

PUBLIC VERSION

to the Agency Response—which the ODRA concluded contained the Supplemental Protest²—Aquila asserted that Strive has no experience performing ten contract administration tasks specified in the contract. *Aquila’s Comments* at 7.

For the reason stated below, the ODRA recommends that certain grounds under Evaluation Factor 1 be sustained, and that all other grounds be denied.

I. The Standard of Review

Aquila, 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 Adsytech, 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) (2018); *Protest of Potter Electric Co.*, 13-ODRA-00657.

II. Findings of Fact

A. The Solicitation Requirements

1. The Product Team issued the Solicitation to obtain “fitness training services and manage the overall operations of the FAA Headquarters Fitness Center.” *AR* Tab 6 at 6, § C.1.³

² See ODRA Letter of September 28, 2018.

³ Unless otherwise stated, all citations to the Solicitation are to the final amended version, found in Agency Response Tab 6, which contains Amendment Four, i.e., the last amendment.

PUBLIC VERSION

2. The Solicitation included a base year of performance plus four option years. *AR* Tab 6 at 4. Each year of performance included two Contract Line Item Numbers (“CLIN”), priced on an hourly basis. *Id.* For each year, one CLIN priced the Fitness Coordinator, and the other CLIN priced the Fitness Specialist. *Id.* Other direct costs could not exceed \$3,050 annually. *Id.* Based on this CLIN structure, the resulting contract would be a Time and Materials contract. *Id.* at 42, § L.2.
3. The Solicitation identified the Fitness Coordinator(s) and the Fitness Specialist(s) as key personnel. *AR* Tab 6 at 20-21, Section H, 3.8.2-17 KEY PERSONNEL AND FACILITIES (MAY 1997).
4. The Statement of Work (“SOW”), in parts pertinent to these Protests, listed 22 tasks, divided into two groups. *AR* Tab 6 at 6, § C.5.
 - a. The first group of tasks consisted of 12 tasks performed by the “on-site Fitness Coordinators and Specialist(s).” *Id.* The tasks included day-to-day operations, maintenance, class instruction, program development, physical assessments, designing personalized exercise routines, seminars, conduct classes, including yoga, and instruction on use of the equipment. *Id.* at 6-7, § C.5, tasks 1-12.
 - b. The second group of tasks had less specificity as to the personnel requirements. The “Contractor/Contractor personnel” were to perform 10 other “administrative duties and services,” such as enter data into databases, process and account for membership dues, maintain membership records, provide monthly and ad hoc reports, and preserve membership privacy. *Id.* at 8-9, § C.5, tasks 13-22.

B. Instructions to Offerors

5. Offerors were to provide their proposals in two volumes. Volume I was to include technical approach, key personnel, past performance references, and other business information. Volume II was to include the proposed price. *AR* Tab 6 at 47, § L.13.

PUBLIC VERSION

6. The Solicitation included specific instructions regarding the contents of Volume I. *AR* Tab 6 at 46-47, § L.13. Volume I had to address the three non-price evaluation factors:
1. Factor 1 – Technical Approach
 2. Factor 2 – Key Personnel
 3. Factor 3 – Past Performance Experience

Id. at 47.

7. Section L.12 described the level of detail expected of offerors' proposals. In particular, it stated:

Offerors are instructed to ensure that all aspects of factors in Section M are addressed. Also, unless explicitly instructed otherwise, the Offerors must submit factual and concise written information as requested in this SIR. Proposals should be specific in order to provide the evaluators with enough information to be able to judge the technical and financial ability of the Offeror to perform this requirement. Omission of, or an underdeveloped response to, the requirements of this SIR may render a proposal incomplete as it relates to the requirements of the SIR, and therefore, may cause it to be found unacceptable for further consideration.

AR Tab 6 at § L.12(e).

8. The Solicitation instructions also stated:

It is the Offeror's responsibility to ensure the completeness of the proposal. The evaluation of proposals will be conducted on the basis of the information contained in the written proposal. The Government will not assume that an Offeror possesses any capabilities not specified in the written proposal.

AR Tab 6 at 46, § L.12(f).

C. Evaluation Criteria

9. The provisions included three technical evaluation factors that corresponded to the three sections of Volume I of each proposal. *AR* Tab 6 at 52, § M.2. Offerors were to "furnish adequate and specific information in their response in accordance with Section L of the SIR." *Id.* at § M.2(d). Moreover, the Solicitation explained: "General statements that the Offeror understands the requirements of the work to be performed, or simple

PUBLIC VERSION

rephrasing or restating of the Government’s requirements, without further substantiation, will not be considered adequate” *Id.* at § M.2(f).

10. The three factors in the technical evaluation were not equally weighted. The Solicitation defined the “order of precedence for each Technical evaluation” as:

- Technical Approach will be 50% of the Technical rating[;]
- Key Personnel will be 30% of the Technical rating[;] and
- Past performance will be 20% of the Technical rating[.]

AR Tab 6 at 58, § M.11.

11. Scoring for the evaluation factors relied on tables⁴ that defined numeric and adjectival ratings of “0” equaling “Unacceptable,” “1” equaling “Acceptable,” and “2” equaling “Excellent.” *AR* Tab 6 at §§ M.6, M.7, and M.8. The numeric ratings were used as multipliers applied to the “order of precedence” to reach an overall score for the Technical Proposal in Volume I. Under this approach, an offeror that received “Excellent” for all three evaluation factors could receive the maximum score of 200 points. *AR* Tab 6 at 58-59, § M.12, Table M 4.

12. The assignment of numeric and adjectival scores for the technical factors depended on whether the TET found deficiencies, weaknesses, or strengths. *AR* Tab 6 at §§ M.6, M.7, and M.8. Section M.5 included definitions:

a. **Deficiency** is defined as a descriptive statement(s) or the lack of descriptive statement(s) that causes the Offeror’s proposal to fail to meet FAA requirements specified in the SIR or does not allow the evaluators to determine if the FAA requirements specified within the SIR have been adequately met.

b. **Weakness** is an element(s) in the Offeror’s proposal or obtained from any other appropriate evaluation source that (while marginally meeting FAA requirements and needs) was presented in such a manner as to:

⁴ The tables for any particular factor, when relevant, are quoted in the Discussion section of these Findings and Recommendations, *infra*.

PUBLIC VERSION

- 1) Inhibit a total assessment or evaluation;
- 2) Be an inadequate attempt at satisfying or addressing the FAA requirement or need; or
- 3) Leave the evaluator with uncertainty as to an Offeror's
 - understanding and/or comprehension of the work;
 - capability to successfully perform the work;
 - capability to effectively approach and/or manage the work effort;
 - probability of successful work performance based upon any aspect of an Offeror’s proposal response or any other appropriate source.

AR Tab 6 at 54, § M.5 (the definition of “strength” is omitted for brevity).

13. The Solicitation required the award decision to be a “best value” determination, with the technical evaluation factors being “significantly more important than price.” AR Tab 6 at 58, § M.11.

D. Evaluation and Award

14. The TET evaluated nine proposals. Aquila provided the third lowest price, and the third highest rated technical proposal. The two higher rated proposals—including Strive’s proposal—also had higher prices. AR Tab 22 at 4-5.

15. Excerpts from a table contained in the TET’s report summarize the relative technical rankings between Strive and Aquila:

Offeror Team / Prime	Factor 1 Tech Approach Score	Factor 2 Key Personnel	Factor 3 Past Performance	Factors 1, 2,and 3 Combined score
Aquila	[DELETED]	[DELETED]	[DELETED]	[DELETED]
Strive Well-Being, Inc.	[DELETED]	[DELETED]	[DELETED]	[DELETED]

AR Tab 19 at 35.

16. Despite Aquila’s [DELETED] the Source Selection Official (“SSO”) determined that Strive’s proposal [DELETED] AR Tab 22 at 7.

PUBLIC VERSION

17. Based on the foregoing determination, Strive received the contract awarded under the Solicitation. AR Tab 24. Its total evaluated price was \$955,150. *Id.*

E. Protest

18. Aquila received notice of the award decision on August 6, 2018. *Initial Protest* at 2; *see also* AR Tab 25. It received a debriefing on August 7, 2018. AR Tab 26.

19. Aquila filed its Initial Protest on August 14, 2018, which is five business days from the date of the debriefing. *Initial Protest* at 1. The ODRA finds that Aquila's Initial Protest was timely.

20. Although the parties attempted to resolve the Protest using mediation, their attempt did not lead to resolution. *Neutral's Letter to the Director* dated September 4, 2018.

21. The ODRA issued a scheduling order on September 7, 2018. *ODRA Letter* dated September 7, 2018.

22. On September 27, 2018, after receipt of the Agency Response, Aquila filed its Comments on the Agency Response. *Aquila's Comments* at 1. The next day, the Product Team filed a letter asserting that Aquila's Comments contain new grounds of protest. *Product Team Letter to the ODRA* dated September 28, 2018. The ODRA agreed, and issued a schedule for further briefing on the matter. *ODRA Letter* dated September 28, 2018.

23. The record closed upon receipt of Strive's Supplemental Comments on October 22, 2018.

III. Discussion

The evaluation process involved considering three technical factors and price to render a best value determination. *Findings of Fact* ("FF") 10-13. Aquila challenges aspects of the evaluation under all technical factors, and therefore, the resulting best value decision as well. *Protests, passim*. The ODRA finds that two of four weaknesses assessed against Aquila under

PUBLIC VERSION

Factor 1 lacked a rational basis. Aquila has failed, however, to demonstrate by substantial evidence that the remaining challenges under Factors 2 and 3 have merit.

A. Factor 1 – Technical Approach

Aquila received [DELETED] strengths and [DELETED] weaknesses ([DELETED] weaknesses) that, taken as a whole, yielded an “Acceptable” rating for Factor 1. Aquila protests all of the weaknesses it received. *Initial Protest* at 5-7.

1. First Weakness – Depositing and Copying Checks

Aquila’s first weakness under Factor 1 related to a Solicitation requirement stating that the successful contractor must:

- 20. Retain a copy of members’ checks, and deposit fees into designated FAA Fitness Center Account within one week of collection. The Contractor must collect funds, but funds must not to be spent [sic] by the Contractor.

AR Tab 6 at 9, § C.5.20. The TET explained the rationale for assessing the weakness:

[DELETED]

AR Tab 19, at 14 (numbering and underlining added). As the underlined text indicates, the TET based its conclusion on two issues, i.e., [DELETED]. The ODRA finds that neither ground is supported by a rational basis.

a. [DELETED]

The Product Team asserts that the proposal was underdeveloped⁵ because it did not expressly state that the [DELETED] task 20 (quoted above). AR at 7. Aquila’s proposal, however, addressed task 20 by stating:

[DELETED]

AR Tab 7 at 7. Apparently discounting Aquila’s promise [DELETED] the TET’s concern is that somehow, in some manner, Aquila does not recognize its obligation [DELETED] the same funds that it affirmatively promises *to* [DELETED].⁶

⁵ The word “underdeveloped” is found in Solicitation § L.12(e) as part of the instructions to offerors. *See Finding of Fact (“FF”) 7.*

⁶ The Product Team also relies on language in the Solicitation stating that the “Government will not assume that an Offeror possesses any capabilities not specified in the written proposal.” AR Tab 1 at 46 (citing § L.12(f); *see also*

PUBLIC VERSION

Aquila relies on the plain meaning of “deposit,” which it convincingly reads in a manner consistent with stated requirement in the SOW that funds are not to be spent. *Initial Protest* at 5. No language in the proposal suggests that Aquila claims the right to [DELETED] it receives nor does Aquila take exception to the terms of the Solicitation. *AR* Tab 7, *passim*. The ODRA finds that to [DELETED] is a binary choice, and paraphrasing a familiar proverb, Aquila cannot spend the funds and deposit them too. Thus, Aquila’s promise to [DELETED] cannot be rationally interpreted—as the Product Team suggests—as meaning that Aquila believes it can also [DELETED]. The ODRA finds the Product Team’s interpretation of the evaluation criteria and the proposal to lack a rational basis.⁷

The ODRA also rejects the Product Team’s view that Aquila’s proposal on this point was “underdeveloped.” *AR* at 7 (citing Solicitation § L.12(e)). Indeed, the Product Team’s position suggests that Aquila needed to overdevelop its proposal in a manner contrary to several express instructions in the Solicitation. For example, the Solicitation required Aquila to be “concise” (*see FF* 7), and here Aquila’s proposal concisely states (albeit with grammatical errors) that Aquila will deposit the dues and fees. A concise proposal naturally should avoid superfluous elaboration, and in this case, that can mean avoiding a reference to [DELETED]. Similarly, the Solicitation instructions expressly discourage offerors from simply parroting the requirements of the Solicitation (*FF* 9), yet the TET apparently required parroting from Aquila. Finally, the Product Team had no issues with how Strive developed its similar proposal for the same requirements. Specifically, Strive’s proposal only discusses [DELETED]. *AR* Tab 8 (Strive’s

FF 8. Thus, the Product Team has assessed a weakness because it “*will not assume*” that Aquila possesses the *capability to not spend* the checks it promises to deposit. Removing the awkward double negative reveals that the Product Team’s position actually rests on an unjustifiable assumption that Aquila may believe it can spend the funds it says it will deposit.

⁷ At least ten United States Courts of Appeal have opined that “absurd” interpretations of a contract’s plain language are per se unreasonable and should be rejected. *Interline Brands, Inc. v. Chartis Specialty Ins. Co.*, 749 F.3d 962, 966 (11th Cir. 2014); *Textileather Corp. v. GenCorp Inc.*, 697 F.3d 378, 382 (6th Cir. 2012); *Bohler-Uddeholm Am., Inc. v. Ellwood Grp., Inc.*, 247 F.3d 79, 96 (3d Cir. 2001); *Grun v. Pneumo Abex Corp.*, 163 F.3d 411, 420 (7th Cir. 1998); *James L. Minter Ins. Agency, Inc. v. Ohio Indem. Co.*, 112 F.3d 1240, 1246 (1st Cir. 1997); *Pub. Serv. Co. of Oklahoma v. Burlington N. R. Co.*, 53 F.3d 1090, 1097 (10th Cir. 1995); *L & A Contracting Co. v. S. Concrete Servs., Inc.*, 17 F.3d 106, 110–11 (5th Cir. 1994); *Lakeland Tool & Eng’g, Inc. v. Thermo-Serv, Inc.*, 916 F.2d 476, 481 (8th Cir. 1990); *Republic Pictures Corp. v. Rogers*, 213 F.2d 662, 665 (9th Cir. 1954); *P.W. Brooks & Co. v. N. Carolina Pub. Serv. Co.*, 37 F.2d 220, 223 (4th Cir. 1930).

PUBLIC VERSION

proposal) at 42. Notably, Strive did not receive a weakness nor was its proposal deemed “underdeveloped.”⁸ AR Tab 19 (TET Report) at 27 (finding no weaknesses).

The ODRA, therefore, concludes that the TET lacked a rational basis, grounded in either the Solicitation or the proposal, to assign a weakness to Aquila for failing to state it would not [DELETED].

b. [DELETED]

As explained above, the second ground for the challenged weakness concerned Aquila’s failure to recognize its obligation to [DELETED]. *See supra* Part III.A.1. Aquila states “it is very reasonable to assume” that Aquila would [DELETED] in order to fulfill its promise to provide a

“Membership & Locker Fees, Revenue, Check [C]ollections report.” *Initial Protest* at 5 (citing AR Tab 7, at 19).⁹ The Product Team again cites to Aquila’s duty to provide a complete proposal and that the Product Team was to avoid making assumptions. AR at 7 (citing AR Tab 6 at § L.12(e) and (f)).

Preliminarily, the ODRA finds the TET’s conclusion that Aquila did not [DELETED] requirement, by itself, to be rational. Aquila does not point to language in the proposal expressly stating that [DELETED] would be maintained as required by SOW § [DELETED]. *See Initial Protest passim; Aquila’s Comments passim*. Moreover, nothing in the reporting section of Aquila’s proposal describes [DELETED]. *See AR Tab 7* at 19. Contrary to Aquila’s position, [DELETED] however, does not necessarily mean that the overall grounds for assessing the weakness were rational.

⁸ Having fully developed grounds to sustain the protest, the ODRA need not elaborate on the obviously disparate treatment that Aquila received compared to Strive regarding the [DELETED].

⁹ Aquila’s proposal is in both the Agency Response and it Aquila’s Protest exhibits. For simplicity and ease of reference, citations to duplicated documents will always refer to only those found in the Agency Response.

PUBLIC VERSION

The weakness assessed does not rely merely on a failure to acknowledge a requirement of the contract. Rather, the [DELETED]. No elaboration on this point is provided,¹⁰ and the logical leap from the failure to acknowledge a simple office task to a broad misunderstanding of funding structure, FAA laws, regulations, and polices is simply too vast to be left unexplained. In other words, the administrative record shows no clear nexus between [DELETED]. The ODRA concludes, therefore, that the Product Team lacked a rational basis to assess this weakness.

2. Second Set of Weaknesses

Although the TET identified three items that “marginally” met the requirements, it viewed the relevant portions of Aquila’s proposal as “inadequate attempt[s] at satisfying and addressing the requirements.” AR Tab 19 at 15. [DELETED]

a. [DELETED]

The first of these items concerned [DELETED]. Section 1.7 of Aquila’s proposal, entitled [DELETED] ¹¹Aquila argues that its passing reference to [DELETED] section 1.12, “Reporting” is sufficient. *Aquila’s Comments* at 14. That text lists a series of bullets, including, “• New [DELETED] Judging the phrase by the context, the reference to [DELETED] associated with [DELETED] not [DELETED]. The ODRA finds no reason to fault the TET for concluding that Aquila did not adequately address the requirements of [DELETED] regarding [DELETED] when there are less than two students.

b. [DELETED]

The second item identified as an [DELETED]. The Solicitation did not require the successful offeror to provide [DELETED], and in fact, stated that the Government would provide [DELETED] needed for the contract. AR Tab 6 at 9, § C.6. Nevertheless, Aquila included a discussion of two separate [DELETED]. AR Tab 7 at 16. [DELETED] The TET’s contemporaneous documentation regarding this weakness professed some confusion, stating, [DELETED].

If the weakness truly stems on the TET’s confusion regarding the cost of the software, the ODRA finds no rational basis for the confusion. The technical proposal plainly [DELETED] AR

¹⁰ See AR Tab 27, *TET Leader Decl.*, at 1-2.

¹¹ Neither Aquila’s Protest nor its Comments cite to relevant language in Section 1.7 of the proposal.

PUBLIC VERSION

Tab 7 at 16. In fact, in a *post hoc* declaration, the Technical Evaluation Team Leader acknowledged without any apparent confusion that Aquila offers two different software programs, i.e., [DELETED] AR Tab 27, *TET Leader Decl.*, at 2. Rather than address confusion, the declaration provides a new, previously unrecorded ground for the weakness:

[DELETED]

Id. The ODRA finds that this new ground for the weakness constitutes a *post hoc* justification, and the ODRA's treatment of *post hoc* justifications is well developed:

As a general matter, when faced with *post hoc* justifications, the ODRA accords greater weight to contemporaneous evaluation and source selection material than arguments and documentation prepared in response to protest contentions. *Protest of Enroute Computer Solutions*, 02-ODRA-00220. The ODRA, however, is not precluded from considering post-protest explanations that provide a detailed rationale for contemporaneous conclusions, as such explanations can simply fill in previously unrecorded details. *Id.*

Protest of Adsytech, Inc., 09-ODRA-00508 at n.15 (citing *Protest of Team Clean, Inc.*, 09-ODRA-00499 at n.2). The TET Leader's new justification does not "simply fill ... unrecorded details" about confusion over the pricing of the software suites. Instead, the Product Team's *post hoc* justification is a newly formed and independent theory worthy of no weight in this Protest.¹²

Accordingly, the ODRA finds there is no rational basis for the TET's confusion over the alternative software, and the *post hoc* justification deserves no weight.

c. Member Recruitment

The Statement of Work requires the contractor to:

21. Develop and administer a recruitment program for new memberships. This should include a discussion of programs and benefits of membership with members and potential members as well as the creation of marketing and promotional materials.

¹² The *post hoc* justification is also unconvincing. Aquila's proposal described its experience with HealthCalc, the current software program used by the FAA, as identified in amendment three. *Compare* AR Tab 7 at 15 (proposal) with AR Tab 5B at 1 (Q & A). Aquila's proposal described drawbacks with the FAA's software and explained how other agencies have transition to other products. AR Tab 7 at 15. As Aquila's explained, use of the newer software would only occur "if opted" by the FAA. *Id.* Nothing in the Solicitation or the AMS generally prohibits offerors from raising the possibility of beneficial modifications if awarded a contract.

PUBLIC VERSION

AR Tab 6 at 9, § C.5.21. Aquila’s proposal included a table of “Key Initiatives” that involved price incentive ideas as:

[DELETED]

AR Tab 7 at 6. While the TET awarded a strength for other aspects of Aquila’s recruitment plan, the items listed above caused the TET to find a weakness:

[DELETED]

AR Tab 19 at 15 (underline added); *see also* Tab 27 at 3. The underlined text is not the model of clarity, but the TET Leader’s Declaration sufficiently fills in the gaps in a manner consistent with the contemporaneous record:

[DELETED]

The ODRA finds that this explanation is consistent with the contemporaneous record, and contains a rational basis to assess a weakness. This aspect of the Protests should be denied.

B. Factor 2 - [DELETED]

Aquila challenges the [DELETED] weakness and [DELETED] deficiency that the TET assessed under Factor 2. *Initial Protest* at 7-8. It also asserts that the TET should have assigned strengths for proposed personnel who allegedly possessed qualifications beyond those required by the Solicitation. *Id.* at 7. Although the ODRA finds sufficient support for both the weakness and the deficiency, the ODRA also finds that further review of the alleged strengths is moot given Aquila’s “Acceptable” rating.

1. [DELETED]

The principal parties agree that Aquila responded to the key personnel requirements by providing eight resumes without segregating them into the two labor categories found in the Solicitation, i.e., Fitness Coordinator and Fitness Instructor. *Compare Protest* at 7 with AR at 9. The TET assigned a weakness for this, stating:

[DELETED]

AR Tab 19 at 15. Aquila protests that the Solicitation did not require offerors to segregate resumes by labor category, and argues that the “task order is very low (84 hours / week) and has

PUBLIC VERSION

been staffed traditionally with only 2 interchangeable directors, which also work as specialists for the remainder of the hours.” *Initial Protest* at 7.

Section L of the Solicitation does not support Aquila. It provides in part, “Offerors may not propose the same person in more than one category.” *AR* Tab 6 at 48, § L13. It also “requires the offeror to perform the requirements of this contract with the proposed personnel specified in this portion of the response.” *Id.* The ODRA, therefore, rejects Aquila’s treatment of the proposed personnel as fungible. Moreover, inhibiting an assessment is valid grounds for assigning a weakness (*see FF 12* at § M.5.b.), and the ODRA finds that the TET had a rational basis for its conclusion. The ODRA recommends this aspect of the Protest be denied.

2. [DELETED]

One resume in Aquila’s proposal did not indicate that the proposed individual had a [DELETED] as required for both labor categories listed in Solicitation. *Compare AR* Tab 6 at 11, § C.7 (Statement of Work) (emphasis added) *with* Tab 7 at PDF page 32 (first resume attached to Aquila’s proposal). The TET assigned a [DELETED] for this omission. *AR* Tab 19 at 15. Aquila argues that the resume shows an [DELETED] *Initial Protest* at 8. “In other words, one cannot [DELETED] *Id.*

Aquila’s position is not supported by substantial evidence or the Solicitation. Aquila does not provide reliable and probative evidence supporting a finding [DELETED] the proposed employee remained “current” at the time of the proposal. The ODRA will not assume that an [DELETED]. Likewise, as previously discussed, Solicitation indicated that offerors were to provide complete proposals, and that the evaluators would not rely on assumptions. *AR* Tab 1 at 46, § L.12(f). The TET, therefore, acted with firm footing when it issued a deficiency for this resume. *See AR* Tab 6 at 54, § M.5. The ODRA recommends this aspect of the Protest be denied.

3. The Generous “Acceptable” Rating Renders Missing Strengths Non-prejudicial

Aquila protested that “the TET ... also omitted to assign significant strengths to Aquila’s key personnel proposed, as Aquila exceeded key personal qualifications in the SIR.” *Protest* at 7. The Agency did not respond to this ground, and Aquila, in turn, did not raise the matter again in its Comments. *See AR, passim; Aquila Comments, passim.* Regardless of whether the ODRA

PUBLIC VERSION

views these omissions in the pleading as an admission by the agency, or an abandoned protest ground (*see e.g., Matter of RAO Contract Sales, Inc.*, B-408656, Nov. 6, 2013), Aquila cannot show prejudice because the TET made a glaring error *in Aquila’s favor*.

The TET erred by awarding an [DELETED] rating for Factor 2 even though it failed to identify any strengths that could offset the weakness and deficiency discussed above.¹³ This runs against the evaluation scheme, which required offsetting strengths to overcome weaknesses in order to achieve an “Acceptable” rating:

Table M.2		
Factor 2 - Key Personnel Evaluation Ratings (IAW SIR		
Numeric Score	Adjectival Rating	Description
0	Unacceptable	Proposed key personnel fail to meet one or more criteria required in the Labor category requirements; or fail to demonstrate abilities in more than one area in the SOW; and/or the combined impact of the weaknesses far outweighs the combined impact of the strengths; and/or significant deficiencies are noted in one or more areas.
1	Acceptable	Proposed key personnel meet all criteria in the Labor category requirements and demonstrated abilities in all areas required in the SOW; <u>or although there are some weaknesses and areas in need of improvement may be cited, these are satisfactorily offset by strengths in other areas.</u>
2	Excellent	Proposed key personnel exceed criteria in the Labor category requirements and demonstrated abilities in all areas required in the SOW. No weaknesses or areas for improvement can be cited.

AR Tab 6 at 56, § M.7 (underline added). Ironically, this error grants to Aquila the best¹⁴ relief available—an “Acceptable” rating—for its claim that the TET failed to award it strengths under

¹³ The Technical Evaluation Lead Report cited to strengths but did not list any. Specifically, the text in the Report reads in part:

Summary: The Offeror received an adjectival score of Acceptable and 30 points for their Factor 2. The resumes submitted by the vendor are overall acceptable and the vendor obtained an adjectival rating of acceptable and 30 points for their factor 2 submission. Although there are some weaknesses and areas in need of improvement, these are satisfactorily offset by strengths in other areas.

Strengths:

[Blank in the original.]

Weaknesses:

- It is unclear which resume is being submitted for which of the labor categories

AR Tab 19 at 15.

¹⁴ [DELETED]

PUBLIC VERSION

Factor 2. The net result is that Aquila cannot show prejudice for any omitted strengths, and the ODRRA recommends that this aspect of the Protest be denied.

C. Factor 3 – [DELETED]

The Solicitation required offerors to provide at least two examples of prior contracts “of similar size, type and scope” as the work stated in the Statement of Work in the Solicitation. AR Tab 6 at 48, § L.13; *see also* Tab 6 at 56, § M.8. [DELETED] FF 15. Aquila asserts, “Strive has not performed work similar in size and scope to the FAA procurement.” *Aquila Comments* at 4. The ODRRA rejects Aquila’s arguments regarding the size of Strive’s prior contracts,¹⁵ but addresses in detail Aquila’s extensive arguments regarding the “scope” of the work, and in particular, arguments that compare Strive’s past contracts with the twenty-two discrete tasks listed in § C.5 of the Statement of Work. *See Aquila’s Comments* at 4-8; *Aquila’s Supplemental Comments* at 3.

Aquila correctly observes that the Statement of Work breaks the twenty-two tasks into two groups. FF 4. The first twelve tasks are identified as work that the on-site key personnel would perform including, for example, yoga classes, fitness programs, and health assessments. FF 4.a. The Solicitation places tasks 13 to 22 into a second group described as “administrative duties and services.” FF 4.b. These tasks include, for example, processing membership dues, recruitment, and reporting. *Id.* Aquila asserts that Strive’s past performance examples fail to demonstrate experience with the administrative duties and services, whereas Aquila discussed such experience in conjunction with its contracts at other fitness centers. *Aquila’s Comments* at 8-9; *Aquila’s Supplemental Comments* at 5. Taken further, Aquila posits that whereas its own past performance justifies the “Excellent” rating because Aquila addressed all aspects of the work stated in the Statement of Work, Strive’s failure to demonstrate experience with half of the requirements establishes that the evaluators lacked a rational basis to award the “Excellent” rating to Strive. *Aquila’s Comments* at 8-9; *Aquila’s Supplemental Comments* at 5.

The Product Team responds by stylizing this protest ground as “an incorrect assumption that the past performance section of the proposal is evaluated against a checklist of requirements [i]n the

¹⁵ [DELETED]

PUBLIC VERSION

SOW.” *Supplemental Agency Response* at 2. The Product Team relies on a declaration by the TET Leader to explain [DELETED]. *Id.* at 3. The TET Leader, in turn, explained that the “TET defined scope as the day-to-day operation and management of a fitness center and group fitness instruction.” *AR Tab 31, TET Leader’s Supp. Decl.*, at 1.

The fundamental question before the ODRA is whether the TET’s approach conformed to the Solicitation provisions that required the “scope” of the past performance examples to be “similar” to the “work required by the SOW.” *See AR Tab 6 at 48, § L.13; see also Tab 6 at 56, § M.8.* To answer the question, the ODRA notes that “similar” does not mean “identical,” and nothing in the Solicitation requires the past performance examples to be identical with the twenty-two specific tasks stated in the present SOW. Such an interpretation would not be consistent with plain English, and further, would create an extremely high past performance standard that would favor incumbents and unnecessarily limit competition. Rather, “similar” means “having a likeness or resemblance, especially in a general way.”¹⁶ Here, the TET looked to the “day-to-day operation and management of a fitness center,” which the ODRA views as within the TET’s discretion and consistent with the two broad groupings of tasks in the Solicitation, as described above, and the general description of the work found in § C.1. *FF 1 and 4.* The ODRA has also considered the materials relating to Strive’s proposal (*AR Tabs 8 and 8.b.*) and finds sufficient detail for the TET’s conclusion that [DELETED].

Having accepted the TET’s approach to considering “scope,” the ODRA turns to the award of [DELETED]. The ODRA first notes that the TET was not permitted to compare offerors to each other. *AR Tab 12 at 6.* As a result, if two offerors meet the standard stated in the Solicitation, both can receive the same rating even if one offeror arguably had a better example of past performance than the other.¹⁷ In this Solicitation, the stated standard for “Excellent” requires two

¹⁶ This succinct definition comes from the Random House Webster’s Unabridged Dictionary, second edition, at 1782 (1998). The first definition in Black’s Law Dictionary---when its still included such ordinary words---is less succinct, but certainly in line: “Nearly corresponding; resembling in many respects; somewhat alike; having a general likeness, although allowing for some degree of difference.” Black’s Law Dictionary 1240 (5th de. 1979).

¹⁷ AMS § 3.2.2.3.1.2.3 grants to product teams substantial latitude in structuring the evaluation method, and does not impose any specific level of precision in order to differentiate between offerors that receive the same evaluation rating for past performance. *Protest of Apptis, Inc.*, 10-ODRA-00535 (*Findings and Recommendations*, Public Version at 93).

PUBLIC VERSION

prior customers to confirm that the offeror had “excellent to superior past performance and no weaknesses or areas of improvement.” AR Tab 6 at 57, § M.8. [DELETED].

The ODRA finds, therefore, that the TET evaluated past performance in a manner consistent with the Solicitation, and reached a conclusion supported by a rational basis. This ground of the Protest should be denied.

D. Miscellaneous Grounds

Aquila’s Initial Protest, which it filed *pro se*, contains a few other grounds based on speculation or that were rearticulated in the Supplemental Protest. In particular, Aquila assumes that the FAA must have had some improper discussions with Strive, but points to no evidence to establish its case. *Initial Protest* at 9; *Aquila’s Comments*, at 1-2 (communications not included in a summary of protest items); *see also* AR at 10-12. Aquila also argued in its *pro se* Initial Protest that there was disparate treatment in the past performance evaluation, but the ODRA has already discussed the Past Performance evaluation under Factor 3 above. Similarly, the ODRA has considered specific weaknesses assessed against [DELETED]. The ODRA has carefully considered each of these matters within the framework of the evaluation factors, as discussed in the preceding sections. Aquila has not met its burden to prove any additional grounds.

IV. Prejudice

Although the ODRA has recommended denial of the protest grounds under Factors 2 and 3, it also found that certain weaknesses assessed under Factor 1 lacked a rational basis. *See supra* Part III, A.1, and A.2.b. [DELETED]. These findings under Factor 1, however, do not automatically mandate sustaining a protest:

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*.

PUBLIC VERSION

Protest of Apptis, Inc., 10-ODRA-00557. In the present matter, Aquila received an [DELETED] rating under Factor 1. *FF* 15. The question of prejudice turns on whether a re-evaluation of Factor 1 without the erroneously assessed weaknesses can yield an [DELETED] rating, and if so, whether such an adjustment means that Aquila had a substantial chance of award.

The difference between “Acceptable” and “Excellent” is found in Table M.1 of the Solicitation:

Table M.1		
Factor 1 -Technical Approach Evaluation Ratings (IAW SIR Section C)		
Numeric Score	Adjectival Rating	Description
0	Unacceptable	[omitted for brevity]
1	Acceptable	The Offeror’s technical approach addresses all the requirements in the SOW and the Offerors’ response to the topic demonstrates a satisfactory understanding of the requirements and work efforts; or the proposal demonstrates the capability to support the Government’s needs; or <u>although there are some weaknesses and areas in need of improvement may be cited, these are satisfactorily offset by strengths in other areas.</u>
2	Excellent	The Offeror’s technical approach addresses all the requirements in the SOW and demonstrates many strengths and a thorough understanding of the full range of requirements and work effort; or <u>the Offeror’s response to the topic exceeds the acceptable requirements</u> ; or no weaknesses or areas for improvement can be cited.

AR Tab 6 at 55, § M.6, Table M.1 (underlining added). In awarding an [DELETED] to Aquila, the TET paraphrased the underlined text found in the associated definition when it concluded: “Although there are some weaknesses and areas in need of improvement, these are satisfactorily offset by strengths in other areas.” *AR* Tab 19 at 13 (emphasis added). The TET made this determination based on their conclusion that there were [DELETED] strengths and [DELETED] weaknesses. *AR* Tab 19 at 13-15.

Having determined that two of the weaknesses lack a rational basis, the ODRA finds that an award of [DELETED] is possible under the definition above. As the underlined text relating to [DELETED]. Such a determination is best left to the properly exercised discretion of the TET,¹⁸ but at this stage in the Protest, the ODRA must resolve doubts as to prejudice in favor of the Protester. *Protest of Optical Scientific Inc.*, 06-ODRA-00365.

¹⁸ The ODRA will not substitute its judgment for the properly exercised discretion vested in the Product Team. See *Protest of GCG Technologies, Inc.*, 14-ODRA-00700 (citing *Protest of IBEX Weather Services*, 13-ODRA-00667).

PUBLIC VERSION

An award of [DELETED] for Factor 1 would greatly narrow the point difference between Aquila and Strive,¹⁹ and thereby reduce the relative value [DELETED] considered in the best value determination. *FF* 16. The ODRA therefore finds that, but for the errors in assigning weaknesses under Factor 1, Aquila stood a substantial chance of award, and was prejudiced.

V. Remedy

AMS Policy § 3.9.3.2.2.4 and the ODRA Procedural Regulation give “broad discretion” to the ODRA to recommend remedies. In this matter, the appropriate remedy is for the Product Team to reassess whether the [DELETED] strengths and [DELETED] remaining weaknesses justify an [DELETED] a new best value and award decision must be rendered. These actions must be completed within 60 business days of service of the Final Order in these Protests, and when complete, must be reported to Acting Administrator through the ODRA.

VI. Conclusion

The Protests should be sustained regarding the weaknesses under Factor 1 pertaining to [DELETED] and the foregoing remedy should be adopted. All other grounds of the Protest should be denied.²⁰

--S--

John A. Dietrich
Dispute Resolution Officer and Administrative Judge
FAA Office of Dispute Resolution for Acquisition

¹⁹ Moving from [DELETED] would add [DELETED] points to Aquila’s tally. *See FF* 11. This in turn would narrow the gap between these offerors from [DELETED]. *See FF* 15.

²⁰ The value of this acquisition is well within the delegation of final decision authority to the Director of the ODRA for protests involving acquisitions valued up to 20 million dollars. *Compare FF* 17 with Delegation of Authority of October 12, 2011, as revised March 19, 2014; *see also* 79 FR 21832 (Apr. 17, 2014).