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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.: **18-ODRA-00841**

Appearances:

For Spatial Front, Inc.:	Jonathan T. Williams, Esq. Kathryn V. Flood, Esq. Julia Di Vito, Esq. Meghan F. Leemon, Esq. of Piliero Mazza, PLLC
For Karsun Solutions, LLC	Ruth Morrel, Esq. Harry Silver, Esq. of Potomac Law Group
For the FAA Product Team:	Rachel F. Muncey, Esq. William Selinger, Esq. Mary-Caitlin Ray, Esq.

This matter arises from a protest (“Protest”) filed with the Federal Aviation Administration’s (“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 Protest.

This Protest is a new matter, but it relates to the *Protest of Spatial Front, Inc.*, 17-ODRA-00803 (“*Spatial Front I*”), wherein the Acting Administrator issued a final order that partially sustained

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the prior protest and required the Product Team to take the following corrective actions:

- (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;
- (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.

Spatial Front I, supra (Findings and Recommendations (“F&R”) at 26-27 (Public Version)).¹ Spatial now challenges the evaluations conducted under items (2) and (3), i.e., the risk reevaluation under Factor 2, and the new Source Selection Decision. *Protest* at 12-18. It also challenges a revised price analysis that the Product Team issued. *Id.* at 6-12.

For the reasons discussed herein, the ODRA recommends that the 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 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

¹ Familiarity with the F&R and the Final Order in *Spatial Front I* is presumed.

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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); *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.” *Agency Response* (“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 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.*
3. 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. The Solicitation further explained the relative order of importance of the evaluation factors:

Proposals will be evaluated using the factors of Corporate Experience, Technical and Past Performance which are listed in descending order of importance. In addition to the non-price evaluation factors, price will be evaluated and considered in the award decision.

AR Tab 1.a. at 68, § M.3.
4. The second volume of a proposal was to address technical matters under Factor 2, broken down into three areas: (1) Technical Approach; (2) Management Approach; and (3)

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Staffing Plan. AR Tab 1.a. at § L.5.2. The offerors were to include within the Management Approach section a “detailed discussion” that included “if applicable, [the] approach to assigning work between the prime and any subcontractors.” *Id.* The Management Approach section also required a discussion of subcontracting arrangements and how “support personnel affiliation with either prime or subcontractor would be transparent to the team, contract management, or the individual employee.” *Id.*

5. 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 4 (Spatial Front’s Proposal).
6. 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.
7. As discussed in greater length in *Spatial Front I*, the Source Selection Official (“SSO”) rendered her first award decision based on Karsun’s initial proposed price of \$[DELETED], but directed further negotiations to reduce the price. *Spatial Front I*, at FF 11 to 13 (Protected Version). Ultimately, Karsun received the award and contract for a total negotiated contract price of \$144,953,627.90. AR Tab 6.
8. Shortly after the award to Karsun, Spatial filed a series of protests that ultimately resulted in an Order from the Acting Administrator requiring the three specific corrective actions quoted above in these Findings and Recommendations. *Spatial Front I*. at 27-28 (Protected Version); *see supra* p. 2.

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B. Reevaluation and Award

9. After the Acting Administrator issued the Final Order in *Spatial Front I*, the Product Team “undertook corrective action that addressed not only [the] three specific items, but also addressed other areas of the award that the ODRA discussed in its Findings and Recommendations.” AR Tab 20 at 2.

10. Relevant to the present Protest, the reevaluation included an assessment under Factor 2 (Technical) of how the offerors would assign work to subcontractors. The assessment of Spatial’s proposal was in two parts, i.e., first a description of the proposal, and second, a conclusion regarding risk. In the description of Spatial’s proposal, the evaluators identified work to be performed by subcontractors, but they expressed concern that “based on the proposal it is not clear ... [DELETED]” AR Tab 15, Attach. 19 at 12 (emphasis added). Although noting Spatial will perform [DELETED] of the work, the evaluators concluded: “Based upon the information provided in the proposal, it appears to the evaluators that the Offeror, Spatial Front, intends to allocate [DELETED]” *Id.* (emphasis added).

11. The evaluators relied on this discussion of subcontractor assignments a few pages later when explaining their decision to assess a risk (albeit “low”) against Spatial for its method of assigning work to subcontractors. AR Tab 15, Attach. 19 at 19. The risk was predicated on the view that the proposal was unclear:

Risks:

 - a. The Offeror has indicated in their Management Approach that, “[DELETED]. The Offeror indicated “SFI will perform [DELETED] of the work” (Page 13, Volume 2), and further indicated in Table 7, Page 13 of Volume 2 that the Prime Contractor, Spatial Front, will provide “[DELETED].” The proposal does not elaborate on what is meant by “lead/support” so it is unclear what level of [DELETED] is meant [DELETED]. The proposal then very specifically allots each technical area of the SSD SOW to its subcontractors. [*Detailed discussion of subcontractors omitted for brevity.*] Due to the specific nature of the [DELETED] proposed by the Offeror for [DELETED], the information in the proposal appears definitive regarding the [DELETED] for performing. However, based on the proposal it

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is not clear to the evaluators what will be the [DELETED] required under this SIR. Based upon the information provided in the proposal, it appears to the evaluators that the Offeror, Spatial Front, intends to [DELETED].

AR Tab 15, Attach. 19 at 18-19 (emphasis added). Resting upon their assumptions regarding Spatial's intended role, the evaluators further imagined a possible string of resulting failures:

This introduces a risk that the Offeror will [DELETED]. This may in turn effect the Offeror's ability to perform [DELETED] in the event of a long term or short term fluctuation of work. In the event that a subcontractor is not performing adequately and there is no immediate resolution from other subcontractors then it may take time for the Prime to come up to speed with their own resources to provide solutions for completing the [DELETED]. This could severely impact delivery of solutions in support of AIT customer requirements, reduce customer confidence, and hinder the Government from meeting AIT business goals. Additionally, the compartmentalization of work between the Prime and its subcontractors may hamper the Offeror's ability to perform capacity management and manage fluctuations of work in both the short and long term as it pertains to the requirements listed in the SOW as required in SIR Section L.5.2. However, the Offeror does indicate that they understand the importance of a well-coordinated contractor team and that they integrate all tasks in the program structure whether they are led by the Prime or a subcontractor. Because of this, chances of realizing this risk are lowered, and therefore, the overall risk of unsuccessful performance is also low.

AR Tab 15, Attach. 19 at 19.

12. Based on the emphasized text in the two preceding factual findings, as well as the absence of contrary evidence, the ODRA finds that the evaluators did not engage in communications with Spatial to clarify their understanding of Spatial's proposal related to the subcontracting issue.

13. The technical evaluators also reassessed Karsun's approach to assigning work to subcontractors. In describing Karsun's proposal, the evaluators wrote:

The Offeror described an approach that reflects that they will assign work between the Prime and subcontractors which [DELETED].

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AR Tab 15, Attach. 10 at 11-12 (emphasis added). The evaluators later summarized their findings with similar prose in two separate bullets, but they omitted from the bullets their observations regarding Karsun’s own technical abilities that are emphasized in the quote above. *Id.* at 15. Karsun did not receive a strength for its approach to subcontracting. *Id.* at 16-18.

14. In addition to reevaluating the issues under Factors 1 and 2, as directed by the Acting Administrator in *Spatial Front I*, the Product Team also reexamined its price evaluation. AR Tabs 14 and 21². Their price reasonableness test included a comparison [DELETED] as well as to the Independent Government Cost Estimate (“IGCE”), and used [DELETED] as a “benchmark.” AR Tab 21 at 6 and 7. Karsun’s initial proposed price did not fall within the benchmarks. *Id.* The evaluators also compared [DELETED]. *Id.* at 9-12. They concluded that [DELETED] of Karsun’s rates were more than one standard deviation above the mean. *Id.* at 12.

15. The price evaluators also conducted an analysis [DELETED]. AR Tab 21 at 12. Their revised report corrects a prior incorrect references to “median” by changing the word to “mean,” but no change in underlying mathematics occurred. AR Tab 22, *Price Evaluator Decl.* at 1-2, ¶ 2. Based on this analysis, the evaluators rated Karsun’s original price as reasonable. AR Tab 21 at 15.

16. As reflected in the amended Trade-Off Analysis, the reevaluation yielded no adjectival change in the relative rankings of the two offerors:

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

² The documents in Tabs 14 and 21 are identical but for a correction contained on page 12. For simplicity of reference, subsequent citations refer only to Tab 21.

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- AR Tab 16, at 3, Chart 1. The chart, notably, used Karsun's initial proposed price rather than the subsequently negotiated price of \$144,953,627.90.
17. The Contracting Officer, in a revised memorandum containing a "trade-off analysis," analyzed the relative advantages, disadvantages, and prices between Spatial and Karsun. AR Tab 16, at 17-22. The analysis considered Karsun's higher initial price rather than the lower negotiated price. *Id.* at 21-22. The tradeoff analysis expressly considered the subcontracting risk assessed against Spatial and contrasted it against Karsun's proposal. *Id.* at 20.
18. The SSO relied upon the tradeoff analysis to down select to Karsun for negotiations. AR Tab 17. The down-select decision does not acknowledge that negotiations had already occurred in 2017. *Id.*
19. The Contracting Officer correctly noted in her subsequent Business Clearance Memorandum that the Administrator's Order did not mandate new negotiations. AR Tab 18, at 3, n.7. She analyzed the previously negotiated price of \$144,953,627.90, concluding in part that the cost reduction stemmed from[DELETED]. *Id.* at 8. Based on this finding, she reasoned that the price reduction would not adversely affect performance under the contract. *Id.* at 8-9. She also found that the price was fair and reasonable based on comparison with [DELETED] and the IGCE because it fell within the [DELETED] benchmarks. *Id.* at 9; *see supra* Finding of Fact ("FF") 14.
20. Following the issuance of the Business Clearance Memorandum, the SSO again considered the award. AR Tab 19. Throughout her documentation, she relied upon the negotiated Karsun price rather than Karsun's initial price. *Id.* Noting that Karsun received an "Excellent" rating for factor 2, as opposed to Spatial's "Good," she again awarded the contract to Karsun. *Id.* at 5 and 7.

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C. Protest

21. On July 6, 2018, Spatial protested the award on a timely basis after receiving notice of the award on June 26, 2018. *Protest* at 1-2.

22. After receiving the agency response and Comments from both Spatial and Karsun, the record closed on August 3, 2018.

III. Discussion

As stated above, Spatial has made three basic challenges against the Product Team's corrective action. Although Spatial devotes most of its briefing to challenging the price reevaluation that the Product Team voluntarily performed, the significant issue in this Protest concerns the risk assessed under Factor 2. This issue, not the pricing issue, compels the ODRA to recommend that the Protest be sustained in part.

A. Evaluation Factor 2 – Technical Rating

In its previous protest, Spatial successfully challenged a risk that it received for its approach to assigning work to subcontractors. *Spatial Front I*, (F&R at 18 (Public Version)). In particular, Spatial demonstrated that the evaluators treated Spatial and Karsun differently in assessing risks for the procedures used to assign work to subcontractors even though both proposals stated that the offerors would assign work [DELETED]. *Id.* Despite their similar approaches, Spatial received a "low risk," while Karsun received no risk. *Id.* Because this was a prejudicial error, the Acting Administrator ordered that the Product Team reevaluate this aspect of the two proposals. *Spatial Front I*, at 24-25 (Public Version). The resulting reevaluation did not change the assessment; Spatial again received a low risk whereas Karsun did not. *Compare AR* Tab 15, Attach. 19 at 18-19 (Spatial) *with* Attach. 10 at 19 (Karsun).

Spatial now asserts that the new evaluation repeats the disparate treatment of the two offerors. *Protest* at 14. It charges that the Product Team created a "false distinction" between the offers

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by inferring that Spatial only would supervise work of subcontractors rather than perform the technical requirements. It also claims that the evaluators improperly evaluated Karsun’s subcontracting plan by relying on [DELETED] “as a substitute for a proposed approach to subcontracting.” *Id.* In response, the Product Team argues in favor of its distinctions. It posits: (1) Spatial’s proposal “explicitly proposed to [DELETED],” and (2) “Karsun proposed to assign tasks based [DELETED] to meet the requirements of the SSD SOW.” *AR* at 22.

The ODRA affirms its previous findings that the proposals are essentially similar inasmuch as they both provide that work assignments will be based on the scope of future task orders. It finds further that the record does not provide a rational basis for the Product Team to infer that Spatial would not perform technical work. The ODRA does not accept, however, that the Product Team erred in its assessment of Karsun by relying on [DELETED]. These points are discussed in detail below.

1. But for the Evaluators’ Inference, the Proposals are Essentially Identical

In *Spatial Front I*, the ODRA found in general terms that both Spatial and Karsun proposed to “assign work to subcontractors [DELETED].” *Spatial Front I*, (F&R at 18 (Public Version)). Closer examination of the proposals in the present Protest confirms the conclusion, and further, reveals more similarities than were summarized in *Spatial Front I*.

The portion of the Karsun proposal that directly addresses work assignments to subcontractors states briefly:

[DELETED]

AR Tab 3, Vol. 2 at 10 (underline added). The evaluators, in their most recent report, explained that they also considered [DELETED], which according to the evaluators, “[DELETED].” *AR* Tab 15, Attach. 10 at 15 (citing *AR* Tab 3, Vol. 2 at 12 (Karsun’s Proposal)). The table in question states:

[DELETED]

AR Tab 3, Vol. 2 at 12 (boldface in original). After quoting the various company attributes stated in the table, the evaluators concluded, “The evaluators interpret this as a flexible approach

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which allows work to be distributed amongst team members based on [DELETED].” AR Tab 15, Attach. 10 at 15.

Spatial also included a [DELETED]. Its [DELETED] was located directly under its proposal text and expressly stated the types of work that its team would perform. The text and [DELETED] state:

[DELETED]

AR Tab 4, Vol. 2 at 13 (underline added). The underlined text found in the quotes from the two proposals confirms the ODRA’s previous finding that, “in essence, both proposals say that they will make assignments based on [DELETED].” *Spatial Front I* at 19, n.9 (Protected Version). The [DELETED] demonstrate further similarities inasmuch as each offeror had multiple subcontractors, and those subcontractors had overlapping skills. The evaluators distinguished the two offers based on their inference that Spatial would allocate “all technical aspects of the work” to its subcontractors while Karsun would “not be reliant” on subcontracts to do such technical work. *Compare* AR Tab 15, Attach. 19 at 12 (evaluation of Spatial) *with* Attach. 10 at 12 (evaluation of Karsun). Spatial, in this Protest, calls this a “false distinction.” *Protest* at 14.

2. The Distinction—and Assessed Risk—Lacks a Rational Basis

The distinction that the evaluators found, *i.e.*, that Spatial itself will not perform technical work, is not supported by a rational basis and is not consistent with the Acquisition Management System’s fundamental principles.

Although the Agency Response refers to “explicit” language in Spatial’s proposal to divide technical and oversight roles (AR at 22), the evaluators recorded a markedly different impression:

However, based on the proposal it is not clear to the evaluators what will be the role of the prime and what its responsibility will be for performing the technical roles and work effort required under this SIR. Based upon the information provided in the proposal, it appears to the evaluators that the Offeror, Spatial Front, intends to allocate the technical aspects of the work under the SSD SOW to its subcontractors while Spatial Front itself performs the contract administrative functions.

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AR Tab 15, Attach. 19 at 18-19 (boldface and underline added). The ODRA does not accept the argument that an “explicit” division of work justifies the assigned risk when the evaluator’s own contemporaneous assessment considered the proposal to be “not clear” such that they needed to rely on an appearance. Rather, the analysis in this Protest must be more subtle and fundamental, focusing on “compliance with the AMS, and using the preponderance of the evidence standard, decid[ing] as an ultimate fact whether there was a rational basis for the [evaluation] such that it was neither arbitrary, capricious, nor an abuse of discretion.” *Protest of Adsystem, Inc.*, 09-ODRA-00508 (Findings and Recommendations at 25 (Public Version)).

The rational basis analysis begins with the text of the Spatial’s proposal, and the text quoted at length above. *See supra* Part III.A.1 (quoting AR Tab 4, Vol. 2 at 13). Undoubtedly, the evaluators read the entire statement in this part of Spatial’s proposal given that they cite many representations in detail. AR Tab 15, Attach. 19 at 18. Nevertheless, Spatial’s proposal stated that “[DELETED],” but assured that Spatial would perform “[DELETED].” AR Tab 4, Vol. 2 at 13. The ODRA finds no substantial evidence in the record suggesting that contract administration alone will amount to [DELETED] of the contract effort or that Spatial will limit itself to administrative functions. Indeed, the text in the table also provides that Spatial will both “[DELETED]” and “[DELETED]” all tasks, whereas the subcontractors for the most part will simply “[DELETED].” To the extent the evaluators interpreted “[DELETED]” to mean performing technical work in the context of subcontractors, there is no reason to presume that the word has a different meaning when it comes to the prime contractor who promises to “[DELETED]” AR Tab 4, Vol. 2 at 13 (underline added). These portions of the text, therefore, do not serve as sufficient foundation for the evaluators to speculate and conclude that Spatial Front “intends to allocate the technical aspects of the work under the SSD SOW to its subcontractors while Spatial Front itself performs the contract administrative functions.” The ODRA therefore recommends that the protest be sustained if prejudice can be demonstrated.

3. Reliance on Karsun’s [DELETED] was not Improper

Spatial also challenges the evaluators’ reliance on Karsun’s [DELETED] *Protest* at 14. Karsun provided the [DELETED] (quoted *supra* Part III.A.1) [DELETED] subcontractor personnel

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under Factor 2, as required by the Solicitation. *See FF 4*. The evaluators relied not only on the [DELETED] but also on the text that specifically addressed subcontractor assignments found on page 10 of Karsun's proposal. *FF 13* (citing pages 10 and 12 of Karsun's technical proposal); *see supra* Part III.A.1 (quoted text from page 10).

The ODRA finds no impropriety here. First, the Solicitation permitted information provided for one factor to be used for evaluation of other factors (*AR Tab 1a. at § M.3*), so the ODRA has no basis to find that the Solicitation prohibited consideration of information that addressed slightly different aspects of the same management subfactor. Second, evaluators may take into account matters logically encompassed by the evaluation criteria. *See e.g. Protest of Advanced Sciences & Technologies, LLC, 10-ODRA-00536*. The [DELETED] at issue address the relationship between the prime contractor and the subcontractors. It is logical to consider the experience of the subcontractors in regard to their work assignments. Finally, Spatial cannot claim that the approach was prejudicial because Karsun did not receive a strength for this aspect of the proposal. *FF 13*.

B. The Unnecessary Price Reevaluation

Although the remedy ordered in *Spatial Front I* did not mandate a new price evaluation, the Product Team amended its Price Evaluation Report "in response to the decision of the Office of Dispute Resolution for Acquisition ... issued in the Protest of Spatial Front [I]."³ *AR Tab 14 at 2*. In so doing, the Product Team once again affirmatively found as reasonable Karsun's initial offered price of \$[DELETED] even though it failed several tests explained in the report. *Id.* at 7 and 15. This needless iteration expressly relied on speculation that technical superiority may explain Karsun's high price,⁴ and it corrected problems with elementary statistical terms used in

³ To the extent the explanations are in opposition to the Order of the Acting Administrator in *Spatial Front I*, they are unmoving and inappropriate. More detrimentally, they complicated the remedy imposed in *Spatial Front I*, and spawned the present protest ground relating to price evaluation.

⁴ The Product Team established the original measures of price reasonableness based on a range of [DELETED] percent above or below both the Independent Government Cost Estimate and the [DELETED] of all proposed

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its previous [DELETED] analysis. *Id.* at 8 and 13. The net result of this belated defense of the original evaluation results has led Spatial to: (1) object to the Product Team’s “attempts to rewrite history,” and (2) renew the basic price-evaluation challenges sustained in *Spatial Front I. Protest* at 2, 6-11.

In *Spatial Front I*, the Administrator did not order the Product Team to rewrite history. Instead, the Findings and Recommendations in *Spatial Front I* expressly stated that Karsun’s revised price of \$144,953,627.90 satisfied the price reasonableness tests originally used, and recommended rendering a new source selection decision after reevaluation of two *non-price matters*. *Spatial Front I*, at 27 and 27, n.11 (Protected Version). Put another way, the proper question before the SSO was whether Karsun’s lower revised price—*not the historic and now irrelevant initial offering*—represented the best value to the FAA. The SSO considered that fundamental question, and concluded “[T]he total amount of \$144,953,627.90 represents the best value to the Government.” *AR* Tab 19 at 7; *FF* 20. Thus, however correct or incorrect Spatial may be regarding the Product Team’s needless reevaluation of Karsun’s initial price, the issue is not prejudicial and affords no basis to sustain the Protest. Moreover, in light of the findings regarding the risk assessed under Factor 2 (*supra*), a new Source Selection Decision is necessary (*see infra* Parts III. C and D), rendering other challenges⁵ to the Source Selection Decision moot.

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

prices. A price that exceeds the maximum range is not entitled to a presumption of reasonableness, and speculation as to the reasons is not a rational basis supporting a finding of reasonableness. Indeed, the AMS Guidance counsels that when price evaluation fails, “Cost analysis is used to determine cost reasonableness when a fair and reasonable price cannot be determined through price analysis alone[.]” *AMS Guidance* T3.2.3 A.1.d.(2); *see also* *AR* Tab 1A (Solicitation) at § M.4.4 (citing *AMS Guidance* T3.2.3).

⁵ Relying on *Spatial Front I*, F&R at 23, n.15 (Protected Version), Spatial attacks the SSO’s reliance on unquantified cost savings expected to come from Karsun’s technical approach. *Protest* at 16. In *Spatial Front I*, the ODRA accepted the rational basis for the technical evaluators to award Karsun a strength for its technical evaluation that might yield cost efficiencies. *Spatial Front I* at 17 (Public Version). The ODRA noted—and even quoted the Agency Response—that the evaluators did not have access to the price proposal when they made their technical assessment. *Id.* Using such unquantified, future savings in assessing Karsun’s actual price, however, remains a questionable proposition that could “boarder on speculation” and “disregard the parameters of the price evaluation.” *Spatial Front I*, at 22, n.15 (Public Version).

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C. Prejudice

In *Spatial Front I*, the ODRA 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.*”

Spatial Front I, at 24 (citing *Protest of Apptis, Inc.*, 10-ODRA-00557) (Public Version).

The subcontracting risk was the only risk assessed against Spatial under Factor 2, and it explained at least in part why Spatial received a “Good” rating rather than an “Excellent.” Section M of the Solicitation explained the differences between Good and Excellent ratings:

Technical Rating	Description
Excellent	<p>The Offeror’s response meets the requirements, is comprehensive and demonstrates an in-depth and exceptional approach to and understanding of the full range of SOW Task Requirements and work effort.</p> <p>The proposal significantly exceeds requirements in a manner that benefits the Government. The combined impact of the strengths considerably outweighs the combined impact of the weaknesses. Risk of unsuccessful performance is very low.</p>
Good	<p>The Offeror's response exceeds the requirements and demonstrates a thorough approach to and understanding of the full range of the SOW Task Requirements and work effort.</p> <p>The proposal exceeds the requirements in a manner that benefits the Government. The combined impact of the strengths outweighs the combined impact of the weaknesses. Risk of unsuccessful performance is low.</p>

AR Tab 1.a. at 71, § M.5.2. Under these standards, Karsun received an “Excellent” based on the finding that it had eight strengths, no weaknesses, no deficiencies and no risks. Spatial’s “Good” stemmed from four strengths, no weaknesses, no deficiencies, and *the one low risk at issue*. The ODRA has found that the subcontracting risk assessed lacked a rational basis. *See supra* Part

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III.A.2. Without the low risk, Spatial's four strengths very well could yield a collective rating of "Excellent."⁶

Given Spatial's initial proposed price of \$131.9 million, which remains significantly less than Karsun's negotiated price of \$144.9 million, a change in the technical evaluation for Spatial would be material. The ODRA therefore finds that but for the error in reevaluation under Factor 2, Spatial would have a substantial chance of receiving the award.

D. Remedy

The ODRA has broad discretion to recommend protest remedies, including recommending reevaluation. 14 C.F.R. § 17.23(a)(4) (2018). At this stage in the acquisition, the sole technical evaluation issue pertains to whether Spatial deserves a risk for its manner of assigning technical work under contract task orders. This drives, once again, a need to render a new source selection decision. The ODRA recommends directing the Product Team to conduct a narrow corrective action:

- (1) Open communications with Spatial to clarify the extent that Spatial itself will perform technical aspects of the work under the SSD SOW;⁷
- (2) Reconsider the risk assigned to Spatial under Factor 2;
- (3) Render a new adjectival rating of Spatial under Factor 2;
- (4) Conduct a new Best Value Trade-off analysis that includes consideration of the revised evaluation of Spatial under Factor 2. In light of the unusual procedural posture of the present Protest, and if supported by a rational basis, the analysis may include a recommendation to engage in negotiations with Spatial even while the Karsun contract continues;

⁶ The record is not sufficient for the ODRA to divine whether the four strengths equate to an "Excellent," i.e., an "exceptional approach to[,] and understanding of[,] the full range of the SOW Task requirement and work effort." AR Tab 1a at 71, § M.5.2. As previously explained, "Any doubts concerning the alleged prejudicial effect of the Product Team's action are resolved in favor of the protester." *Spatial Front I* at 24 (citing *Protest of Apptis, Inc.*, 10-ODRA-00557) (Public Version).

⁷ Directing that communications take place on this point is consistent with the AMS since "open communication" is a fundamental principle of the FAA's Acquisition Management Policy. See *AMS Policy* 3.1.3, and 3.2.2.3.1.2.2.

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- (5) Render a new Source Selection Decision that weighs Spatial's evaluated proposal and price against Karsun's evaluated proposal and its final price as awarded. In light of the unusual procedural posture of the present Protest, and if supported by a rational basis, the SSO may decide to engage in negotiations with Spatial while Karsun's present contract continues. If such negotiations are conducted with Spatial, the results of the Spatial's revised proposal must be compared with Karsun's revised proposal for a final Source Selection Decision;
- (6) Take such measures, as appropriate and consistent with the needs of the FAA, to effectuate the final Source Selection Decision; and,
- (7) File reports on the first business day of each month with the Office of Dispute Resolution for Acquisition explaining the progress toward implementing the corrective action.

Reevaluation of the price reasonableness of Karsun's initial proposed price, however, is neither necessary nor required.

Finally, Spatial has requested that new evaluators and supervisors conduct the reevaluation. *Protest* at 19. While the ODRA now has recommended corrective action twice for relatively narrow issues, it also recognizes that the Product Team has successfully defended its selection process on a host of other issues, particularly in *Spatial Front I*. Given their overall performance as well as their considerable familiarity with the procurement, directing that new personnel be assigned would not be in the public interest or necessary to ensure the integrity of the Acquisition Management System.

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IV. Conclusion

The ODRA recommends that the Protest be sustained with regard to the assessment of a risk against Spatial under Factor 2, and that corrective action be required. The ODRA recommends the remaining grounds of the Protest be denied.

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