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

FINDINGS AND RECOMMENDATIONS

Matter: **Protests of Spatial Front, Inc.**
 Under Solicitation No. DTFACT-17-R-00003

Docket No.: **17-ODRA-00803**

Appearances:

For Spatial Front, Inc.:

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For Karsun Solutions, LLC

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For the FAA Product Team:

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This matter arises from a Protest (“Initial Protest”), a Supplemental Protest (“Supp. Protest”), and a Second Supplemental Protest (“2nd Supp. Protest”) (collectively “the Protests”) filed with the Federal Aviation Administration (“FAA”) Office of Dispute Resolution for Acquisition (“ODRA”) by Spatial Front, Inc. (“Spatial”) under Solicitation DTFACT-17-R-00003 (“Solicitation” or “SIR”). The Solicitation sought proposals from small businesses for software and software support services. The FAA Product Team (“Product Team”) awarded the contract to Karsun Solutions, LLC (“Karsun”), which has intervened in the Protests.

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For the reasons discussed herein, the ODRA recommends that the Initial Protest be dismissed. It further recommends that the Supplemental Protest and Second Supplemental Protest be sustained in part and denied in part.

I. The Standard of Review

Spatial, as the protester, bears the burden of proof, and must demonstrate by substantial evidence that the challenged decision lacked a rational basis, was arbitrary, capricious or an abuse of discretion, or otherwise failed in a prejudicial manner to comply with the Acquisition Management System (“AMS”). *Protest of Alutiiq Pacific LLC*, 12-ODRA-00627 (citing *Protest of Adsystech, Inc.*, 09-ODRA-00508). Consistent with the Administrative Procedures Act, 5 U.S.C. §§ 554 and 556, which applies to ODRA adjudications, the phrase “substantial evidence” means that the ODRA considers whether the preponderance of the evidence supports the challenged agency action. Where the record demonstrates that the challenged decision has a rational basis and is not arbitrary, capricious or an abuse of discretion, and is consistent with the AMS and the underlying solicitation, the ODRA will not substitute its judgment for that of the designated evaluation and source selection officials. 14 C.F.R. § 17.19(m) (2017); *Protests of IBEX Weather Services*, 13-ODRA-00641 and -00644.

II. General Findings of Fact Regarding the Solicitation, Award, and Protest

A. The Solicitation

1. The Product Team issued the Solicitation to obtain “Software Solutions Delivery (SSD) Support Services.” *AR* Tab 1.A., at § B.1. These services include “support services to assist with the implementation and continuing support of enterprise-wide software application and database development and maintenance related activities.” *Id.* These services “can be broadly categorized as solutions development (new applications) and enhancement and sustainment (existing applications).” *Id.*
2. The Solicitation set aside the competition and resulting contract for a single award to a

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qualifying small business under North American Industry Classification System code 541519, which limits qualifying firms based on a three-year average of annual receipts that do not exceed \$27.5 million. *AR* Tab 1.A. at §§ L.11 and M.2.

3. The anticipated contract resulting from the Solicitation would be an Indefinite Delivery/Indefinite Quantity (“IDIQ”) contract with a five-year performance period. *AR* Tab 1.A. at §§ B.1 and L.10. Most task orders under the contract likely will be issued on a time-and-materials basis, but firm fixed price orders also are contemplated. *Id.*
4. Proposals were to be submitted in four volumes, each associated with an evaluation factor. *AR* Tab 1.A. (the final version of the Solicitation) at 57, Table L.1. An additional volume, called “Annex #1,” contained the required declarations, representations, standard forms, and other materials. *Id.* at Table L.1 and § L.4.4.
5. The Solicitation required the first volume of any proposal to address “Corporate Experience.” In this volume, each offeror was to provide “information for a minimum of three (3) to a maximum of five (5) recent contracts that describe the Offeror’s and (if applicable) the Offeror’s proposed subcontractors’ corporate experience similar to this SIR requirement performed within the last five (5) years....” *AR* Tab 1.A. at § L.5.1. The Solicitation continued by stating, “At least one recent corporate experience example must be that of the prime contractor.” *Id.*
6. The second volume of a proposal was to address technical matters, broken down into three areas: (1) Technical Approach; (2) Management Approach; and (3) Staffing Plan. *AR* Tab 1.A. at § L.5.2.
7. The third volume of a proposal was to address past performance. The Solicitation required offerors to provide a past performance questionnaire (“PPQ”) to each customer listed in Volume 1, and those customers were to submit their responses to the Product

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Team by the closing date of the Solicitation. *AR* Tab 1.A. at § L.5.3. Additionally, each offeror was to provide a chart that listed the points of contact of each customer that received a questionnaire. *Id.*

- 8. The pricing volume, Volume 4, was to include a completed copy of the pricing schedule, found in attachment B-1 of the Solicitation. *AR* Tab 1.A. at § L.5.4.1. That schedule is a spreadsheet with labor rates organized by locations and periods of performance. *See e.g., AR* Tab 18 (Spatial Front’s Proposal).
- 9. The Solicitation explained that award would be made on a “best value” basis that involves a trade-off analysis between price and non-price evaluation factors. *AR* Tab 1.A. at § M.2. Non-price factors, combined, were deemed more important than price. *Id.* at § M.3.

B. The Evaluation Results and Award

- 10. Twenty-eight offerors submitted proposals, but only twenty-four remained after four were eliminated for failure to comply with the Solicitation instructions. *AR* Tab 7 at 2.
- 11. The Contracting Officer’s Trade-off Analysis narrowed the twenty-four offerors to a group of four offerors with relatively high non-price evaluation scores, and prices deemed reasonable:

Offeror	Factor 1 – Corp. Experience	Factor 2 – Technical	Factor 3 – Past Performance	Total Evaluated Price
[DELETED]	Acceptable	Good	Satisfactory Confidence	\$(DELETED)
Spatial Front, Inc.	Acceptable	Good	Satisfactory Confidence	\$(DELETED)
[DELETED]	Acceptable	Good	Satisfactory Confidence	\$(DELETED)
Karsun Solutions, LLC	Acceptable	Excellent	Substantial Confidence	\$(DELETED)

AR Tab 6A at 7, Chart 6. Karsun had the highest evaluation scores, but also the highest

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proposed price. The trade-off analysis compared Karsun to each of the three remaining offerors, including Spatial. The Contracting Officer recommended Karsun for award. *AR Tab 7.*

12. The Source Selection Official (“SSO”) rendered a similar, somewhat shorter analysis. *AR Tab 8.* The SSO determined that Karsun would receive the award, but recommended that negotiations take place to reduce Karsun’s high price. *Id.* at 5.
13. The Contracting Officer’s negotiation efforts yielded a reduction in Karsun’s total price from \$[DELETED] to \$144,953,627.90. *AR Tab 10.B. at 2.*
14. The Contracting Officer notified Karsun of its award, at the new negotiated price, on August 15, 2017. *AR Tab 11.* On the same date, the Contracting Officer separately notified Spatial of the award to Karsun. *Initial Protest, Exh. A.*

C. Protest

15. Spatial timely filed its Initial Protest with the ODRA on August 23, 2017, i.e., six days after receiving the notice of the award. *Initial Protest; see also, 14 C.F.R. 17.15 (a)(3)(i) (2017).* The Initial Protest alleged that Karsun was ineligible for award because it did not meet the size standard found in the Solicitation. *Initial Protest, passim.*
16. At the Initial Status Conference conducted on August 30, 2017, the ODRA invoked the procedures found in ODRA Standing Order 2013-2, “Protests Regarding Size or Eligibility of Awardee.”¹ *Conference Memorandum at 2.* The ODRA permitted the parties to negotiate a date for rendering the Contracting Officer’s size determination in

¹ Standing Order 2013-2, “Protest Regarding Size or Eligibility of Awardee,” provides the procedures for the FAA Contracting Officer to review size challenges and render informed size determinations prior to ODRA intervention.

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light of their expressed desire to engage in an alternative dispute resolution (“ADR”) effort. *Id.*

17. Spatial received debriefing materials on August 29, 2017, and filed its Supplemental Protest² in a timely manner on September 6, 2017. *Supp. Protest* at 2. The Supplemental Protest alleged a variety of evaluation flaws in the non-price evaluation factors for both Spatial and Karsun. *Id.* at 6-26. It also challenged the price analysis and the best value decision. *Id.* at 26-28.
18. On October 12, 2017, the Contracting Officer issued and filed a size determination that found Karsun met the size standard. *Size Determination*.
19. Consistent with an ADR Agreement signed by the parties, Spatial filed a Second Supplemental Protest³ on October 26, 2017 based on materials received from the Product Team on October 17, 2017, during the course of their mediation effort. *2nd Supp. Protest* at 2. The Second Supplemental Protest made detailed challenges to the price evaluation and raised several concerns about disparate evaluation under the non-price evaluation factors. *Id.* at 2-18. It concluded by arguing that the best value trade-off was unreasonable. *Id.* at 18-19.
20. On November 15, 2017, Spatial filed a letter to inform the ODRA that ADR efforts did not lead to resolution. *Spatial Letter to the ODRA*, Nov. 15, 2017. Spatial requested that adjudication commence for the Supplemental Protest and the Second Supplemental Protest. *Id.* Spatial also withdrew its Initial Protest. *Id.*

² Spatial characterized its second filing as a “Protest” rather than as a “Supplemental Protest.” Consistent with ODRA practice, the September 6, 2017 filing is referred to herein as the “Supplemental Protest,” and cited as “Supp. Protest.”

³ Spatial called this document the “Supplemental Protest.” As the third actual protest document, it is referred to herein as the “Second Supplemental Protest,” and cited as “2nd Supp. Protest.”

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21. Also on November 15, 2017, the Product Team stated that it would take limited corrective action regarding the Price Evaluation Report, and that the results would be incorporated as an addendum to the Price Evaluation Report. *Product Team Letter to the ODRA*, Nov. 15, 2017.
22. Consistent with the ODRA's Adjudication Scheduling Letter of November 15, 2017, the Product Team filed an Agency Response, and both Spatial and Karsun filed Comments. Thereafter the record closed.

III. Withdrawal and Dismissal of the Size Protest

As relayed above, Spatial's Initial Protest challenged Karsun's size, and the ODRA invoked its Standing Order 2013-2, "Protest Regarding Size or Eligibility of Awardee." *Findings of Fact ("FF")* 16. After the Product Team timely filed a "Size and Eligibility Determination for Karsun Solutions, LLC," Spatial withdrew the Initial Protest against Karsun's size, but requested that adjudication proceed regarding the Supplemental Protest and the Second Supplemental Protest. *FF* 20. Size issues, therefore, are no longer before the ODRA, and the Initial Protest should be dismissed with prejudice.

IV. Discussion of the Supplemental and Second Supplemental Protests

Although Spatial withdrew its size challenge, many evaluation issues remain before the ODRA. Spatial challenges every aspect of the evaluations, i.e., every technical factor, the price evaluation, and the best value determination. In so doing, Spatial argues that its own evaluation scores should be higher, and Karsun's should be lower. It also argues that regardless of the other evaluation results, Karsun's price was unreasonably high. After discussing a challenge of consistency between Factors 1 and 3, the ODRA considers each evaluation factor in numeric order, followed by the price evaluation and best value determination.

A. Alleged Inconsistency between Corporate Experience and Past Performance Evaluations.

Spatial opens the argument in its Supplemental Protest by comparing the evaluation results for Factor 1, Corporate Experience, with the results for Factor 3, Past Performance. *Supp. Protest* at 6. Positing a “very close connection” between these factors, Spatial notes that offerors were to use the same contract examples for both factors and related volumes. *Id.*; *see also FF 6*. It also notes that both factors required the evaluators to consider the relevancy of the work performed to the scope of work in the present acquisition. *Supp. Protest* at 6. Spatial takes issue with the fact that [DELETED] factors 1 and 3, and states that this caused inconsistent evaluations between Factors 1 and 3 that advantaged Karsun and disadvantaged Spatial. *Supp. Protest* at 7. Surprisingly, the Product Team did not respond to Spatial’s opening salvo, and left the ODRA to consider only the arguments from Spatial and the record before it.

The Solicitation’s evaluation standards are not the same for these two factors, and the ODRA rejects Spatial’s argument. For Factor 1, each of the adjectival ratings include a specific measure of the degree to which an example reflects the scope and complexity of the Solicitation. “Excellent” and “Good” require experience that “involved the same scope and complexities.” *AR Tab 1.A.* at § M.5.1. “Acceptable” requires “much of the same” scope and complexity, while “Marginal” involves “some of the same” scope and complexity. *Id.* In contrast to these specific elements within each Factor 1 rating definition, the Factor 3 rating system and definitions did not require a specific finding of relevancy. While “relevance” under this factor relates to the “scope and complexity” of work under the current Solicitation, relevance was not included in the adjectival definition. *Id.* at § M.5.3. Instead, the Solicitation merely states, “More relevant past performance will typically be a stronger predictor of further success and will have more influence on the Past Performance Confidence Assessment than past performance of lesser relevance.” *Id.* To award a “Substantial Confidence” for Factor 3, the evaluator had to have a “high expectation that the Offeror will successfully perform the required effort.” Factor 3, however, *does not* require an express finding regarding the “same scope and complexity” to achieve the highest rating.

The dissimilarity of the Factor 1 and 3 rating schemes reveals that the premise of Spatial's first protest ground is flawed. The ODRA therefore recommends that this ground of the Protests be denied, and will evaluate each challenged evaluation factor by the applicable standards in the Solicitation.

B. Protest Grounds under Factor 1, Corporate Experience

Both Spatial and Karsun received a rating of "Acceptable" for Factor 1, Corporate Experience. *FF* 11. Spatial's Supplemental Protest challenges the evaluation that Spatial received under Factor 1. The Second Supplemental Protest adds challenges to Karsun's evaluation under Factor 1. These are collected below.

1. Spatial's Rating under Factor 1

a. Omission of Strengths for Spatial

Spatial provides five quotes from the Technical Evaluation Report that reflect favorable views of Spatial's proposal. *Supp. Protest* at 10. It asserts that each of these justifies a strength that should have resulted in a higher evaluation score than just "acceptable." *Id.* The Product Team replies that this ground of protest is merely a disagreement with the evaluators and is not a valid ground of protest. *AR* at 17. Spatial's Comments add nothing new, and actually reiterate the quotes previously provided. *Spatial Comments* at 19-20.

Successful protests of the failure to award strengths commonly rely on disparate treatment theories or on failure-to-consider arguments. *Enterprise Engineering Services, LLC*, 09-ODRA-00490. Spatial has not attempted either of these approaches. Indeed, the fact that Spatial is quoting the actual evaluation report itself demonstrates that "failure to consider" is not at issue. Further, Spatial does not explain how its quoted excerpts demonstrate a "strength," i.e., "An aspect of an Offeror's proposal that exceeds the minimum requirements of the SIR in a way that will be advantageous to the Government during contract performance." *AR* Tab 1.A. at § M.5.7. Spatial cites no "minimum requirements" that have been exceeded, and all that remains is

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Spatial's disagreement with the evaluation. Mere disagreement with an evaluation, however, is not a valid ground of protest. *AHTNA Facilities Services, Inc.*, 12-ODRA-00615.

The ODRA therefore recommends that this ground of the Protests be denied.

b. Cloud Management Experience Weakness

Spatial received one weakness under Factor 1. *AR* Tab 6.A., Attach. 19 at 9. The TET found that although Spatial provided examples of experience "in providing cloud support services," it believed that "the [DELETED] supporting the requirements of Section 3.4.2" of the Statement of Work ("SOW"). *Id.* Spatial argues that "this criticism is overstated and wrong." *Supp. Protest* at 11.

As to "wrong," the issue is whether the evaluation is supported by a rational basis. Although Spatial's Protest quotes several references to cloud services mentioned in Spatial's proposal, the evaluators acknowledged in general terms that examples are present. *Compare Supp. Protest* at 11-13 *with AR* Tab 6.A., Attach. 19 at 9. The evaluators further elaborated on their concern by writing, "[DELETED] as indicated in the SOW." *AR* Tab 6.A., Attach. 19 at 9 (emphasis added). This emphasized language comes directly from SOW § 3.4.2. *See AR* Tab 1.C. at § 3.4.2. Although the burden of proof rests with Spatial, Spatial does not call to the ODRA's attention or otherwise explain how any of its quoted samples directly contradict this finding. Given that "technical evaluators have considerable latitude in assigning ratings, which reflect their subjective judgments of a proposal's relative merits," the ODRA finds no basis to question their findings. *Protest of Exelis, Inc.*, 15-ODRA-00727.

Spatial's charge that the weakness is "overstated" pertains to citing this weakness in the finding of a [DELETED] risk. *Supp. Protest* at 11. Spatial argues that "[i]t was irrational for the FAA to conclude that the perceived weakness ... would have 'little or no impact on performance,' but then find that SFI's cloud management experience elevated the risk of its unsuccessful contract performance to [DELETED]." *Id.* The Solicitation does not support Spatial's argument for two

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reasons. First, the Solicitation recognizes that an “acceptable” rating may include low impact weaknesses and moderate risk.⁴ Second, the definition of “risk” explains in part, “The magnitude of the risk is derived from a combination of the likelihood of occurrence and the severity of the potential consequence.” *AR* Tab 1.A. at § M.5.7. Consistent with this definition, the evaluators’ report shows that they balanced likelihood with severity when they stated:

While the weakness was identified in their experience with Cloud Management (SOW Section 3.4.2), **which is a significant area of the SSD SOW**, it is anticipated to have little to no impact on performance as the Offeror has demonstrated sufficient experience [DELETED] as well as sufficient experience [DELETED]. Due to these factors, the risk of unsuccessful performance is [DELETED].

AR Tab 6.A., Attach. 19 at 4 (emphasis added). Based on this text, the ODRA finds that the evaluators determined that the likelihood of failure for [DELETED] Cloud Management experience was low due to Spatial’s experience in related fields. The ODRA also finds that they considered the severity of the potential consequence when they noted that Cloud Management was a “significant area of the SSD SOW.” *Id.* The evaluators classified the magnitude of the risk as “[DELETED]” because a “significant area” of performance is jeopardized even if a failure is unlikely. *Id.* The ODRA finds this to be a rational determination based on the record and well grounded in the Solicitation.

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

c. Website Evaluation

Spatial challenges the evaluators’ conclusion that Spatial provided insufficient information regarding certain websites described in its past performance examples. *Supp. Protest* at 14-15 (citing *AR* Tab 6.A., Attach. 19 at 4). Specifically regarding Spatial’s first example, the evaluators explained that they could not “[DELETED].” *AR* Tab 6.A., Attach. 19 at 4. The

⁴ An “acceptable” rating is described in part as: “The proposal meets the requirements. Any identified strength(s) and/or weakness(es) are offsetting or will have little or no impact on performance. Risk of unsuccessful performance is low to moderate.” *AR* Tab 1.A. at § M.5.1. Notably, [DELETED] would still apply.

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report further stated, “Due to the lack of information, the evaluators were unable to determine that the portfolio supported by the Offeror was of similar complexity to the portfolio described in Section 1.2 of the SOW.” *Id.*

As previously explained, successful protests of the failure to award strengths sometimes rely on “failure-to-consider arguments.” *See supra* Part IV.B.1.a (citing *Enterprise Engineering Services, LLC*, 09-ODRA-00490, at 54 (Public Version)). In the cited case, the ODRA held that the record did not support an evaluation where the evaluators failed to consider information provided in the appropriate location of a proposal. *Id.* at 54 (Public Version). In this matter, Spatial calls out three separate portions of text, all appropriately located within Volume 1, Example 1, and all addressing scope and complexity. *Supp. Protest* at 14-15; *see also AR* Tab 18, Vol. 1.

The ODRA finds two separate and independent reasons to conclude that the evaluation lacked a rational basis regarding the websites in Example 1. First, the evaluators cite to Section 1.2 of the SOW to divine the distinction between [DELETED]. That section of the SOW, however, makes no express mention of [DELETED]. *AR* Tab 1.C. at § 1.4. Second, the proposal text that Spatial cites includes references to a “[DELETED]” and “[DELETED].” *Supp. Protest* at 14-15. By comparison, the Product Team offers no reference to the contemporaneous record or even a *post-hoc* declaration⁵ to explain how these otherwise convincing quotes from the proposal represent anything other than [DELETED]. *See AR* at 17 and 19.

The prejudicial effect of this error is discussed below, following a complete review of the alleged errors. *See infra* Part IV.G.1.

⁵ “The ODRA ... is not precluded from considering post-protest explanations that provide a detailed rationale for the contemporaneous conclusions as such explanations can simply fill in previously unrecorded details.” *Concur Technologies, Inc.*, 14-ODRA-00708 n.8 (citing *Artic Elevator Company, LLC*, 12-ODRA-00629, and *Protest of Teams Clean, Inc.*, 09-ODRA-00499).

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d. Alleged Failure to Follow Stated Criteria

Spatial adds a general ground that the evaluation under Factor 1 was not consistent with the stated evaluation criteria. *Supp. Protest* at 15. The ground recites two portions of the Solicitation to make several arguments. *Id.* Both portions, underlined below, come from § M.4.1:

M.4.1 CORPORATE EXPERIENCE

The Government will evaluate (in accordance with the definitions provided in M.5.1) the extent to which the Offeror, to include (if applicable) its subcontractors, has demonstrated that it can perform the current requirement based on its experience on prior contracts or subcontracts with similar scope and complexity.

The Government will evaluate the extent to which the Offeror has experience in hiring and retaining corporate knowledge and skilled staff to meet fluctuating demands in work effort and the extent to which the Offeror has experience in managing resources through capacity planning to meet fluctuating demands in work effort.

In the circumstance that the Offeror submits corporate experience examples for its proposed subcontractor(s), greater weight will be given to the relevant experience of the Prime Offeror.

AR Tab 1.A. at § M.4.1 (emphasis added). The challenges relating to the underlined text are addressed separately.

(1) Size versus “Scope and Complexity”

Spatial quotes the “scope and complexity” standard from § M.4.1, but it relies on language from the risk assessment to argue that the evaluators improperly considered the “size” of Spatial’s [DELETED] of applications in certain examples. *Supp. Protest* at 16 (citing *AR* Tab 6.A. at 10). The ODRA rejects this argument because Spatial does not acknowledge or reconcile the full text of the risk assessment under Factor 1, which permits a consideration of size.

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Spatial is correct that “size” should not be equated with “scope and complexity,”⁶ but the narrow language of § M.4.1 is not the only provision of the Solicitation. Section § M.4.1 must be read side-by-side with the Factor 1 adjectival ratings defined in § M.5.1 and with the definition of “risk” found in § M.5.7. “Risk” is an element of all ratings – from “unacceptable” to “excellent” – for Factor 1, Corporate Experience. AR Tab 1.A. at § M.5.1. (table). “Risk” is defined as:

An aspect of an Offeror’s proposal that presents an uncertainty that, if realized, would result in a negative impact on FAA operations, resources or program execution; or, increases the probability of a negative impact to successful performance, disruption of schedule, increase cost or degradations of performance, or the need for increased Government oversight. The magnitude of risk is derived from a combination of its likelihood of occurrence and the severity of the potential consequence.

Id. at § M.5.7 (underline added). “An aspect of an Offeror’s proposal” is a very broad term, and the Solicitation expressly directed offerors to identify the number of applications that it supported in each example. AR Tab 1.A. at § L.5.1. The ODRA finds, therefore, that “size” of the portfolio described in the experience examples is an aspect that could be considered as part of the risk assessment.

Consistent with the foregoing, the evaluators’ documented their size concerns as part of the risk assessment. They concluded in their evaluation report, under the topic of risk: “As the examples provided experience managing [DELETED] of applications ..., this introduces risk that the Offer may be unable to successfully manage a similar portfolio of applications described in Section 1.2 of the SOW.” AR Tab 6.A., Attach. 19 at 10.⁷ The ODRA finds that this is supported by a rational basis and is well grounded in the Solicitation. The ODRA therefore recommends denying this ground of the Protests.

⁶ See AMS Guidance T3.2.2 A. 3.

⁷ Section 1.2 of the Statement of Work identified 800 applications. AR Tab 1.C. at § 1.2.

(2) Alleged Limitation of the Evaluation to Only Contract Administration

The remaining arguments in this section of the Supplemental Protest concern alleged failures to award strengths and the proper application of the second emphasized portion of § M.4.1 (quoted above) relating to contract administration. First, Spatial claims that it should have received a strength for its ability to meet fluctuating work demands, but Spatial does not explain how this meets the standard for a strength, *i.e.*, how its proposal “exceeds the minimum requirements of the SIR in a way that will be advantageous to the Government.” *Compare Supp. Protest* at 16 with *AR Tab 1.A.* at § M.5.7. Spatial also challenges whether the evaluators properly considered the “complexity” of the applications contained in the examples rather than restricting their assessment to the complexity of administering the underlying contractual example. *Supp. Protest* at 16. The ODRA rejects this interpretation for the simple reason that § L.5.1. required the examples to demonstrate “the offeror’s ability to perform the required effort as delineated with the SIR.” *AR Tab 1.A.*, at § L.5.1. Section 3.4 of the Statement of Work contains a broad array of complex technical requirements that Volume 1 should address. Assessing the complexity of the applications described in the Solicitation, therefore, is entirely appropriate and logically encompassed within the criteria of § M.4.1. *Protest of Advanced Sciences & Technologies, LLC*, 10-ODRA-00536.

The ODRA therefore recommends denying this portion of the Protest.

2. The Evaluation of Karsun under Factor 1

Spatial challenges the evaluation of Karsun’s experience, and in particular, the first example of corporate experience provided in Karsun’s proposal. *Protest* at 23-24; *2nd Supp. Protest* at 10-11. That example involved a [DELETED] contract, known as the “[DELETED] Contract,” awarded to a joint venture, Alliant Solutions Partner (ASP). *AR Tab 17, Vol. 1*, at 2. Focusing on Karsun’s proposal statement that it “currently supports [DELETED] as the prime contractor,” Spatial charges that the FAA failed to consider that Karsun was really serving as the managing partner for the joint venture holding the contract, and further, that it was improper to consider the

example because it pertained to the joint venture, not Karsun. *Supp. Protest* at 10-11.

As Spatial acknowledges, Karsun also stated in its proposal that it was the managing partner of the joint venture awarded the [DELETED] Contract. *Id.* at 10. Indeed, by agreement between the joint venturers, Karsun was the managing venturer for the [DELETED] Contract and was to “perform as the Prime Contractor on behalf of ASP, as if the [DELETED] Contract were awarded directly to Karsun.” *Size Determination*, Attach. 14 at 2 (an agreement between the venturers). The ODRA does not find, therefore, that Karsun made a misrepresentation regarding its role in the [DELETED] Contract.

The ODRA further finds that regardless of whether the evaluators recognized that Karsun performed as the managing venturer or as a prime contractor, the precise legal distinction would be immaterial to the evaluation. The Solicitation required offerors to submit three to five examples of corporate experience, and at least one of those examples had to be the experience of the proposed prime contractor. *AR Tab 1.A.* at § L.5.1. This instruction does not include an express or implied requirement that the proposed prime contractor actually have experience as a prime contractor. *Id.* Instead, the examples had to “demonstrate the Offeror’s ability to perform the required effort as delineated within the SIR...” *Id.* Whether the performance experience came from service as a “prime contractor” or a “managing venturer” is immaterial to the assessment of the experience itself.

The ODRA therefore recommends denying this aspect of the Supplemental Protest.

C. Evaluation Factor 2 – Technical Rating

Spatial received a “Good” rating, but argues that it should have received an “Excellent.” *Supp. Protest* at 17. Spatial culls from the technical evaluation report many positive assessments of the proposal that the evaluators recognized. *Id.* at 17-18. Spatial argues that “the numerous strengths assigned and the language the FAA used in describing the benefits of [Spatial’s] proposal clearly warrant an ‘Excellent’ rating.” *Id.* at 18. Spatial, however, does not call out information that the agency failed to consider, or other problems.

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Weighing the degree of importance of the positive features in a proposal is a matter of discretion vested in the evaluators. Unlike an “Acceptable” rating, both the “Good” and “Excellent” ratings require strengths that exceed the basic requirements of the Solicitation. *AR* Tab 1.A. at § M.5.2. The Solicitation distinguished an “Excellent” rating from merely a “Good” rating by inserting superlatives like “significantly,” and “exceptional” into the definition. Spatial quotes the evaluators’ own assessments of strengths, but with nothing more than argument of counsel, Spatial challenges only the ultimate determination of whether the superlatives are satisfied. This is another case of “mere disagreement with the evaluators,” which is not a valid basis to sustain a protest. *AHTNA Facilities Services, Inc.*, 12-ODRA-00615.

The Second Supplemental Protest raises more concerns under Factor 2, including whether Karsun’s rating of “Excellent” was appropriate. *2nd Supp. Protest* at 17. Spatial acknowledges that Karsun had more recognized strengths ([DELETED]), and does not challenge the advantages that the evaluators identified. *Id.* Instead, Spatial argues that some are duplicative. *2nd Supp. Protest* at 17; *Spatial Comments* at 25. While it is true that several of the strengths assigned are duplicative inasmuch as they relate to [DELETED] (*AR* Tab 6A, Attach. 10 at 15-16, strengths a to c.), the written descriptions span multiple sections of the Statement of Work, and address several distinct aspects of software services. *Id.* The parsing of the perceived benefits into strengths is a matter of discretion vested in the evaluators, and the ODRA finds that Spatial has not established that their distinctions lacked a rational basis.

Spatial also argues that strengths based on potential cost savings [DELETED] are inconsistent with the high price of Karsun’s offer. *2nd Supp. Protest* at 17-18. In reply, the Product Team correctly points out that the technical evaluators properly could not have compared their evaluation with the price proposal. *AR* at 27. More importantly, the evaluators cite to numerous, specific technical reasons why they expect costs savings. *AR* Tab 6.A. Attach. 19 at 15-16. Thus, the ODRA finds that the Spatial has not shown a lack of a rational basis for relying on the strengths at issue.

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Spatial speculates that Karsun will not be able to comply with the Limitations on Subcontracting clause, AMS Clause 3.6.1-7, which is incorporated into the Solicitation. *Supp. Protest* at 25. “The ODRA will not address matters of contract administration in the context of a bid protest, and this includes speculating whether an awardee will comply during performance with the Limitation on Subcontracting Clause.” *Protest of Adysstech, Inc.*, 09-ODRA-00508 (citing *Midwest Weather, Inc.*, 98-ODRA-00070). Similarly, the ODRA recommends that this aspect of the Protests be denied.

Lastly, Spatial makes a disparate treatment challenge relating to the risk assessment.⁸ *2nd Supp. Protest* at 16-17. The ODRA finds validity in this argument. Spatial has directed the ODRA’s attention to the specific sections of the two offerors’ proposals that address work assignments between the prime and subcontractors. *2nd Supp. Protest* at 16. Spatial fairly characterizes both proposals as explaining that both offerors would assign work to subcontractors [DELETED].⁹ *Id.* Despite their similar approaches, Spatial received a “[DELETED],” while [DELETED] was found for Karsun. *Compare AR Tab 6A Attach. 10 at 18 (Karsun) with Attach. 19 at 17 (Spatial).*

The prejudicial effect of this disparate treatment is discussed below, following a complete review of the alleged errors. *See infra* Part IV.G.2. The ODRA recommends that other arguments under Factor 2 be denied.

⁸ Before withdrawing its Initial Protest of Karsun’s size, Spatial also argued that Karsun’s lack of prime contracting experience should have been considered as a risk associated with Factor 2. *Supp. Protest* at 24-25. This argument—made prior to receiving the Contracting Officer’s size determination and prior to receiving Karsun’s proposal—charged that public records revealed that Karsun had limited experience as a federal prime contractor. *Id.* at 24. Although Spatial has maintained this position throughout these proceedings (*see Spatial Comments* at 24), the proposal and supporting information in the Size Determination reveal that Karsun has managed a large [DELETED] contract since 2014, albeit as the managing venturer of a joint venture. *AR Tab 6A, Attach. 10 at 1-2; Tab 17, Vol. 1 at 2; and Size Determination, Attach. 8 at 2.* The record, therefore, does not support Spatial’s argument on this point. *See supra* Part IV.B.2.

⁹ Spatial’s proposal stated in part, “[DELETED]” *AR Tab 18, Vol. 2, at 13.* Spatial also provided [DELETED]. *Id.* at Table 7. By comparison, Karsun stated in the corresponding section of its proposal, “[DELETED]” *AR Tab 17, Vol. 2, at 10.* In essence, both proposals say [DELETED].

D. Evaluation Factor 3 – Past Performance

Spatial presents a table in its Supplemental Protest that summarizes the results of its past performance questionnaires to argue that it should have received the highest rating—“Substantial Confidence”—rather than merely the second highest rating of “Satisfactory Confidence.” *Supp. Protest* at 19-22. Spatial also argues using other tables that the FAA treated Karsun more favorably for similar performance reviews, thereby creating another case of disparate treatment. *2nd Supp. Protest* at 11-15.

Review of Spatial’s tables, as well as the underlying questionnaires and evaluation documents, reveals material distinctions between the proposals that justified the different evaluation ratings. At the very least, one of Spatial’s questionnaires shows that out of 19 possible “Excellent” ratings, it instead received [DELETED] scores. *See 2nd Supp. Protest* at 13 (summarizing the questionnaires). The evaluator considered these results. *AR* Tab 6.A., Attach. 19 at 17-18. Karsun did not have a similarly disappointing evaluation, and it submitted [DELETED] of its own performance that combined, contained only [DELETED]. *AR* Tab 6.A., Attach. 10 at 18-20. The ODRA finds that these considerations alone are sufficient to support the evaluator’s rating of “Satisfactory Confidence,” and further, that Spatial has not demonstrated disparate treatment.

The ODRA therefore recommends denying this portion of the Protests.

E. Price Evaluation

The Supplemental Protest challenged the price realism analysis, and Spatial refined its arguments in the Second Supplemental Protest. *Supp. Protest* at 26-27; *2nd Supp. Protest* at 2-10.

Spatial correctly observes that the Price Evaluation Team (“PET”) ran three price reasonableness tests of the twenty-four responsive offers received, and that Karsun’s initial price proposal “flunked” all of them. *2nd Supp. Protest* at 3; *AR* Tab 6.B. Specifically, Karsun’s proposed price of \$[DELETED] was above the ranges of reasonableness established for all three tests:

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- The first test compared proposed prices [DELETED], and established a [DELETED]% delta as the benchmark for the “cluster” of offers that were affirmatively deemed as “reasonable.”¹⁰ AR Tab 6.B., at 4-5. Karsun was [DELETED]% above [DELETED].
- The second test looked to whether the offerors were within [DELETED] of the Independent Government Cost Estimate (“IGCE”), but Karsun failed again by falling [DELETED]% above the IGCE. *Id.* at 5-6.
- The third test considered several high priced offers that failed the first two tests. It drilled down into the [DELETED] that would likely account for [DELETED]% of the costs anticipated under the contract. *Id.* at 6. [DELETED] *Id.* Karsun’s rates [DELETED]. *Id.* at 7-9.

Thus, Karsun’s prices substantially failed all three tests, but the Price Evaluation Report nevertheless concludes:

We consider all twenty-four responsive Offerors’ prices **reasonable**. However, the relatively high rates of Karsun, [DELETED], and [DELETED] (as compared to other Offerors), should be considered in the Tradeoff analysis.

Id. at 9 (emphasis added). Nothing in the report leads to the conclusion that Karsun’s price is reasonable, and the ODR finds that it is not supported by substantial evidence and therefore lacks a rational basis.

The Product Team must have recognized the problem¹¹ because it filed a “Corrective Action” attached to its Agency Response. The Corrective Action documentation, however, is unpersuasive. First, it expressly “[DELETED],” meaning that the originally unsupported conclusions have not been reassessed. *AR, Corrective Action*, at 1. More importantly, the

¹⁰ Two points are worth noting. First, one firm deviated from the [DELETED], but was still included in the “cluster” of reasonable offers. This firm’s price was the last of the offers that [DELETED]. The second point is that the Price Evaluation Report made *affirmative* findings of reasonableness for firms that passed its tests. *See AR Tab 6.b. at nn. 1 and 2.* The Product Team is disingenuous in arguing that these affirmative findings do not support the corollary that Karsun’s substantially higher price is unreasonable. *See AR at 9.*

¹¹ The Product Team did not explain its reason(s) for taking corrective action. *See Product Team Letter to the ODR, Nov. 15, 2017; see also AR at 11* (stating merely “out of an abundance of caution.”)

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methodology modifies the [DELETED] analysis used previously (i.e., the third test described in the original report) in ways that raise significant doubts about the validity of the new analysis.

The new analysis relies on a General Services Administration (“GSA”) website [DELETED]. *AR, Corrective Action*, at 1. The Price Evaluation Team compared [DELETED] data to [DELETED] used in its prior analysis. Unfortunately, at least three methodology differences inject potential error into the new analysis. First, the [DELETED] gleaned from [DELETED] merely approximate the [DELETED] used for the present acquisition. They purportedly derive from filters based on education and experience, but the report does not identify the precise filters used, show any intermediate steps, or include the raw output from [DELETED]. Second, the [DELETED] data is not broken down by [DELETED].¹² Third, the report does not explain a fundamental change made in the statistical analysis. Whereas the first Price Evaluation Report compared the proposed [DELETED], the Corrective Action compared [DELETED]. *Compare AR Tab 6.A at 6* (stating “mean”) *with AR, Corrective Action at 1* (stating “median”). It is beyond argument that standard deviation is a measure of dispersion derived from the mean of the data values rather than the median.¹³ The report does not explain the analytical value of creating a benchmark based on [DELETED].¹⁴ The ODRA finds, therefore, that the “Corrective Action” does not provide a rational basis to conclude—even on a *post hoc* basis—that Karsun’s initial pricing is reasonable.

The prejudicial effect of this error is discussed below, following a complete review of the alleged

¹² The record supports the conclusion that Oklahoma City has lower labor costs than other parts of the country. See *AR Tab 6.1, Price Evaluation Report*, at 7-8, Tables 5 through 8.

¹³ “Standard Deviation” is a common term in the field of statistics. It is defined as “a measure of dispersion in a frequency distribution equal to the square root of the mean of the squares of the deviations from the **arithmetic mean of the distribution.**” *Random House Webster’s Unabridged Dictionary*, 2nd ed. (1998) (emphasis added).

¹⁴ Without working papers to support the summary tables in the Corrective Action, the ODRA has no basis to find that the [DELETED] figures are accurate or comparable. Further, without working papers or other support, the administrative record does not reveal whether the price evaluators repeatedly mistook “median” as synonymous with “mean.” Regardless, the report does not provide a rational basis to conclude – even on a *post hoc* basis – that Karsun’s initial pricing was reasonable.

errors. See *infra* Part IV.G.3.

F. The Best Value Decision: The Award *before* Negotiation

The record includes a “Trade-off Analyses” signed by the Contracting Officer and a “Source Selection Decision” signed by the Source Selection Official. AR Tabs 7 and 8, *respectively*. The Trade-Off Analysis used a table to summarize the evaluation results for all twenty-four responsive offerors by listing the ratings for the three non-price factors and sorting the group from lowest price to highest price. AR Tab 7 at 2, Chart 1. The Contracting Officer eliminated fourteen offerors because they received one or more ratings of “Unacceptable” or “No Confidence.” *Id.* at 3, Chart 2. She eliminated three more for providing unrealistically low offers coupled with marginal technical scores. *Id.* at 4, Chart 3. Three additional offerors were eliminated for not having non-price scores in the high ranges. *Id.* at 6, Chart 5. After this series of eliminations, only four offerors (“the final four”) remained:

Offeror	Factor 1 Corp. Experience	Factor 2 Technical	Factor 3 - Past Performance	Total Evaluated Price
[DELETED]	Acceptable	Good	Satisfactory Confidence	\$(DELETED)
Spatial Front, Inc.	Acceptable	Good	Satisfactory Confidence	\$(DELETED)
[DELETED]	Acceptable	Good	Satisfactory Confidence	\$(DELETED)
Karsun Solutions, LLC	Acceptable	Excellent	Substantial Confidence	\$(DELETED)

Id. at 7, Chart 6. The Trade-off Analysis then considered Karsun’s relatively high price, and concluded that the technical benefits from Karsun’s approach would eliminate many of the man-hours required to be included in the price proposal. *Id.* at 10.¹⁵ Based on this view of the pricing and the ratings above, the Contracting Officer recommended that Karsun receive the award. *Id.* at 24.

¹⁵ “Based upon the strengths identified in non-price Factors of the Karsun proposal[,] the FAA anticipates Karsun’s proposed approach will produce [DELETED].” AR Tab 7 at 10. This logic—at the very least—borders on speculation because the record is barren of any quantified savings. It also suggest that the evaluators disregarded the parameters of the price evaluation.

The Source Selection Official adopted essentially the same reasoning, but also recommended further negotiation. She wrote:

Although the total evaluated price of the Karsun proposal has been determined to be reasonable, and I as the SSO concur with that finding, the Karsun proposal is not the lowest priced offer and is above the IGCE; according, it is recommended that prior to award the Contracting Officer negotiate with Karsun in an attempt to obtain additional discounting in its total evaluated price to provide additional value to the Government. **This recommendation to attempt negotiation does not in any way impact my determination that Karsun Solutions, LLC represents the best value to the Government nor does it impact my decision to select Karsun Solutions, LLC for award.**

AR Tab 8 at 5 (emphasis added). Thus, the SSO's determination *did not* depend on lowering Karsun's price. To the contrary, the emphasized language expressly concurs with, and relies upon, the finding that Karsun's extraordinary initial price of over \$[DELETED] million was reasonable.

The ODRA finds that this order of events—*award followed by negotiations*—violated the AMS Policy. While the AMS permits negotiation with a single, down-selected offeror, it does not contemplate making an award without knowing the final negotiated price, rates, or costs. AMS Policy states:

In some circumstances it may be appropriate to down-select to one offeror for negotiation. However, if the FAA and the selected offeror cannot come to an agreement, the FAA may select another competing offeror for communications/award without issuance of further SIRs.

AMS Policy 3.2.2.3.1.2.5 SSO Decision. Negotiating the price before rendering a final award decision is “common sense”¹⁶ and particularly important in cases as this, where the preferred offeror failed repeatedly to pass the standard price reasonableness tests used in the evaluation.

¹⁶ “... The procurement system emphasizes ‘common sense’ decision-making, flexibility, business judgment, and a team concept for managing procurements. ...” *AMS Policy 3.1.1. Introduction.*

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When properly used, the AMS procedure permits a product team to open negotiations with another offeror if it cannot agree to a final negotiated price representing the best value with the first down-selected offeror.

A Source Selection Decision is only as good as the underlying evaluations upon which it relies. The analysis in these many pages has shown at least three material flaws in the evaluations that the SSO used to reach her decision, specifically: (1) the assessment under Factor 1 that assigned a risk to Spatial; (2) the disparate risk assessment under Factor 2; and (3) the finding in the Price Evaluation Report that Karsun's proposed prices were reasonable. Accordingly, the ODRA finds that the Source Selection Decision also was flawed. Spatial's entitlement to relief depends whether these errors were prejudicial.

G. Prejudice

The ODRA has previously explained the concept of prejudice:

“The ODRA will only recommend sustaining the Protest if [protester] can demonstrate prejudice, *i.e.*, that but for the Product Team's inappropriate action or inaction, [the protester] would have had a substantial chance of receiving an award. *Protest of Enterprise Engineering Services, LLC*, 09-ODRA-00490, citing *Protest of Optical Scientific Inc.*, 06-ODRA-00365; *see also Protest of Enroute Computer Solutions*, 02-ODRA-00220. Furthermore, any doubts concerning the alleged prejudicial effect of the Product Team's action are resolved in favor of the protester. *Protest of Optical Scientific, Inc.*, *supra*.”

Protest of Apptis, Inc., 10-ODRA-00557. Under this standard, and based on the language in both the Source Selection Memorandum and the Contracting Officer's “Trade-off Analysis,” the ODRA finds that Spatial has demonstrated prejudice.

As the table above (*see supra* FF 11) shows, the competition narrowed to the final four offerors with the highest non-price evaluation scores. The Trade-off Analysis did not identify a runner-up, or otherwise rank the final three unsuccessful offerors, to render a final comparison between one offeror and Karsun. Instead, Section 4 of the Trade-off Analysis contains subparts that separately compare each of these three offerors against Karsun. AR Tab 7 at 11-15 (“Karsun vs.

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[DELETED]”), 15-19 (“Karsun Solutions, LLC vs. Spatial Front, Inc.”), and 19-23 (“Karsun Solutions, LLC vs. [DELETED]”). Similarly, the Source Selection Decision did not identify a clear second choice among the unsuccessful offerors. Indeed, it described the last three as acceptable without further winnowing:

While rated the highest from a non-price factor standpoint, the Karsun proposal was not the lowest priced Offeror. There were three (3) other Offerors that were considered acceptable from a non-price factor standpoint and had a lower total evaluated price than the Karsun, [DELETED], Spatial Front, Inc. and [DELETED], however, these Offerors did not possess the strengths and additional value to the Government than that provided by the Karsun proposal. This is reflected, in particular, in the Technical factor which is the next most important non-price factor after Corporate Experience. Although Karsun, [DELETED], Spatial Front, and [DELETED] received ratings of Acceptable in Factor 1: Corporate Experience, Karsun received a rating of Excellent in Factor 2: Technical.

AR Tab 8 at 4 (emphasis added). Thus, the record demonstrates that the final four offerors were acceptable for award, and the ODRA turns to the question of whether each error found herein prejudiced Spatial.

1. Factor 1 – Website Complexity

The record demonstrates an unsupported risk assessed against Spatial under Factor 1. *See supra* Part IV.B.1.c. While total elimination of the negative finding would not necessarily raise Spatial’s “Acceptable” rating to a “Good,” the ODRA nevertheless finds prejudice due to extensive discussion of this matter in the Trade-off analysis. *AR* Tab 7 at 16. In that analysis, the Contracting Officer compared Spatial’s “Acceptable” to Karsun’s “Acceptable,” and much of the discussion concerns the Spatial’s risk relative to Karsun. Given that the resulting recommendation to the SSO favored Karson, the ODRA finds that the error under Factor 1 prejudiced Spatial.

2. Factor 2 – Disparate Risk Assessment

Spatial also has demonstrated disparate treatment in Karsun’s favor under the Factor 2 risk assessment. *See supra* Part IV.C. Treating Karsun’s and Spatial’s risk as identical under Factor

2 could very well lower Karsun's risk rating from "none identified" to "[DELETED]" like Spatial. Under the criteria established in the Solicitation, the best evaluation for Factor 2 that an offeror with a "[DELETED]" can receive is a "[DELETED]." AR Tab 1.A. at § M.5.2. Thus, the Factor 2 evaluation is tainted with prejudicial error.

3. Flawed Price Evaluation and Premature Award

Finally, the flawed price evaluation is prejudicial inasmuch as the SSO relied upon it to render her decision to award the contract to Karsun before negotiations. *See supra* Parts IV.E and F. The ODRA need not speculate as to the outcome if the price report had concluded that Karsun was unreasonable. It is sufficient that: (1) no rational basis in the record supports the report's conclusion; (2) the SSO relied upon that conclusion to make the *award* rather than a down-select; and (3) doubts are resolved in favor of the protester.

The ODRA finds, therefore, that Spatial has been prejudiced.

H. Remedy in Light of Subsequent Negotiations with Karsun

The best value remains in question even after the negotiations. Although Karsun lowered its total price to \$144,953,627.90 through year five,¹⁷ that price remains higher than all other offerors in the final four. *Compare* AR Tab 12.D. with AR Tab 7 at 7, Chart 6 (quoted *supra* FF 11). Moreover, reevaluation of the risks under Factors 1 and 2 may lower the degree of Karsun's technical superiority. Such circumstances require corrective measures. The ODRA recommends directing the Product Team to:

- (1) Reevaluate the risk assessed against Spatial under Factor 1 as it pertains to website complexity.
- (2) Reevaluate the risk assigned under Factor 2 for both Karsun and Spatial and follow the Solicitation criteria in a consistent, non-disparate manner;

¹⁷ The negotiated price is within the reasonableness tests initially used price analysis described in Part IV.E., *supra*. Specifically, the revised price deviates from the revised mean by 12.1%, and exceeds the IGCE by only [DELETED]%. *See* AR Tab 10.B.

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- (3) Render a new Source Selection Decision once negotiations (if any) are finished and take any further actions required as a result of the Source Selection Decision.

The ODRA also recommends that the Administrator direct the Product Team to complete the foregoing corrective measures within sixty business days. Further, if the new Source Selection Decision finds that award should be made to another offeror, then work under Karsun's current task orders should be transitioned to the new awardee as soon as is practicable, consistent with the Agency's needs. Finally, the Product Team should report to the Administrator through the ODRA on the first business day of each month explaining its progress toward implementing this remedy.

V. Conclusion

The ODRA recommends dismissing the Initial Protest regarding Karsun's size. The ODRA recommends sustaining the Protests, as discussed above, regarding: (1) the assessment against Spatial of a risk under Factor 1; (2) the disparate assignment of a risk under Factor 2; (3) the flawed price evaluation; and (4) the flawed Source Selection Decision. The ODRA further recommends that the Administrator deny the remaining grounds of the Protests.

—S—

John A. Dietrich
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FAA Office of Dispute Resolution for Acquisition