PUBLIC VERSION

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

FINDINGS AND RECOMMENDATIONS

Matter: Protest of SGT, Inc.
Under Solicitation No. DTFAWA-16-R-00010-003

Docket No.: 20-ODRA-00872

Appearances:

For SGT, Inc.:	John Horan, Esq. of Faegre Drinker Biddle & Reath LLP
For CSRA, Inc.:	Mark D. Colley, Esq. Michael Samuels, Esq. of Arnold Porter Kay Scholer, LLP
For the FAA Product Team:	Shannon Pagano, Esq. Alexander Athans, Esq. Kelly Ghassemieh, Esq.

SGT, Inc. ("SGT"), a disappointed offeror that was not selected for a $700 million contract awarded to CSRA, Inc. ("CSRA"), has filed a second protest under solicitation number DTFAWA-16-R-00010-003.[1] The solicitation is known as the

[1] SGT's first protest was docketed as 17-ODRA-00814. Familiarity with the Findings and Recommendations is presumed.

TFM-2 procurement.[2] In SGT's prior protest ("*SGT I*"), the Administrator ordered the Product Team to replace the contracting officer for TFM-2, conduct a proper assessment of awardee CSRA's organizational conflicts of interest ("OCI"), and conduct a partial technical reevaluation for the award.

The new contracting officer produced an extraordinarily disturbing, single-spaced, 22-page report. That report describes systemic failures to abide by contractual requirements, inadequate disclosure of material information, and competitive harm to SGT.[3] Nevertheless, fully aware that CSRA's OCIs had not been neutralized, avoided, or mitigated, the same contracting officer issued a partial waiver that allowed CSRA to remain in the competition. After reevaluation, the FAA once again awarded the contract to CSRA. SGT now raises the fundamental question of whether the waiver is supported by sound business judgement that demonstrated fairness and integrity in this acquisition and in the Acquisition Management System ("AMS").

The ODRA finds that the waiver is vague, not adequately supported, and does not promote and preserve the integrity of the AMS. Although SGT raises other issues regarding the reevaluation, the ODRA finds that these other issues are minor and immaterial in light of the inadequacy of the waiver. The ODRA recommends issuing an interlocutory order to: (1) direct the termination of CSRA's contract as expeditiously as possible; (2) make no further award under the solicitation; (3) initiate a new acquisition process if necessary; and (4) refer CSRA to debarment officials for further action within the debarment officials' authority. The ODRA also recommends further proceedings to determine the amount of reasonable proposal preparation costs to award to SGT.

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[2] The FAA refers to this procurement as "TFM-2" because it follows a prior contract supporting the Traffic Flow Management ("TFM") Program. *Protest of SGT, Inc.,* 17-ODRA-00814.

[3] *Agency Response* ("*AR*") Tab 142 at 2.

I. STANDARD OF REVIEW

SGT, as the party seeking relief, bears the burden of proof and must demonstrate by a preponderance of the evidence that the challenged decision lacks a rational basis; is arbitrary, capricious, or an abuse of discretion; or is inconsistent with the AMS or the underlying solicitation.[4]

II. FACTUAL AND PROCEDURAL BACKGROUND

Through the TFM-2 solicitation, the FAA sought to obtain a wide range of services relating to program management, operations support, system development, and other work to support the TFM Program.[5] The FAA uses TFM-2 services to provide real-time data to flight operators through the Traffic Management Initiative, which ensures that active flights in the National Airspace System ("NAS") do not exceed capacity.[6] It is the only system in the FAA with such broad capability.[7]

In *SGT I*, SGT protested the initial award based on evaluation issues and on allegations that the awardee, CSRA, had unmitigated OCIs arising from the merger of its predecessor entities, SRA International, Inc. ("SRA") and Computer Science Corporation ("CSC").[8] Prior to the merger, CSC held the incumbent support contract for TFM (i.e., the predecessor contract to the TFM-2 contract at issue here), and SRA supported the FAA's procurement planning for TFM-2. In other words, in

[4] 14 C.F.R. § 17.21(m) (2020); 5 U.S.C. § 556(d); *see also Protest of Alutiiq Pacific LLC*, 12-ODRA-00627 (citing *Protest of Adsystech, Inc.*, 09-ODRA-00508).

[5] *SGT I, supra.*

[6] *Id.*

[7] *Id.*

[8] *Id.*

merging with CSC, SRA switched sides from supporting the TFM Program Office's procurement effort to actually pursuing the award. More specifically, the OCIs at issue flow from SRA's supporting role under the En Route Technical Assistance Support Services ("ETASS") contract. Under ETASS, SRA directly engaged in the planning for the TFM-2 procurement by working to identify the requirements, developing cost estimates, and drafting the solicitation.[9] ETASS included an AMS contract clause prohibiting SRA from competing in future related procurements, including TFM-2.[10] Notwithstanding this clause, the newly created CSRA submitted an offer and ultimately received the award.[11]

In *SGT I*, the Administrator sustained SGT's protest and adopted the ODRA's Findings and Recommendations. The Findings and Recommendations explained that the contracting officer failed to adequately document the original OCI determination and that parts of the technical evaluation lacked a rational basis.[12] The Administrator ordered the Product Team to replace the contracting officer, evaluate CSRA's OCIs, and issue a written OCI determination.[13] If the new contracting officer determined that CSRA remained eligible for award—"consistent with the AMS"—then the Product Team was instructed to conduct a partial technical reevaluation and make an award decision.[14]

As required by the Administrator's order, a replacement contracting officer, Samantha Williams, assessed CSRA's potential OCI problems. She found that

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[9] *Id.*

[10] *Id.* (citing *AMS Clause* 3.1.7-1, Exclusion from Future Agency Contracts (August 1997)).

[11] *Id.*

[12] The contracting officer's memorandum was marked "DRAFT" across each page, unsigned, and included comments from the attorney. *Id.*

[13] *Id.*

[14] *Id.*

CSRA had extensive, impermissible OCIs that prejudiced SGT.[15] Nevertheless, based largely on her own experience, the FAA's financial expenditure to date, and a four-page PowerPoint presentation prepared for other purposes, she issued a "partial waiver." That waiver permitted CSRA to not only remain in the competition, but ultimately, to receive the award for a second time when the evaluation ratings did not change. The award was "partial" in the sense that it limited the duration and scope of the contract in light of the recognized OCIs.

On April 1, 2020, SGT filed the present protest challenging both the waiver and the reevaluation. Following the filing of the Agency Response and Comments from the parties, the ODRA began its review. In stark contrast to the many exhibits relating to the new OCI assessment,[16] the Product Team's scant record regarding the waiver included only the vague and conclusory statements in the waiver itself and a four-slide PowerPoint presentation. In light of this inadequate record, the ODRA ordered a hearing.[17] The record closed after a three-day hearing and the filing of post-hearing briefs.

[15] *AR* Tab 142.

[16] *AR* Tabs 1-142.

[17] *Status Conference Memorandum*, dated July 7, 2020.

III. DISCUSSION

The instant protest presents three main issues. First, SGT asserts that the contracting officer's OCI waiver lacked a rational basis. Second, SGT asserts that the Product Team's limited technical reevaluation was flawed and failed to follow the Administrator's remedy in the prior protest. Similarly, SGT's third issue challenges the revised risk assessment.

With respect to the second and third issues, the Administrator in *SGT I* directed the Product Team, as a threshold matter, to appoint a new contracting officer and issue a written OCI determination. If—and only if—CSRA was not "disqualified" from competing due to OCI issues, would the Product Team undertake a limited technical and risk reevaluation of SGT's proposal. For the reasons discussed below, the ODRA finds that CSRA is not eligible for award due to unmitigated OCIs and the contracting officer's subsequent waiver is unsupported. Because the ODRA finds that this first issue is dispositive, the ODRA does not need to reach the second and third issues.

A. The contracting officer's OCI waiver lacked a rational basis.

The analysis of whether the contracting officer had a rational basis to waive CSRA's OCIs begins with a review of AMS OCI waiver policy and the contracting officer's authority. The analysis then must consider the underlying OCI findings and the record that the contracting officer relied upon to support the waiver.

1. The FAA's OCI Policy, Provisions, and Clauses

The most fundamental principles of the AMS require that the FAA's procurement system "ensure[s] the public trust" and "promote[s] high standards of

conduct."[18] To further those principles, and since the inception of the AMS, "[t]he policy of the FAA" has always been "to avoid awarding contracts to contractors who have unacceptable organizational conflicts of interest."[19] The FAA implements this policy through solicitation provisions, contract clauses, and the AMS Guidance to FAA personnel.[20] These authorities explain how to process OCI situations both before and after award of a contract.

The FAA strives to identify and mitigate OCIs before award.[21] Rather than rely solely on information that the agency possesses, the FAA expects its existing and potential contractors to self-report potential OCI problems.[22] Where the Product Team identifies OCIs early, tailored contract clauses and mitigation plans may be used to maintain competition.[23] Contract clauses are also used to notify contractors—including SRA—that work involving the preparation of solicitations

[18] *AMS Policy* 3.1.3, "Fundamental Principles."

[19] *AMS Policy* 3.1.7, Organizational Conflicts of Interest.

[20] The ODRA observes that the FAA revised parts of the AMS Procurement Guidance related to OCIs in October 2019. *See* <https://fast.faa.gov/docs/procurementGuidance/guidanceT3.1.7.pdf> (Last viewed on January 26, 2021). SGT filed its original Protest with the ODRA on November 15, 2017. Accordingly, the ODRA follows the version of the AMS in effect at the time of the procurement. *See* <https://fast.faa.gov/archive/v1710/docs/procurementGuidance/guidanceT3.1.7.pdf> (Last viewed on January 26, 2021).

[21] *AMS Guidance* T3.1.7(A)(2)(a), T3.1.7(A)(1) (It is the FAA's policy "to avoid awarding contracts to contractors who have unacceptable organizational conflicts of interest."), and T3.1.7(A)(6)(d) ("The Contracting Officer should . . . attempt to avoid, neutralize, or mitigate the OCI before contract award.").

[22] The AMS Guidance explains that "[o]fferors or contractors should provide information which concisely describes all relevant facts concerning any past, present or currently planned interest, (financial, contractual, organizational, or otherwise) relating to the work to be performed and bearing on whether the offeror or contractor has a possible OCI." *AMS Guidance* T3.1.7(A)(3)(a). In addition, it explains that in the absence of a disclosure, "submitting an offer or signing the contract, warrants that to its best knowledge and belief no such facts exist relevant to a possible OCI." *Id.* at T3.1.7(A)(3)(b). While the AMS Guidance itself does not bind offerors or contractors, similar provisions and clauses in contractual documents are binding. *See AMS Clauses* 3.1.7-2 Organizational Conflicts of Interest (August 1997), 3.1.7-4, Organizational Conflict of Interest – Mitigation Plan Required (April 2012), and 3.1.7-5, Disclosure of Conflicts of Interest (March 2009), incorporated by reference into the solicitation. *AR* Tab 88 at I-2.

[23] *See AMS Guidance* 3.1.7(6)(c)(2) and (7).

and other acquisition support tasks will bar the contractor from bidding on the resulting solicitation.[24] In some limited "case-by case" instances, however, the AMS allows the FAA to issue an OCI waiver and award the contract to an otherwise conflicted offeror if it is "in the best interests of the FAA."[25] Waivers must be well documented following consultation with legal counsel and team members.[26] The AMS requires the contracting officer to support the waiver with a documented rational basis.[27]

The FAA's OCI evaluation, mitigation, and waiver processes are undermined when a firm fails to disclose or misrepresents potential OCI issues. If the Product Team finds otherwise discoverable OCIs after award, the AMS provides appropriate remedies.[28] These remedies include disqualification for award, contract termination, debarment, and other remedies as appropriate.[29] Termination of the

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[24] *AMS Clause* 3.1.7-1, Exclusion from Future Agency Contracts (August 1997).

[25] *AMS Policy* 3.1.7., Organizational Conflicts of Interest; *AMS Guidance* T3.1.7.

[26] *AMS Guidance* T3.1.7(6).

[27] *AMS Guidance* T3.1.7A(2)(c).

[28] *See supra* n. 22.

[29] The enumerated sanctions are:

> a. Refusal to provide adequate information may result in disqualification for award.
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> b. Nondisclosure or misrepresentation of any relevant interest may also result in the disqualification of the offeror for award.
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> c. Termination of the contract, if the nondisclosure or misrepresentation is discovered after award.
>
> d. Disqualification from subsequent FAA contracts.
>
> e. Other remedial action as may be permitted or provided by law or in the resulting contract.

AMS Guidance T3.1.7(A)(4); *see also AMS Clauses* 3.1.7-4, Organizational Conflict of Interest - Mitigation Plan Required (April 2012), at (e), and 3.1.7-2, Organizational Conflicts of Interest (August 1997), at (d).

contract can be for the convenience of the FAA or for default, depending on the circumstances.[30]

As with all business decisions under the AMS, contracting officers who assess OCI issues and waivers must exercise "sound business judgment … while maintaining fairness and integrity."[31]

2. The New Contracting Officer found numerous, unmitigated OCI problems.

The contracting officer exhaustively reviewed the files for multiple contracts and sought additional information from sources both within and outside of the FAA.[32] Her review focused on the support that SRA provided through its ETASS contract for the planning and development of the TFM-2 procurement through contract-award.[33] In her determination, the contracting officer found unmitigated OCIs from SRA's work on the TFM-2 procurement, systemic failures on the part of the FAA to enforce contractual terms, and misleading statements from CSRA.

a. SRA's intimate involvement with the planning of the TFM-2 procurement led to OCIs.

The contracting officer concluded that SRA's substantial role in the TFM-2 acquisition created multiple OCIs when it became a competitor for the award as CSRA. SRA was "embedded" in the day-to-day work of the program.[34] Its

[30] *AMS Clause* 3.1.7-2, Organizational Conflicts of Interest (August 1997), at (g).

[31] *AMS Guidance* T3.1.7A(1)(a).

[32] *AR* Tabs 1-141.

[33] *AR* Tab 142 at 1.

[34] *Id.*

employees attended procurement planning meetings where confidential, nonpublic information was discussed.[35]

The records from Program Management Reviews ("PMR") showed SRA's intimate involvement in the development of the solicitation and other acquisition activities.[36] Relying on the PMRs, the contracting officer concluded that SRA performed work in several key areas, including:

- Developing the solicitation, including the evaluation criteria;
- Developing the cost estimation methodology and Independent Government Cost Estimate; and
- Conducting requirements analysis for system capabilities.[37]

Ultimately, Williams found that knowledge gained by SRA's employees "contribute[d] to an unfair advantage in [the] competition."[38] Finding that SRA "received advanced procurement information" and "had access to nonpublic information," she determined that this led to two distinct OCIs—bias ground rules and unequal access to information.[39]

b. The FAA failed to adequately enforce the terms of the ETASS contract and failed to adequately mitigate the harm.

The contracting officer faulted the Product Team for its failure to enforce SRA's obligations under AMS Clause 3.1.7-1, Exclusion from Future Agency

[35] *Id.*

[36] *Id.* at 4.

[37] *Id.* at 4-5.

[38] *Id.* at 6.

[39] *Id.* at 2-5 (citing *AMS Guidance* T3.1.7A(1) and *AMS Clause* 3.1.7-1, Exclusion from Future Agency Contracts).

Contracts.[40, 41] Williams also specifically focused on efforts to mitigate SRA's access to nonpublic information.[42]

Williams found that the Program Office took insufficient steps to mitigate SRA's access once it learned of the merger between SRA and CSC.[43] In particular, in August 2015, after the public announcement of the merger, the FAA directed that two, and only two, individuals be denied access to the FAA's Knowledge Sharing Network ("KSN"). Williams found that "[t]he denial of KSN access was only one step toward mitigating" the knowledge CSRA gained from SRA's "work already performed."[44] She further determined that the denial of KSN access for only two SRA employees did not account for all of the personnel who still had access to the site.[45]

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[40] While the contracting officer only focuses on "specific guidelines to identify and process OCI concerns" pursuant to AMS clause 3.1.7-1, the clause also expressly provides:

> (b) In order to prevent a future OCI resulting from potential bias, unfair competitive advantage, or impaired objectivity, the Contractor shall be subject to the following restrictions: (1) The Contractor shall be excluded from competition for, or award of any government contracts as to which, in the course of performance of this contract, the Contractor has received advance procurement information before such information has been made generally available to other persons or firms. (2) The Contractor shall be excluded from competition for, or award of any FAA contract for which the contractor actually assists in the development of the screening information request (SIR), specifications or statements of work.

AMS Clause 3.1.7-1 (b)(1)-(2). The ETASS contract, under which SRA performed procurement planning work for TFM-2, included this provision. *SGT I, supra*, at 5-6 (Public Version) (citing *AR* Tab 0 at H-2). The record shows that the FAA did not enforce this prohibition by allowing CSRA to compete for the award of the TFM-2 contract where it "received advance procurement information" and "supported the TFM2 development of the Screening Information Request (SIR)uniformed contract sections descriptions, including development of evaluation criteria" as found by the contracting officer. *AR* Tab 142 at 4 and18.

[41] *AR* Tab 142 at 6.

[42] *Id.* at 4.

[43] *Id.*

[44] *Id.* at 7.

[45] *Id.*

Williams observed that "[t]here should have been a full accounting of all the SRA employees . . . prior to a break in access to the KSN."[46] This was not done, and she found 29 SRA employees and subcontractors continued to have access to KSN information until at least November 4, 2015, which was after the stoppage of SRA's work on October 31, 2015.[47] She also observed that CSRA failed to identify all SRA personnel in its mitigation plans.[48] Thus, Williams concluded that the limited actions of the Program Office did nothing to mitigate the effects of SRA's unequal access to information gained during its performance of the ETASS contract.[49]

c. CSRA's mitigation plans were inadequate and misleading.

The contracting officer found that CSRA's mitigation plans were both misleading and insufficient due to their overreliance on firewalls and non-disclosure agreements ("NDAs"). She stated that firewalls and NDAs, as provided in CSRA's various mitigation plans, cannot have "fully safeguarded the exchange of inherent knowledge between" the companies.[50] The OCI determination further observes that "there appears to be a misperception by multiple parties" that an unequal access to information OCI may be mitigated through individual firewalls and NDAs "regardless of . . . work previously performed" under the ETASS contract.[51] Williams concluded that such measures were wholly inadequate to mitigate an OCI as a result of the merger of two companies.[52]

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[46] *Id.*

[47] *Id.* at 8.

[48] *Id.* at 2.

[49] *Id.*

[50] *Id.* at 3.

[51] *Id.*

[52] *Id.*

The contracting officer observed that the merger created additional challenges. In light of the new corporate structure, she concluded that CSRA retained "the ability to influence [SRA] through stock ownership, financial incentives, and the movement of employees between the entities."[53] This relationship "negate[d] the confidence of an effective firewall . . . outlined in mitigation plans."[54] NDAs were "not enough to mitigate or provide assurances" that nonpublic information could not be shared "in a matter as complicated as" the TFM-2 procurement.[55]

CSRA also did not assure the Product Team that SRA would not share confidential TFM-2 information with it.[56] Williams expressed concern that, regardless of the rote language used in the mitigation plans, CSRA did not adequately guard against "using the 'inherent knowledge' and wisdom gained" by SRA during performance.[57] In this regard, despite assurances in the mitigation plan of May 27, 2016, which stated that CSRA would recuse itself from work involving identified potential OCIs, that "[r]ecusal did not take place."[58]

Williams generally expressed her concern with the "discovery of information that does not appear to have been fully disclosed or shared with all parties, and could not be fully considered" before award of the contract.[59] She found it "of great concern" that "all versions of mitigation plans . . . *glossed over* the work performed

[53] *Id.*

[54] *Id.*

[55] *Id.*

[56] *Id.* at 5-7.

[57] *Id.* at 5-6.

[58] *Id.* at 5-7.

[59] *Id.* at 2.

by SRA under the ETASS contract.[60] CSRA merely provided "a summary and [] not a representation of the explicit work performed [by SRA] prior to the stoppage" ordered by the Program Office.[61] She concluded that "[t]his information [did] not provide a full picture and is *misleading*."[62] Thus, the contracting officer found the mitigation plans unsatisfactory for their failure to address SRA's actual, material work on TFM-2 under the ETASS task orders.[63]

The contracting officer concluded that these failures resulted in actual harm to SGT.[64] She stated that, SGT suffered "a financial loss for time" spent on the preparation of its proposal and associated costs when the award "appeared to be slanted toward the contractor with inherent knowledge of the work."[65] Disturbingly, Williams observed that the problems with CSRA's OCIs persist even in the performance of the current contract.[66] She explicitly warned in her determination that "[a]dditional mitigation measures were, and still are, needed."[67]

3. The waiver is based on inadequate grounds and reasoning.

Despite her findings of extensive, unmitigated OCIs, the contracting officer issued a waiver that permitted CSRA to remain in the competition, and ultimately, receive the award for a second time. The contracting officer based the waiver on the

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[60] *Id.* at 5 (emphasis added).

[61] *Id.*

[62] *Id.* (emphasis added).

[63] The contracting officer disturbingly found that "[i]nherent knowledge was already obtained by individuals working under ETASS [Task Orders] 0013A and B, and set a biased stage for the future." *Id.* at 7.

[64] *Id.*

[65] *Id.* at 19.

[66] *Id.* at 2.

[67] *Id.*

need to sustain the TFMS system, the amount the FAA had already spent under the CSRA contract, and simply on her own experience. None of these bases, however, withstood scrutiny at the hearing. Instead, testimonial and documentary evidence showed that program officials provided no meaningful analysis to support the decision. In addition, the contracting officer's experience that allegedly contributed to the decision is undocumented and unexplained. Finally, the lack of a rational basis manifests itself by culminating in waiver-text that uses vague terms and states no clear plan of action. Each of these failings—discussed in detail below—leads the ODRA to recommend that this aspect of the protest be sustained.

a. The Program Office provided no meaningful analysis to support the waiver.

As explained earlier, waivers must be well documented after consultation with legal counsel and team members.[68] The Agency Response cited a four-page PowerPoint presentation to support the waiver determination.[69] Further, the contracting officer testified that she relied on the Program Office to support the OCI waiver.[70] Neither the scant, four-page PowerPoint nor the testimony from four program office employees demonstrate that the Product Team conducted a meaningful analysis to support the waiver.

The PowerPoint brief was not presented to, or created for, the contracting officer. Instead, it was prepared for senior acquisition officials other than the contracting officer. It originated on February 26, 2020, when an Air Traffic Organization ("ATO") Deputy Vice President tasked TFMS Program Manager

[68] *See supra* Part III.A.1 (citing *AMS Guidance* T3.1.7(6)).

[69] *AR* at 6, Tab 141.

[70] Williams stated, "I asked additional questions of the program office about the intricacies, interdependency, [and] the timeliness of the program." *Hr. Tr.*, Vol. III at 345: 15-17. Regardless, in light of the testimony of four officials from the Program Office, the ODRA finds the contracting officer's testimony on this point not credible. *See infra* Part III.A.3.

Robert Mount with conducting an impact assessment if the FAA had to "transition away from [CSRA]" due to OCIs.[71] Mount stated that he consulted with three members of the TFMS Program Office: Chris Burdick, Omar Baradi, and Dong Kyun Noh.[72] On March 4, 2020, Mount presented the briefing to the same ATO Deputy Vice President, the Deputy Director of Acquisitions, an FAA attorney, a Division Manager in Acquisitions, and the Deputy Assistant Administrator for Acquisitions.

Ignoring the cover-sheet on the first page of the briefing, the remaining three slides use vague and conclusory language, unsupported with in-depth discussion. For example:

- Page two relies on an unexplained, "key" assumption that "[s]everal CLINs [contract line item numbers] supporting system sustainment must remain on contract with the current vendor pending re-competition to preserve operational availability of the TFMS."[73] It does not, however, explain what "system" requires "sustainment," or why CSRA must retain the contract when SGT was neither tainted with an OCI nor disqualified from award.[74]
- Page three, in only 105 words, describes the "preferred," "strategic" stoppage of CSRA's work. In general terms, it identifies four "enhancements" that would be delivered, but again does not explain why SGT could not undertake the work, and states conclusively that CSRA would retain these activities.[75]
- The last page, in less than 100 words, discusses completion of two, unidentified enhancements, and again assumes that CSRA would be retained for "sustainment" during a re-competition.[76]

[71] *Hr. Tr.*, Vol. II at 166: 10-16, 167: 3-8, and 221: 13-21.

[72] *Id.* at 168: 11-18.

[73] *AR* Tab 141 at 2.

[74] *Id.*

[75] *Id.* at 3.

[76] *Id.* at 4

The ODRA recognizes that top-level briefing documents provided to senior officials are often short, and the ODRA therefore does not expect them to always include a full presentation of the underlying analysis or supporting materials. Nevertheless, a conclusory, high-level briefing is of little value if the presenting staff cannot produce or demonstrate the underlying analysis and support.

Unfortunately, the record shows that this briefing was created without analysis and support. The contracting officer who issued the OCI waiver did not participate in the briefing itself and did not even see the PowerPoint document until March 9, 2020.[77] She stated, however, that she "asked additional questions of the program office about the intricacies, interdependency, [and] the timeliness of the program."[78] She identified Robert Mount as the person she spoke with, and testified that "[they] had a few phone calls and several email exchanges."[79] But Mount and the three employees he identified as helping to create the PowerPoint all testified that they did not participate in the waiver decision and some even disavowed contributing to the PowerPoint altogether. In particular:

- *Robert Mount.* Robert Mount testified that his employees did not provide any work product or written analysis to support the PowerPoint.[80] Instead, he prepared "[j]ust the PowerPoint."[81] Mount further testified that none of his team provided any work product or written analysis.[82] He further testified that "[i]t was really just through discussions with . . . three key management members of my team."[83] Importantly, Robert Mount testified that he "did not" have any input in the waiver.[84] He stated that he "was not part of [the

[77] *Hr. Tr.*, Vol. II at 170: 9-15, 175: 8-10; *Hr. Tr.*, Vol. III at 350: 9-10.

[78] *Hr. Tr.*, Vol. III at 345: 15-17.

[79] *Id.* at 346: 8-11.

[80] *Hr. Tr.* Vol. II at 221: 1-4.

[81] *Id.* at 251: 6-9.

[82] *Id.* at 221: 1-4.

[83] *Id.* at 216: 17-21.

[84] *Id.* at 287: 20-22.

waiver] process."[85] Mount only "briefed [FAA] executives [with] those four slides."[86] He testified, "I was not part of the decision-making process that followed that."[87] He did provide a copy of the PowerPoint to the contracting officer.[88] Mount only had a "follow-up – just a phone call with [the contracting officer]" on a "technical question."[89] Mount stated, "I received one email, and I think that's all I got from her."[90]

- *Chris Burdick*. Chris Burdick, TFMS Systems Engineer, testified that "these were discussions and not even completely really formal discussions. So, you know, it's not a lot of that in-depth analysis was done."[91]

- *Omar Baradi*. Omar Baradi, the traffic flow management system development manager, was on detail for a special project.[92] He only had a single conversation with Mount.[93] He testified that he "did not present any findings," and "did not work on the slide deck."[94] Importantly, Baradi testified that he did not have any input into the OCI waiver.[95]

- *Dong Kyun Noh*. Dong Kyun Noh, the program control manager for the TFMS program, testified that he did not have any input into the waiver.[96] He did not "work on any documentations or PowerPoint presentation."[97] He testified, "I didn't have the requisite knowledge or experience on the program

[85] *Id.* at 223: 15-22.

[86] *Id.*

[87] *Id.*

[88] *Id.* at 223: 15-22.

[89] *Id.*

[90] *Id.* at 223: 15-22 - 224: 1-9 and 286: 3-15.

[91] *Hr. Tr.*, Vol. I at 51: 1-4.

[92] *Id.* at 93: 18-22.

[93] *Id.*

[94] *Id.* at 94: 11.

[95] *Id.* at 96:3-6.

[96] *Id.* at 150: 11-22.

[97] *Id.* at 151: 15-18.

to provide that level of information."[98] Indeed, he was only "cc'd on an email."[99]

Perhaps in light of this collected testimony, the Product Team's position after the hearing retreated from its reliance on the program office to support the waiver. Instead, the Product Team's post-hearing brief recognized that the contracting officer "did not adopt the entirety of the proposed options proposed on the PowerPoint but instead 'made a determination to do what the AMS allowed [her] to do, and that was to do the waiver, the partial waiver.'"[100] The Product Team further states that, "Ms. Williams made her own decision based upon, in part, the PowerPoint . . . and *her own experience*."[101]

In light of the foregoing discussion, the ODRA finds that the Program Office provided no meaningful contribution to the decision to issue the waiver. The ODRA further finds that the PowerPoint presentation, which lacks underlying support itself, is inadequate as a foundation for the waiver.

b. The contracting officer's experience is an unsupported and undocumented basis for the waiver.

The Product Team's reliance on the contracting officer's "*own experience*" to support the OCI determination is unsubstantiated.[102] In her testimony, Williams stated that she is a contracting officer and acquisitions manager with 14 years of FAA experience.[103] She also has a bachelor's degree in political science and some

[98] *Id.*

[99] *Id.* at 150: 22.

[100] *Product Team Post-Hearing Brief* at 12 (citing *Hr. Tr.*, Vol. III at 454:5-7).

[101] *Id.* at 13 (citing *Hr. Tr.* at 356:7-10) (emphasis added).

[102] *Id.* at 13 (citing *Hr. Tr.* at 356:7-10) (emphasis added).

[103] *Hr. Tr.*, Vol. III at 316: 8-10, 20.

work toward a master's degree in business.[104] None of this points to any specialized experience that she relied upon to issue the waiver. Similarly, the Agency Response does not provide any information as to how Williams' experience supported her waiver.[105] Thus, the experience of the contracting officer alone cannot serve as a rational basis for the waiver.

c. The vague and illogical waiver is the natural product of an inadequate decision process.

Like the PowerPoint document, the waiver is exceedingly short, lacks supporting documentation, and uses undefined terms such as "sustainment" and "fulfill investments."[106] It consists of two distinct waivers.[107] The first waiver allows CSRA to compete in the reevaluation ordered in *SGT I*. The second allows CSRA to receive the award, albeit on a limited basis. These are addressed in turn.

(1) The Waiver to Remain in the Competition

The discussion above has detailed the many adverse effects on competition that the merger of SRA and CSC created. These included unequal access to information, the establishment of biased ground rules,[108] and SGT's "financial loss" for time and proposal costs when the award "appeared to be slanted toward the contractor with inherent knowledge of the work."[109] While doing nothing to

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[104] *Id.* at 316: 13-18.

[105] *See generally AR*.

[106] *AR* Tab 145 at 1.

[107] "The waiver is being issued for reevaluation purposes, and if CSRA receives the award, the continuance of critical work currently ordered on the subject contract and work necessary for continued sustainment." *Id.* at 2.

[108] *See supra* Part III.A.2.

[109] *AR* Tab 142 at 19.

mitigate these many injuries, and without a rational basis, the contracting officer ironically relied on AMS competition policies to justify the waiver.[110]

The contracting officer is correct to observe that the fundamental principles of the AMS promote competition. But competition is not promoted by perpetuating an unequal playing field. Issuing a "waiver" implicitly recognizes that the OCIs could not be neutralized, avoided, or mitigated.[111] Thus, the FAA made no effort to exclude portions of CSRA's proposal that were tainted by SRA's unequal access to information, nor did it exclude portions that would be reviewed under criteria established by SRA. Maybe these measures would have been impractical (we will never know), but this unqualified waiver for the competition in no way promoted *real competition*. To the contrary, in essence the FAA allowed the competitive harm to SGT to be repeated.[112] Not only does this lack a rational basis, it is utterly illogical.

(2) The Waiver to Receive the Limited Award

The waiver also allowed CSRA to continue its performance if the reevaluation process resulted in another award decision in its favor.[113] The scope of the waiver, however, is vague. It merely states that "the waiver will allow CSRA to complete currently ordered work on the subject contract and work necessary for continued

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[110] *Id.* at 2 (citing *AMS Policy* 3.1.3, Fundamental Principles, which states in relevant part, "Encourage competition as the preferred method of contracting.")

[111] *AMS Guidance* 3.1.7(6)(a). In addition, The Product Team unequivocally states that the "Contracting Officer found an OCI and determined that at this time, the OCI could not be mitigated." *AR* at 6.

[112] Even the contracting officer conceded these points during the hearing. In response to a question as to whether the waiver protected "the integrity of the competition that occurred between CSRA and SGT," she said, "It did not." *Hr. Tr.,* Vol. III at 443: 11-14. In answer to whether "allowing [CSRA] to compete with the OCI[s] would at least potentially have an adverse effect on the competition," she testified, "Yes. At least the appearance of that." *Id.* at 377: 1-7.

[113] *AR* Tab 145 at 1-2.

sustainment."[114] One purpose of the wavier was to allow the FAA to "fulfil [sic] investments," but this is not clearly explained.[115] The waiver concludes with an aspirational promise to undertake a new competition for the TFM-2 contract.[116] It added a few lines about "safety of the NAS and the flying public," and concluded that it "is established in full force and effect with the specific conditions."[117]

But the ODRA finds that the "specific conditions" actually lack specificity. The waiver allows "sustainment," but that is a term neither defined in the contract nor in the four-page PowerPoint. Moreover, while the document promises a shortened performance period followed by a new competition, Williams testified at the hearing that "[i]t wasn't so much that a re-competition would happen but a pragmatic solution to uphold the integrity of the AMS and do a re-competition."[118] There is no evidence in the record of a re-competition for TFM-2 services.

The lack of specificity is not the only problem with the waiver. The ODRA also finds that the waiver improperly relies on the FAA's own acquisition failures to perpetuate CSRA's contract. Regarding her reference in the waiver to "investment," the contracting officer testified, "I felt like having background knowledge in programs and working programs like this, I felt like there was an investment already."[119] She stated that "[t]oo much time had gone by during this protest period."[120] The FAA was into "two years of a multimillion-dollar program and a lot

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[114] *Id.* at 2.

[115] *Id.* at 1.

[116] *Id.* at 2.

[117] *Id.* at 3.

[118] *Hr. Tr.* Vol. III at 383: 20-22.

[119] *Id.* at 345: 17-22 to 346: 1-3.

[120] *Id.* at 345: 19-21.

of dedication and work that should not have been lost."[121] The PowerPoint presentation submitted by the Product Team also relies on this idea of "sunk funds" as a basis to issue a waiver.

In this instance, the Product Team voluntarily elected to proceed with CSRA's contract performance despite SGT's serious OCI allegations and despite the unjustifiable defense in *SGT I* for failing to conduct and document a proper OCI determination.[122] Neither a flawed award nor the funds spent on ill-advised performance are valid considerations in waiving the OCIs. Indeed, at the outset of this matter, SGT requested a stay of performance, which the FAA opposed. Based on agency needs, the ODRA denied the request, but cautioned the Product Team that it bore the financial risk if it proceeded with performance.[123] The Product Team elected to proceed, and in effect, has let CSRA benefit despite its misrepresentations and conflicts. The integrity of the AMS must place the consequences on the Product Team, not SGT. It cannot penalize SGT through the perpetuation of an unfair acquisition process created through the poor performance of FAA personnel and misrepresentation by SGT's competitor.

Finally, the waiver includes safety in the NAS as a justification. Without a doubt, safety *is* the first of the FAA core values,[124] but it is not a talisman that wards off the requirements for a documented and well-supported rational basis. As previously explained, the Program Office provided no meaningful analysis of

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[121] *Id.* at 357: 13-15.

[122] The Product Team in *SGT I* asserted that it was "an abuse of discretion to allocate an abundance of time and resources to one OCI." *SGT I, supra*, at 21 (Public Version).

[123] "By opposing the suspension request, the Product Team assumes the risk of any costs or delay in the event the Protest is sustained." *Protest of SGT, Inc.*, 17-ODRA-00814 (Decision on Request for Suspension (Dec. 8, 2017)).

[124] FAA Mission Statement, <https://www.faa.gov/about/mission/> (Last viewed on January 26, 2021).

programmatic effects to support its PowerPoint presentation, or by extension, to support the waiver.

4. Summary and conclusion: the waiver lacked a rational basis.

The foregoing pages demonstrate the many inadequacies of the waiver, and the ODRA is not surprised that during the hearing the contracting officer expressed reluctance in issuing it.[125] Starting with the breadth of the OCIs being waived, the independent contracting officer devoted 22, single-spaced pages to find unmitigatable OCIs that conferred a competitive advantage to CSRA. Her findings also included many FAA failures to recognize OCIs, impose adequate protective measures, and enforce AMS clauses that protect the integrity of FAA procurements. She further placed blame on CSRA for not fully cooperating in the mitigation process when it glossed-over or misrepresented SRA's work under ETASS.

Regardless of her extensive OCI determination, the contracting officer issued a partial waiver that allowed CSRA to remain in the competition, and ultimately, continue the performance of the contract. That waiver was not supported by meaningful participation of the Program Office as required by the AMS, and it was not adequately supported with a rational basis grounded in analysis or documentary evidence. Its reliance on competition principles is utterly illogical, and it improperly used FAA acquisition failures as justification to perpetuate CSRA's contract. For these reasons, and the others detailed in the pages above, the ODRA recommends sustaining this ground of protest.

[125] Williams testified, "I actually decided [on] a partial waiver. I wasn't comfortable with a full waiver." *Hr. Tr.,* Vol. III at 345: 10-11. "I was not comfortable ask [sic] after writing that single-spaced, 22-page paper and doing the research." *Id.* at 347: 16-22. Williams further testified, "I just felt like I wanted - there was a balance, and the integrity of the AMS needed to be protected." *Id.* "I was not comfortable doing a full waiver. I was shocked." *Id.* at 347: 22 to 348: 1.

IV. PREJUDICE

The ODRA will recommend sustaining a protest when a protester has shown prejudice.[126] The protester demonstrates prejudice where, but for the product team's actions or inactions, the protester "would have had a substantial chance of receiving the award."[127] Any doubts regarding the prejudicial nature of the actions complained of are resolved in favor of the protester.[128]

SGT has demonstrated prejudice relating to the Product Team's waiver of CSRA's OCIs. Regardless of SGT's challenges to the reevaluation, the fact remains that SGT remains in the competition for the award as the only other offeror.[129] Had the contracting officer either eliminated CSRA from further consideration for award or mitigated CSRA's OCIs for the reevaluation, SGT would have had a substantial chance for award.[130]

V. REMEDIES

The findings in the contracting officer's OCI determination, described above, show how seriously the integrity of this acquisition has been undermined. Aside from the thoroughness of the determination itself, repeated failures by FAA personnel to conduct adequate OCI vetting and mitigation processes have resulted in the unjust award of a contract to CSRA. Continued performance by that firm under the current partial waiver does nothing other than to reward it for misleading communications that created an unfair competitive environment to SGT's detriment. To that end, and consistent with the broad remedies found in 14

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[126] *Protest of Enterprise Engineering Services, LLC*, 09-ODRA-00490.

[127] *Id.*

[128] *Protest of Optical Scientific, Inc.*, 06-ODRA-00365.

[129] *See generally AR* Tabs 146, 147, and 151.

[130] *AR* Tab 146 at 5.

C.F.R. § 17.23(a) and (b), the ODRA recommends that the Administrator issue an interlocutory order that requires the Product Team to:

- End CSRA's contract and task orders as expeditiously as possible, consistent with the safety mission of the FAA. Effectuating the end of the contract must be by means deemed in the best interest of the FAA, including:
  - Letting the contract expire on its terms without exercising any further options or issuing or modifying task orders to add work;
  - Termination for convenience; or
  - Termination for default under appropriate authority in the contract.
- Make no further award under the solicitation.
- Reimburse SGT for its reasonable proposal preparation costs.

Given the interlocutory nature of the recommended order, the ODRA should retain jurisdiction for determining the amount of reimbursement for proposal preparation costs. If the Product Team and SGT cannot reach a negotiated resolution of the amount within a reasonable period of time as determined by the ODRA, the ODRA should be authorized to order such adjudicatory procedures as required to recommend an amount to incorporate into a final order in this matter.

While the foregoing remedies address the immediate problem and restore SGT to some state similar to its pre-award status, they do not protect the FAA from further jeopardy from CSRA and its business practices. The record as a whole demonstrates that the FAA spent significant (though non-quantified) appropriated funds on the performance of the contract based on the representations of CSRA. Thus, the best interests of the FAA and the integrity of the AMS require further proceedings in a forum other than the ODRA.

Under the AMS, the FAA "may suspend or debar contractors for cause."[131] Debarment is appropriate for "any other cause of so serious or compelling a nature that it affects the present responsibility of a Government contractor or subcontractor."[132] "Responsibility," in turn, requires that the company has a "satisfactory record of integrity and proper business ethics."[133] Given the contracting officer's findings regarding the pervasive OCIs and misleading statements by CSRA, "cause for debarment or suspension may exist."[134]

The ODRA does not hear suspension or debarment matters, but recommends that the Administrator direct AGC-500 to appoint an officer to determine whether cause for debarment or suspension exists, and to take further action as warranted based on the results of the investigation.

The Product Team should report to the Administrator through the ODRA on the first business day of each month explaining its progress toward implementing these remedies.

[131] *AMS Policy* 3.2.2.7.4, Suspension and Debarment.

[132] *AMS Guidance* T3.2.2.7 A.3.b(1)(d).

[133] *AMS Policy* 3.2.2.2, Source Selection Policy (delineating the elements of a responsibility determination).

[134] *AMS Guidance* T3.2.2.7 A.3.a(7).

VI. CONCLUSION

Based on the foregoing, the ODRA recommends sustaining the protest and adopting the remedies stated above.

-s-

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