proposal because it exceeds the applicable size standard for that solicitation.

13 C.F.R. § 121.103(h)(4). In other words, “[a] prime contractor and its subcontractor may be treated as affiliates if the subcontractor either performs the primary and vital requirements of the contract, or if the prime contractor is unusually reliant upon the subcontractor.” *Size Appeal of DoverStaffing, Inc.*, SBA No. SIZ-5300, at fn. 2 (2011). When applying the Ostensible Subcontractor Rule one must consider “all aspects of the relationship between the prime and subcontractor, including the terms of the Proposal, agreements between the firms (such as teaming agreements, bonding or financial assistance), and whether the subcontractor is the incumbent on the predecessor contract.” *Size Appeal of SM Resources Corporation, Inc.*, SBA No. SIZ-5338 (2012). The rationale is to “prevent other than small firms from forming relationships with small firms to evade [] size requirements.” *Size Appeal of Fischer Business Solutions, LLC*, SBA No. SIZ-5075, at 4 (2009). The analysis is intensely fact specific, and based on the solicitation and the proposal at hand. *Size Appeal of Four Winds Services, Inc.*, SBA No. SIZ-5260, at 6 (2011). In the present Protest, several aspects of the WX-CSR relationship demonstrate a violation of the Ostensible Subcontractor Rule.

1. Hiring of Managerial Incumbent Personnel

The Contracting Officer concluded with respect to the hiring of incumbent Senior Weather Observers that:

WX's proposal states that [REDACTED] . . . I do not find the proposed division of the staffing of sites between WX and CSR to be unusual since it appears that, as a result of the Limitations on Subcontracting clause and the Teaming Agreement, the majority of the employees under the Contract (which includes the Senior Weather observers) will be employed by WX.

FF 42. As discussed further below, while the Contracting Officer correctly applied the AMS to determine that the proposed [REDACTED] did not constitute affiliation, additional support for the Contracting Officer's conclusion can be found through the [REDACTED]² *See, e.g., Size Appeal of SM Resources, supra.*

OHA has held that there is an indication of affiliation where a prime contractor relies heavily on the incumbent personnel of its subcontractor to perform the primary and vital requirements of the contract. *See, e.g. Size Appeal of The Analysis Group, LLC, SBA No. SIZ-4814, at 6 (2006).* However, Executive Order 13,495 (2009) states “[t]he Federal Government's procurement interests in economy and efficiency are served when the successor contractor hires the predecessor's employees,” E.O. 13,495, Nondisplacement of Qualified Workers Under Service Contracts, 74 Fed. Reg. 6103 (Feb. 4, 2009), and the OHA has held that “the mere hiring of incumbent non-management personnel is no longer indicative of unusual reliance under the ostensible subcontractor rule.” *Size Appeal of DoverStaffing, Inc., SBA No. SIZ-5300, at fn. 2 (2011); see also Size Appeal of Spiral Technologies, Inc., SBA No. SIZ-5279 (2011).* However, OHA has also held that E.O. 13,495 only applies to non-managerial, non-supervisory personnel. *Size Appeal of SM Resources, supra* (“Managerial employees are exempted from the reach of Executive Order 13,495.”).

² Inasmuch as the Product Team relies on AMS Clause 3.6.1-7 Limitations on Subcontracting (October 2011) in support of its finding that there is no affiliation between the prime contractor and its subcontractor, *Size Determination* at 10, OHA has held that “the fact a challenged firm is performing over 50% of the work of the contract and has complied with the Limitations on Subcontracting Clause does not preclude a finding of unusual reliance.” *Greenleaf Construction Company, Inc., SBA No. SIZ-4765 (2006).*

The Executive Order at issue in *DoverStaffing* also applies to the FAA. Section I.12 of the Solicitation, quoting AMS Clause 3.6.2-40 Nondisplacement of Qualified Workers (April 2009), states in relevant part:

The contractor and its subcontractors must, except as otherwise provided herein, in good faith offer those employees (*other than managerial and supervisory employees*) employed under the predecessor contract whose employment will be terminated as a result of award of this contract or the expiration of the contract under which the employees were hired, a right of first refusal of employment under this contract in positions for which employees are qualified.

FF 10 (emphasis added). AMS Clause 3.6.2-40 is taken verbatim from Executive Order 13,495. Compare Executive Order 13,495, 74 Fed. Reg. 6103 (Feb. 4, 2009) with AMS Clause 3.6.2-40. Indeed, the plain language of AMS Clause 3.6.2-40, like E.O. 13, 495, expressly omits “managerial and supervisory employees.” Recognizing the similarity of the AMS and other acquisition systems under E.O. 13,495, the ODRA finds the *DoverStaffing* decision to be persuasive.

In *DoverStaffing*, the OHA upheld the SBA Area Office’s Size Determination on the basis “that Appellant is reliant upon [Subcontractor One] not only for the 40% of the contract work assigned to it by the proposal, but for nearly all of Appellant's own staff for this contract and for all of the key employees performing the contract management.” SBA No. SIZ-5300 (2011). OHA stated that “[t]he critical point, which Appellant does not dispute, is that not only will Appellant be subcontracting to [Subcontractor One] for 40% of the work on this contract, but Appellant will be hiring the [Subcontractor One]’s incumbent employees *en masse* to perform Appellant's 51% of the work.” *Id.* OHA found that “[n]one of Appellant's proposed personnel is currently employed by Appellant” and “[a]ll of the proposed key personnel on this contract, the Project Manager, the Project Support Manager, Youth Services Project Manager, School Services Project Manager, Project Analyst, and Web Specialist, are currently [Subcontractor One] employees based in East Point, Georgia.” *Id.* Only one current employee of the Appellant was proposed to be “involved with the performance and management of this contract ... its President and CEO.” *Id.*

Similarly, in *SM Resources Corporation, Inc.*, OHA again upheld an Area Office Size Determination on the grounds that the “Appellant would be hiring all of its key employees who manage the contract ... as strongly indicative of unusual reliance.” SBA No. SIZ-5338 (2012). OHA observed that “[o]nly 14% of the proposed contract personnel are currently Appellant's employees.” *Id.* “[A]ll of Appellant's managerial and supervisory employees for this contract are currently [Subcontractor] employees.” *Id.* In addition, the Appellant in its Proposal “clearly stated that its goal was to utilize the incumbent key personnel as its own key personnel.” *Id.*

In the instant case, WX in its Proposal states [REDACTED]³ WX only proposes [REDACTED] In WX’s Proposal, [REDACTED] *See generally* AR Tab 7.

Both the Solicitation and the Proposal by WX make it clear that Senior Weather Observer is a managerial and supervisory position. FF 5, 8, 55-57, 59-62, 64. The Proposal clearly establishes under the “Labor Relations Section” that the Senior Weather Observer is a management position. It states:

[REDACTED]

FF 58. The Organizational Chart provided by WX [REDACTED]

Section H.24 of the Solicitation designates the Senior Weather Observers as key personnel under the contract. FF 8. The SOW requires the contractor to designate “a senior employee at each site as ‘Senior Weather Observer’” and that the “Senior Weather Observer must be the contractor’s on-site representative and as such must be the contractor’s initial point of contact (POC) at each site by the COTR/TOR, CO, and/or NWS representative.” FF 5. The SOW goes on to state that “the Senior Weather

³ WX states that [REDACTED] “While Appellant's proposal mentions the potential of hiring other employees, they are not proposed here, and an ostensible subcontractor case must be analyzed on the basis of the solicitation and proposal at hand.” *DoverStaffing, supra citing Size Appeal of Four Winds Services, Inc.*, SBA No. SIZ-5260, at 6 (2011). Moreover, WX states in its Proposal [REDACTED]

Observer must be able to discuss and act on behalf of the contractor in the following areas: site staffing/work and leave schedule, implementation and continuation of the contractor’s Quality Assurance Management Plan, and initial POC for any NWS or FAA site inspections.” FF 5. Subsection L.20.3.1 also states that the Senior Weather Observer has “a significant role in the day-to-day management of the contract.” FF 17.

In addition, the WX Proposal [REDACTED] Section A10.3.1 Senior Weather Observer describes the position as follows:

[REDACTED]

FF 57. The Proposal also provides the following job description for Senior Weather Observer [REDACTED]:

[REDACTED]

FF 57. The Proposal further describes the Senior Weather Observer’s responsibilities and authority, which the ODRA finds are managerial and supervisory in nature. FF 55-56. Thus, the ODRA finds that WX proposed [REDACTED]. The analysis does not end here, however, since the Ostensible Subcontractor Rule requires that “[a]ll aspects of the relationship between the prime and subcontractors are considered.” 13 C.F.R. § 121.103(h)(4). As discussed below, the ODRA also finds that WX is affiliated with CSR on other aspects in addition to [REDACTED]

2. Independent Access to Financing

As initially raised in Section C of these Findings and Recommendations, the Contracting Officer concluded that WX does not have “independent access to financing” to “cover 90 days of contract expenses” pursuant to section L.21.3 of the Solicitation in making her determination that the two are not affiliated. FF 47. The Contracting Officer states that:

[REDACTED], I looked to its other financial resources to see how it intended to satisfy the requirement. WX submitted [REDACTED]

FF 47. The record demonstrates a rational basis to support the Contracting Officer's conclusion. First, the letter, which WX submitted in support of its ability to provide 90-days of initial financing from [REDACTED]

In an attempt to meet the 90 days of working expense requirement, WX, in response to the Contracting Officer's fact finding investigation for size determination purposes offered [REDACTED] As part of the WX Protest filing, [REDACTED] The ODRA finds that the Contracting Officer's determination regarding independent access to financing has a rational basis, and finds that WX is economically dependent upon CSR to meet the requirement of 90 days of working expenses.

3. Other Grounds

In its Proposal, WX relies heavily on the expertise of CSR. FF 72-81. [REDACTED] Accordingly, on this basis, the ODRA finds that WX is affiliated with CSR as an ostensible subcontractor.

In addition, the Product Team asserts that [REDACTED] led the Contracting Officer to find that "CSR was the dominant, if not sole, author of the proposal." AR at 7. The Product Team does not place any proposals other than WX's into the record. The Product Team does provide [REDACTED] FF 94.

Moreover, WX [REDACTED] The Response to the Contracting Officer's size investigation states:

FAA Question 21: In preparing the bid, was any assistance provided by an alleged or acknowledged affiliate?

WX Response: [REDACTED]

FF 88. Proposal preparation is an indicator of affiliation under the ostensible subcontractor rule. *Size Appeal of ePerience, Inc.*, SBA No. SIZ-4668 (2004). Thus, the ODRA finds that the Contracting Officer's finding that WX and CSR are affiliated under the ostensible subcontractor rule based on undue reliance on CSR for management, financing, technical support, and proposal preparation has a rational basis.

E. Totality of the Circumstances

WX asserts that it should not be found affiliated with CSR based on the totality of the circumstances. *Protest* at 13. The Product Team asserts that the Contracting Officer had a rational basis for finding that WX and CSR are affiliated based on the totality of the circumstances. *AR* at 13-14.

“In determining whether affiliation exists, SBA will consider the totality of the circumstances, and may find affiliation even though no single factor is sufficient to constitute affiliation.” 13 C.F.R. § 121.103(a)(5). The Contracting Officer concluded that WX and CSR are affiliated on the basis of totality of the circumstances “based on her earlier findings.” FF 49. The remainder of the record provides substantial indicia of affiliation when the applying the totality of the circumstances standard. These include, but are not limited to:

- The dependence on CSR resources and experience, as referenced throughout the WX proposal.
- The reliance on [REDACTED] to meet the financial requirements found in Provision L.10 of the Solicitation.
- The reliance on [REDACTED] to meet the [REDACTED] requirements of the Solicitation.

Considering all aspects of the relationship, the ODRA finds that the Contracting Officer's Size Determination on this point was supported by substantial evidence, had a rational basis and was not arbitrary, capricious or an abuse of discretion.

IV. CONCLUSION

For the reasons discussed herein, the ODRA recommends that the Protest be denied in its entirety.

-S-

C. Scott Maravilla
Dispute Resolution Officer and
Administrative Judge
FAA Office of Dispute Resolution for Acquisition

APPROVED:

-S-

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