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

FINDINGS AND RECOMMENDATIONS

Matter: Protest of Alutiiq Pacific LLC

Under Solicitation No. DTFAWA-11-R-000025

Docket No.: 12-ODRA-00627

Appearances:

For the Protester:	S. Lane Tucker, Esq. of Stoel Rives LLC
For the FAA Product Team:	Bruce Hinchey, Esq.
For the Intervenor:	Katherine S. Nucci, Esq. and Scott F. Lane, Esq. of Thompson Coburn LLP

Alutiiq Pacific LLC ("Alutiiq") filed a protest on November 9, 2012 (“Initial Protest”) and a supplemental protest on January 9, 2012 ("Supplemental Protest”) (The Initial Protest and Supplemental Protest are jointly referred to herein as the “Alutiiq Protests”). The Alutiiq Protests challenge corrective action that was taken by the FAA Product Team in connection with protests previously filed by American Eagle Protective Services (“AEPS Protests”) and docketed as 12-ODRA-00619. The solicitation at issue in these protests, No. DTFAWA-11-R-00025 (“SIR” or “Solicitation”), consolidates into one contract the provision of Security Officer (“SO”) services in the Federal Aviation Administration ("FAA") Western Service Area (“Contract”). The Western Service Area encompasses 18 different sites in Alaska, Arizona, California, Colorado, Guam, Hawaii, Nevada, Utah and Washington. Finding of Fact *("FF")* 1, *infra.*

The Alutiiq Protests are based on actions taken by the FAA Product Team in connection with the AEPS Protests filed on September 7, 2012 and October 2, 2012. AEPS challenged the award of the Contract to Alutiiq based on allegations that the FAA’s evaluation of the proposals was unreasonable and inconsistent with the SIR’s criteria, and that the FAA’s cost-technical tradeoff and source selection decision were mechanical and without rational a basis. AEPS’ Protest

further alleged that Alutiiq failed to comply with a minimum mandatory requirement in the SIR, and that the technical evaluation, particularly the past performance factor, was prejudicial, because it failed to distinguish between the qualifications and experience of [DELETED]. Alutiiq timely intervened in the AEPS Protests.

Pursuant to the ODRA Procedural Rules, AEPS and the FAA Product Team agreed to attempt to resolve the AEPS Protests using an Alternative Dispute Resolution ("ADR") process. *Agency Response* (*"AR")* at 18. As the awardee/intervenor, Alutiiq did not participate as a party in the ADR proceedings between the Product Team and AEPS. Following the ADR effort, Alutiiq was advised in early November of 2012 of a "tentative" agreement reached between the Product Team and AEPS to take corrective action. *AR* at 19. After learning of the tentative agreement, Alutiiq formally protested the proposed corrective action to the ODRA in the Initial Protest, which was docketed as 12-ODRA-00627, with AEPS timely intervening on November 14, 2012. The ODRA conducted a preliminary scheduling conference in the Initial Protest on November 19, 2012, during which the parties in the AEPS Protests informed the ODRA that an agreement in principal had been reached, but no settlement agreement had been executed. *Scheduling Conference Memorandum and Order*, dated November 19, 2012. The ODRA also amended the September 13, 2012 Protective Order issued relative to AEPS Protests so as to make it applicable to the Alutiiq Initial Protest, but did not consolidate the two protests. *Id*.

On December 6, 2012, the Product Team executed the Settlement Agreement implementing the corrective action resulting from the ADR process in the AEPS Protests, and on December 10, 2012, AEPS requested that its Protests be dismissed without prejudice. *FF* 73, *infra*. On December 18, 2012, Alutiiq filed its Supplemental Protest on the basis that the proposal of AEPS violated the "ostensible subcontractor" rule. *Supplemental Protest* at 1-2. On December 21, 2012, AEPS filed a motion to dismiss as untimely Alutiiq's Supplemental Protest ("Motion to Dismiss"). Alutiiq opposed the Motion to Dismiss in a filing on January 9, 2013 ("Opposition") and the Product Team filed its Reply to the Opposition as part of its Agency Response on January 11, 2013. Alutiiq and AEPS filed their Comments on the Agency Response on January 24, 2013.

Alutiiq's Initial Protest asserts that the Product Team lacked a rational basis for awarding the

contract to AEPS pursuant to the ADR Settlement Agreement because of an erroneous interpretation of the SIR's minimum requirements. *Initial Protest* at 1. Alutiiq's Supplemental Protest alleges that AEPS' arrangement with its subcontractor, Paragon, violates the ostensible subcontractor rule; thereby rendering AEPS ineligible for award. *Supplemental Protest* at 1-2. The adjudication of the Alutiiq Protests commenced on December 18, 2012, after the Product Team and Alutiiq determined that a negotiated resolution pursuant to ADR efforts would not be forthcoming. *FF* 74, *infra*.

For the reasons discussed below, the ODRA recommends that Alutiiq's Initial Protest be denied because the Product Team properly determined that Alutiiq failed to meet the Solicitation's minimum eligibility requirements. The ODRA also finds the Alutiiq Supplemental Protest to be timely; but that its allegation that AEPS violates the ostensible subcontractor rule has no merit. The ODRA therefore recommends that the Supplemental Protest also be denied.

I. FINDING OF FACTS

A. The Solicitation

1. The Facility Security Risk Management Group of the FAA's Air Traffic Control Facilities organization oversees facility risk management efforts, including guard services. The FAA issued the subject SIR for Security Officer ("SO") services for the Western Service Area on December 15, 2011. The purpose of the SIR is to replace an expiring agreement that provided security guard services. *AR* Tab 3.

2. The SIR contemplates the award of a Firm Fixed Price Indefinite Delivery Indefinite Quantity Contract, with a Time and Material Contract Line Item Number having a period of performance of one base year and four one-year options. *AR* Tab 12, § B.1. The Contract supports the National Security Officer Services ("NSOS") program and its purpose is to:

> [I]ncrease physical security and safeguard FAA employees, facilities, Government property and assets from loss, theft, damage, unauthorized use, criminal acts, espionage, sabotage, and terrorism. A well-trained and

equipped armed SO force provides management with an effective means for implementing and monitoring the provisions of the Facility Security Management Program (FSMP).

AR Tab 12, § C.l.

3. The Contract is subject to FAA Order 1600.69B, Change 1, dated March 29, 2005, which was prepared and published by the FSMP, and pertains to internal FAA security requirements. It specifically requires that contract guard providers have a minimum of five years of "documented experience in the field of contract security services. *AR* Tab 12, § C.1; *AR* Tab 75.

4. The SIR contained AMS Clause 3.6.1-7, Limitations on Subcontracting (October 2011), which was incorporated by reference in Section I. AR Tab 3, § I.2. This clause requires "at least 50 percent of the cost of contract performance incurred for personnel shall be expended for employees of the prime contractor. *Id.*

5. The Product Team provided an opportunity for Questions and Answers ("Q & A's"). The Q & A's clarified the following aspects of the acquisition, among others:

Number	Question	Answer
16	The SIR does not appear to state what level of documentation is required for submission regarding subcontractors such as Business Declaration Form, and level of Cost & Pricing Information. Please clarify.	Section L.5.1.3 will be changed through an amendment to the SIR to include the requirement for offerors to provide Business Declaration forms for prime contractors and each subcontractor. The prices proposed by the prime offeror should be final dollar amounts inclusive of all costs attributable to both the prime contractor and all subcontractors. There are no further representations or certifications required of subcontractors.
25	Can the Prime Contractor be a joint venture comprised of multiple small businesses that collectively fall under the $18.5 million small business	The requested teaming strategy is not acceptable unless the requirements of SIR Section C.3.b are met by the joint venture. SIR Section C.3.b requires

	threshold? Will the FAA acknowledge this teaming strategy as acceptable?	the contractor to have at least five (5) years of documented experience in providing armed contract SO services. Pre-existing joint ventures with five (5) years of experience performing work as a joint venture are acceptable; however, *individual corporate experience does not apply*. Additionally, SIR Section L.6.1.1 requires the offeror to identify clearly the prime contractor and all subcontractor relationships. Also, offerors must submit only one prime contractor per offer
69	Can a subcontractor be outside of the set-aside? (Business, unrestricted)	Other businesses classifications may participate as subcontractors; however, clause 3.6.1-17 Limitations on Subcontracting applies, requiring that at least 50% of the work be performed by employees of the prime contractor.
75	Regarding M.3 EVALUATION OF OFFERS. Each offeror may be considered as a prime contractor for only one Service Area (SA) award but has the ability to pursue subcontracting opportunities on other service area awards without restriction. The FAA will only recognize one Prime Contractor per offer. Please clarify can an offeror submit as Prime contractor and also submit as a subcontractor within the same Service Area?	Section M.3 will be revised through an amendment to the SIR to indicate that offerors have the ability to pursue subcontracting opportunities on any service area award without restriction.
76	Part IV - Section L.5 Volume 1 – Offer, Other Documents, Cost, and Pricing Submission requirements for subcontractor have not been identified for Volume 1. Can the government please clarify what is required for submission regarding subcontractor? (I.E. representations, certifications, Section I Contract Clauses, Section K Representations and Certifications, Business Declaration Form, Cost & Pricing Information). 151 Part IV - Attachment L.1 Offeror's Relevant	See the response to question 16.

	Past Experience and Performance History Form "The length of any one Relevant Past Performance History form shall not exceed three (3) pages."	

AR Tab 11 (emphasis added).

6. The final version of the SIR was published in Amendment 003 on February 1, 2012. *AR* Tab 12.

7. The SIR generally requires the contractor to meet the following minimum criteria:

> a. The contractor's primary business must be providing contract SO services, including armed SOs.
>
> b. The contractor must have *at least five (5) years of documented experience in providing armed contract SO services*.
>
> c. The contractor must provide written evidence of satisfactory service to large facilities similar to FAA Security Level 3 and 4 type, staffed facilities. FAA Security Level 3 designated facilities will usually have between 151 and 450 employees and have between 80,000 and 150,000 square feet of space. Security Level 4 designated facilities will usually have more than 450 employees, more than 150,000 square feet of space and may have a high volume of public contact.
>
> d. The contractor must certify and, if requested by the Government, provide proof that they and all of their personnel assigned to FAA facilities, meet all applicable federal, state and local license and registration requirements, and that all required registrations and licenses are current. In those circumstances where the state or local requirements are less stringent than FAA requirements, SOs will be required to meet the FAA requirements. Providers must maintain currency for all required registrations and licensing throughout the contract period of performance.

AR Tab 12, § C.3 (emphasis added).

8. The statement of work ("SOW") is set forth in Section C of the SIR. In pertinent part, it describes the work broadly as "all labor, supervision, materials, equipment, transportation, training, and management necessary to provide SO services in accordance with the stated requirements . . . ." *AR* Tab 12 § C.2. The SIR also contains a section which sets forth

requirements relative to access control, screening, visitor processing, patrol and response, control operations, inspections, security officer operations and staffing. *AR* Tab 12§ C.5.

9. Section C.6 of the SIR also specifies the basic qualifications required of all persons specifically hired, organized, trained, and equipped to protect personnel, assets, and facilities under the Contract. *AR* Tab 12, §C.6.

10. SIR provisions in Section C.9 pertain to the licensing of all SOs and the contractor, while Section C.11 sets forth detailed reporting and notification requirements regarding SOs, incidents, firearm discharge, complaints, threats, traffic accidents and security incidents. *AR* Tab 12, §C.9. and §C.11. Section C.13 of the SIR also provides for extensive training responsibilities and the documentation of such on the part of the Contractor. *AR* Tab 12, § C.13.

11. The SIR's statement of work further requires the contractor to provide a description of the program management process for central management and communications between the Government and the contractor. In this regard, C.17, Program Management, states in part:

> The contractor must manage all requirements to assure adequate and timely completion of these services. Included in this function will be a full range of management duties including, but not limited to: training, planning, scheduling, report preparation, establishing and maintaining records, and quality control. The contractor must provide an adequate, qualified staff of SO personnel.

AR Tab 12, § C.l7.

12. SIR Section C.17.1, Program Management Plan, also required offerors to provide a program management plan describing processes for central management, liaison and communications between the Government and the contractor. *AR* Tab 12, § C.17.l.

13. Section L contains instructions to offerors regarding the preparation of their proposals. Among other things, it states that the evaluation of technical and cost/proposals will be conducted on a best value basis and that the FAA may communicate with one or more offerors at any time during the solicitation process. *AR* Tab 12, § L.2(b) and (c). That

section also informs offerors that: "an award may be made without further discussions or negotiations. Vendors are to consider all terms and conditions contained in the formal SIR in preparation of their proposals." *AR* Tab 12, § L.2(d).

14. With respect to the offerors' presentation of their proposals, the SIR informs offerors that:

> Proposals must contain comprehensive, concise, factual information and complete and substantiated price data. Submittals must provide documentation to substantiate any statement of fact. General statements indicating that the offeror understands the requirements of the work to be performed, or simple rephrasing or restating of the Government's requirements will not be considered adequate. Similarly, submittals containing omissions or incomplete responses to the requirements of this SIR, or that merely paraphrase the Statement of Work (SOW), or that use nonspecific phrases such as "in accordance with standard procedures" or "well-known techniques" will also be considered inadequate. Deficiencies of this kind may be cause for rejection of the offer. Submissions that do not specifically address all specifications or requirements will not be evaluated. The information provided is assumed to be accurate and complete.

AR Tab 12, § L.4(e).

15. Section L further provides instruction to offerors as to what information to include in each volume and sections of their proposals. Section L.5.1.3 instructs offerors to "completely fill out and sign the FAA Business Declaration Form FAA Template No. 61 (rev. 10/08) for the prime offeror and each subcontractor and include these forms in the offer." *AR* Tab 12, § L.5.1.3. Section L.5.2 describes the cost and pricing information to be provided in the proposal. *AR* Tab 12, § L.5.2.

16. The SIR Business Declaration referenced in Section L.5.1.3 requires that companies declare if a controlling interest in the company is a Service Disabled Veteran Small Business or 8(a) certified. *AR* Tab 12, § K.3. The Business Declaration form within the SIR contains a signature block stating:

> ***I DECLARE THAT THE FOREGOING STATEMENTS ARE TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE, INFORMATION, AND BELIEF. I AM AWARE THAT I AM SUBJECT TO CRIMINAL PROSECUTION UNDER THE PROVISIONS OF 18 USCS 1001.***

Underneath this statement are lines for signature, typed name, and title.

AR Tab 12, § M.3.

17. With respect to the management approach information required by Section L.6.1. states:

> **L.6.1.1 VOLUME 2, PART A, SECTION 1 - MANAGEMENT APPROACH**
>
> The FAA desires that offerors provide management strategies and proposed solutions demonstrating how they will result in better value to the government. Management approach includes specific information on subcontracting arrangements that may be implemented to ensure site coverage. The management organization of the offeror, to include all subcontractors, must present the details of responsibility and authority for fulfilling the requirements of this SIR. Offerors must include the program management plan per Section C.17.1 here.
>
> **L.6.1.1.1 VOLUME 2, PART A, SECTION 1.1 - SUBCONTRACTING ARRANGEMENTS**
>
> The offeror must provide information on the division of responsibility and authority between the firms within the offeror's proposal. Offerors must clearly identify the prime contractor and all subcontractor relationships. Offerors must submit only one prime contractor per offer. The information provided must detail the primary point of contact for all correspondence and the processes that will be followed to disseminate information to other team members.
>
> **L.6.1.1.2 VOLUME 2, PART A, SECTION 1.2 - MANAGEMENT ORGANIZATION**
>
> Describe the management organization that will be established to manage the day-to-day as well as emergency or contingency operations that require short or no notice augmentation of established SO levels at one or more sites.

AR Tab 12, § L.6.l.1.

18. Included in the Quality Assurance Section L.6.2.2, are instructions to offerors regarding how to address the supervision of security officers:

L.6.2.2 VOLUME 2, PART B, SECTION 2 - QUALITY ASSURANCE

The guarded FAA facilities are important elements in the control of air traffic across the United States and its territories. It is imperative that the quality of guard services provided be of the highest possible. The offeror must provide the details of its quality assurance program that will ensure that high quality, professional services will be provided for the duration of the contract. Information must be provided as to the process for detecting inadequate performance and the methods for rectifying it.

AR Tab 7, § L.6.2.2.

19. Section L.6.3.1 of the SIR addresses the information to be provided regarding experience and past performance:

Regarding Volume 2, Part C, Section l, the offeror must comply with the following:

(a) The offeror must demonstrate relevant experience and past performance or affirmatively state that it possesses no relevant experience and past performance. Relevant experience and past performance is experience and performance under contracts currently being performed or performed within the past five (5) years that are of a similar or directly related scope, and magnitude to that described in the solicitation and as defined below. Contracts of a shorter duration, or recently awarded, may be considered as slightly less relevant or presenting a higher performance risk given the shorter period of performance. The Government will also consider the quality of the offeror's past performance.

The offeror must complete up to three (3) Experience forms, Attachment L.l, that provide information on the contracts that the offeror believes are relevant to this solicitation. Where subcontracting arrangements are proposed, an additional maximum of three (3) contracts for each subcontractor may be submitted. However, the maximum number of contracts that will be evaluated per proposal is nine (9). Three (3) Experience forms must be for the prime contractor and a maximum of six (6) for all sub-contractors. The maximum for a single subcontractor must be three (3).

Concurrent with the Experience form, the offeror is to provide to each of the customers referenced, a corresponding Past Performance Questionnaire, Attachment L.2, to be completed by that customer and returned to the FAA at the address provided in section L.7.(a) by the time and date provided in section L.7.(b). Information provided in the response to this factor will

assist the Government in determining the degree of risk associated with award of this contract to the offeror in question, based upon that offeror's past and present performance on other relevant contracts. It is the offeror's responsibility to follow-up with its customers to ensure that the completed questionnaires are provided to the FAA by the deadline provided in section L. 7(b).

(b) The Government reserves the right to obtain information from sources other than those identified by the offeror. An evaluation of relevance will be done for no more than three (3) contracts submitted by the offeror for itself and for no more than six (6) contracts submitted for all subcontractors. The offeror is therefore cautioned to submit only its three (3) most relevant efforts and is cautioned to submit only the six (6) most relevant efforts of subcontractors. If the offeror or its subcontractors submit more than three (3) contracts each for consideration, only three (3) per entity will be reviewed up to a maximum of nine (9). The three (3) reviewed for each entity will be the first three (3) as displayed within the proposal from front to back.

(c) Where offeror subcontracting arrangements are proposed, a narrative must be submitted as part of the proposal which clearly details the roles, responsibilities, and distribution of effort (by type and percentage) between the parties in performance of the Government's requirement. This information should be provided by the prime contractor in the contractor's program management plan as discussed in section C.17.1.

(d) *Where an offeror provides contracts performed by its managers, key personnel, subcontractors or other partners for consideration, the Government will evaluate the past performance of its proposed managers, key personnel, subcontractor or other partners separately and consider its findings about them, in conjunction with information provided as required in paragraph (a) above, when determining the risk associated with the proposal and assigning the appropriate rating to the proposal.* The Government will determine whether the past performance of a contractor's, managers, key personnel, subcontractors or other partners offsets the risk of doing business with a prime contractor that has *no or limited experience and past performance of its own. The Government may decide not to attribute to the prime contractor, as an organization, the past performance of its managers, key personnel, subcontractors or other partners.*

(e) If the government attributes to the successful offeror the past performance of its proposed managers, key personnel, subcontractors or other partners, the successful offeror's proposal will be incorporated into the resultant contract as a requirement. In such cases the subject managers, key personnel, subcontractors or other partners must not be replaced without prior approval of the CO.

AR Tab 12, §L.6.3.1 (emphasis added).

20. The SIR also provides that "the FAA reserves the right to consider as acceptable only those proposals submitted in accordance with the requirements set forth in the SIR, which demonstrate an understanding of the complexity and scope of the requirements." *AR* Tab 12, § L.13.

21. Section M of the SIR provides instruction to offerors as to how proposals will be evaluated. Section M.2 describes the information and considerations that affect the submission of proposals:

> **M.2 INFORMATION AND CONSIDERATIONS AFFECTING VENDOR PROPOSAL SUBMISSIONS**
>
> (a) This acquisition will employ best practices and procedures for competitive negotiated procurements as authorized by the Federal Aviation Administration (FAA) Acquisition Management System (AMS), as amended, January 2011.
>
> (b) All offers will be screened initially to determine if they are in compliance with the Screening Information Request (SIR) procurement response instructions. These instructions include the requirement that offerors only respond to one Service Area specific SIR as a prime contractor. The FAA reserves the right to eliminate all offers submitted by an offeror if these instructions are not followed or if the offeror does not clearly demonstrate understanding of the requirements of the SIR. In the event a proposal is rejected a notice will be sent to the offeror stating the reason(s) that the proposals will not be given further consideration.
>
> (c) Each proposal will be evaluated on the basis of its written submissions and cost/price information described in Section L. Separate technical and cost/price proposals are required as described in Section L.
>
> (d) All offers will be subjected to a detailed evaluation by the Proposals Evaluation Team (PET).
>
> ***
>
> ***
>
> (e) Technical proposals will be evaluated, rated, and scored in accordance

with pre-established evaluation factors. These factors are listed in Provision M.5.1.

(f) Cost/Price proposals will be reviewed for mathematical accuracy, reasonableness, and realism.

(g) The cost/price evaluation team will not have access to technical proposals during the cost/price evaluation. Likewise, the technical evaluation team will not have access to price/cost proposals during the technical evaluation.

(h) The offer that provides the overall best value to the FAA will be selected. The successful offer may not necessarily be the lowest priced offer. Management, technical and past technical performance are significantly more important than cost/price. If total factor scores are close together, price will become more important. The FAA will also consider risk in its determination of best value.

(i) All proposals must be submitted in accordance with Section L and must conform to all the terms and conditions of the SIR. Failure to conform to all requirements expressed may be cause for rejection without further evaluation or discussion.

(j) Additional information may be requested from the vendor whose proposal the FAA considers to represent the overall best value. The information may clarify or supplement, but not basically change the proposal as submitted. The FAA reserves the right to award a contract based on initial offers received, without discussions or negotiations. For this reason, each initial offer should be submitted on the most favorable terms from the standpoint of technical and price/cost.

(k) In accordance with clause 3.2.2.3-19 of this SIR, the FAA reserves the right to limit offerors participating in the competition to only those most likely to receive a contract award. Vendors will be notified if a down selection decision results in their elimination from further consideration for award.

AR Tab 12, § M.2.

22. Section M.3 describes how proposal submissions will be evaluated, as well as the use of a tiered evaluation process:

M.3 EVALUATION OF OFFERS

(a) The offeror must provide adequate and specific information in their

proposal. A proposal may be eliminated from further consideration if the proposal is so grossly and obviously deficient as to be unacceptable without further evaluation. An offer will be deemed grossly and obviously deficient if it fails to comply with the material instructions in Section L to include: required forms, volumes, certifications, etc.

(b) Tiered Evaluation. In order to provide opportunities for small businesses, the acquisition strategy for this procurement is anticipated to use a tiered evaluation of offerors with the following tiers:

I. 8(a) Companies
II. SDVOSB
III. Small Businesses
IV. Large Businesses

(1) Tiered evaluation of offers is a process by which FAA promotes small business participation while providing the FAA a means to continue the procurement if small business participation is insufficient.

(2) The FAA may use tiered evaluation of offers to promote competition in each tier of small business concerns while still allowing other than small business to participate without issuing another SIR.

(3) The FAA will consider the tiers of small business concerns prior to evaluating offers from other than small business concerns.

All business classifications will be encouraged to submit offers for this SIR. The FAA will proceed with the evaluation of offerors and award within the lowest tier found to contain adequate competition among technically acceptable offers. An offer is considered technically acceptable if:

1) The offer is not grossly or obviously deficient; and
2) The offer receives at least a marginal evaluation in the management, technical, and past performance factors.

Adequate competition exists when at least two offers are compared. If only one proposal is received in a lower tier, this offer from a lower tier may compete with higher tiered submissions in order to achieve adequate competition.

Each offeror may be considered as a prime contractor for only one Service Area (SA) award but has the ability to pursue subcontracting opportunities on any service area awards without restriction. The FAA will only recognize one Prime Contractor per offer. In accordance with AMS clause 3.6.1-7 Limitations on Subcontracting at least 50% of the work must be performed by employees of the Prime contractor Award for awards made

under the first three tiers.

(c) Alternate proposals will not be evaluated. In the event a proposal is rejected a notice will be sent to the offeror stating the reason(s) that the proposals will not be given further consideration.

AR Tab 12, § M.3.

23. Section M.4 summarizes the overall evaluation and down-select process as follows:

(a) Cost/Price, management, technical, and past technical performance are evaluated as set forth herein. The Proposal Evaluation Team (PET) will consider tradeoffs between technical and cost/price factors. Management, technical and past technical performance are significantly more important than price in determining the overall best value to the FAA.

(b) Management, Technical, and Past Technical Performance Evaluation - The management, technical, and past technical performance volume will henceforth be referred to as the technical proposal/volume. Technical proposals will be reviewed by the TET in order to determine whether the minimum requirements of the Statement of Work (SOW) have been met. Technical proposals that have been evaluated to meet the minimum requirements as identified in the SOW will then be further evaluated and scored according to their ability to exceed the requirements identified in the SOW and the evaluation factors listed in Section M.5.1. Technical scores are then ranked in preparation for a Best Value determination. Technical proposals that have been evaluated and determined to not meet the minimum requirements as identified in the SOW will be eliminated from further consideration.

(c) Risk Assessment - The Government will assess the risk associated with conducting business with each vendor. This risk assessment will be completed after the technical evaluation. The risk assessment will be used to help determine best value for the government.

(d) Cost/Price Evaluation - The CPET will evaluate offers in accordance with M.6 below. Unlike technical proposal submissions, cost/price proposals will not be scored. Results of this cost/price analyses are forwarded to the PET for inclusion in the Best Value determination.

(e) Best Value Determination - Using the results from the TET and the CPET, the offer that provides the best overall value to the FAA will be selected for award. A tradeoff between technical and price may be considered, in which case, the lowest total evaluated price offer may not provide the greatest overall value to the Government. If a tradeoff is

considered, that determination will be made by the Source Selection Officer.

AR Tab 12, § M.4.

24. The technical evaluation of proposals is addressed in Section M.5 of the SIR, where it details the evaluation criteria for each factor and sub factor:

M.5.l Evaluation Factors

(a) The evaluation factors listed below are intended to determine the vendor's capabilities to effectively and efficiently provide Security Officer Services to the FAA.

(l) Factor 1 - Management Proposal:

(i) Sub-Factor 1.1 - Management Approach
This sub-factor will be evaluated on the degree to which the proposed management approach, subcontracting arrangements, and offeror organization will effectively and efficiently oversee guard services. Similarly, the degree to which the offeror proposes efficient and effective management efforts regarding day-to-day as well as emergency or contingency operations will be evaluated. The offeror's Management Plan as required in Section C.17.1 and L.6.1.1 will also be evaluated under this sub-factor.

(ii) Sub-Factor 1.2 - Transition
This sub-factor will be evaluated based on the degree to which the proposed transition methodology, timeline, staffing, and staff qualifications and training will ensure a timely, effective, and efficient transition of guard services. The offeror's Transition Plan as required in Section C.l7.2 and L.6.1.2 will also be evaluated under this sub-factor.

(2) Factor 2 - Technical Proposal:

(i) Sub-Factor 2.1 - Staffing
This sub-factor will be evaluated based on the degree to which the offeror's proposed staffing processes and procedures effectively and efficiently satisfy the requirements stated in Section C.5, C.6 and L.6.2.l. Proposed measures regarding temporary additionally staffing, maintenance of staff certifications, and records control will also be evaluated here for effectiveness and efficiency.

(ii) Sub-Factor 2.2 - Quality Assurance

This sub-factor will be evaluated based on the degree to which the offeror proposes strategies for effectively and efficiently ensuring that the quality of service provided under the contract is of the highest level according to Section L.6.2.3. Proposed measures regarding the supervision of security officers and quality control will also be evaluated here for effectiveness and efficiency.

(3) Factor 3 - Past Technical Performance

(i) Sub-Factor 3.1 - Relevant Past Experience and Performance

In accordance with L.6.3.1, this sub-factor will be evaluated based upon the completed L.l attachments and the receipt of questionnaires, attachment L.2, completed by customers, assessing the performance of the offeror on relevant contracts that are similar in scope and magnitude to this SIR. The contracts selected by the offeror must demonstrate that the offeror has an understanding of the work to be performed. The Government will determine the relevance of a contract offered by the vendor to demonstrate past performance by analyzing the following and comparing it to the SIR:

(a) Scope - Contract relevance will be evaluated based on the type of service provided. A relevant contract example exists where similar security officer services have been offered in the past. For example a contract relevance determination focuses on whether or not SOs are armed; type of SO qualifications and training requirements; type of permit, licensure and certification requirements in performance of the effort; typical duties and responsibilities required of security force; type of protection required (e.g. interior and exterior building protection vs. exterior-only protection and gate access control); and the number and geographic dispersion of service sites;

(b) Magnitude - The magnitude of a contract offered under relevant past experience will be evaluated through the following: the number of productive hours per year, number of SO personnel to support the effort, total contract value and potential subcontractors, if proposed, under a single contract.

(ii) Sub-Factor 3.2 - Related Information

This sub-factor will be evaluated based on the offeror's related information that complements the services required under this

> SIR in accordance with L.6.3.2. If there is no related information, the offeror must affirmatively state that it possesses no related information. No related information will result in a satisfactory rating.

AR Tab 12, § M.5.

25. The reference in Section M.5.1(a)(3)(i) to Attachment L.2 pertains to Past Performance Questionnaires, which contain sixteen questions relating to the offeror's past performance, including fourteen that are answered by the assignment of point scores: 1 for marginal, 2 for satisfactory, 3 for good and 4 for excellent (a response of "Not Applicable" also is available). *AR* Tab 7, Attachment L.2.

26. Section M.5.1(b) sets forth the weight to be assigned to each of the technical evaluation factors as follows:

Factor/Sub factor		Percentage
1. Management Proposal*		20%
Sub-Factor 1.1 Management Approach	40%	
Sub-Factor 1.2 Transition	60%	
2. Technical Proposal*		45%
Sub-Factor 2.1 Staffing	70%	
Sub-Factor 2.2 Quality Assurance	30%	
3. Past Technical Experience and Performance*		35%
Sub-Factor 3.1 Relevant Past Experience and Performance	80%	
Sub-Factor 3.2 Related Information	20%	
TOTAL		100%

*NOTE: The three factors above comprise the entirety of the technical evaluation criteria.

AR Tab 12, § M.5.

27. Section M.7 describes the assessment of risk to occur at the conclusion of the overall evaluation process and is intended to aid the source selection process by providing more information for the best value determination. *AR* Tab 12, § M.7(a). It provides in part:

(b) The risk assessment will be conducted by the CPET Lead and the TET Lead. Members of the CPET and the TET who identify potential risks are to communicate those risks to their respective team lead for consideration and inclusion in the assessment. Risks may be identified by any team or evaluator throughout the evaluation process.

(c) Risks will be evaluated both as to their potential impact on the offeror's ability to successfully perform the contract and the likelihood of the risk occurring. This analysis will evaluate risks in terms of their potential impact on cost, schedule, and work performance. Risks may be identified within any aspect of the offeror's proposal, or from any additional sources of information.

(d) The team that assesses risk will identify proposal risks and note the potential impact and likelihood of those risks occurring. Not all risks may be addressed. The evaluators have discretion to determine which risks merit discussion.

(e) The team that assesses risk will then determine what overall level of risk the entire proposal includes. Determining the overall level of risk is not a numeric average or summation of the number of risks identified. Rather, the level of overall risk associated with a proposal depends on the types of risks identified and the likelihood of their occurrence.

(f) Categories to be used in assessing risk to the Government are:

a. Low risk – Risks in the offeror's proposal, if any, present no more than a minimal likelihood of occurrence or a minimal potential impact on the offeror's ability to deliver services within cost, schedule, or work performance requirements.

b. Moderate risk - Risks in the offeror's proposal, are more likely than not to occur or are more likely than not to have an impact on the offeror's ability to deliver services within cost, schedule, or work performance requirements.

c. High risk - Risks in the offeror's proposal, are highly likely to occur or are certain to have an impact on the offeror's ability to deliver services within cost, schedule, or work performance requirements.

AR Tab 12, § M.7(b)-(f).

28. Section M.8 of the SIR provides that contract award will be made on the basis of best value:

(a) The offer that provides the best overall value to the FAA will be selected for award. A tradeoff between technical factors and price may be made. However,

> the lowest total evaluated priced offer may not provide the best overall value to the Government. Evaluation factors are significantly more important than cost/price. The risk assessment is intended to aid the source selection process by adding more information to the best value determination. If total factor scores are close together price will become more important. Best value will be based on the following:
>
> - Technical Evaluation;
> - Cost/Price Evaluation; and
> - Risk Assessment.
>
> (b) To arrive at a best value decision, the PET will integrate the evaluation of the specific criteria described above. While the FAA source selection evaluation team will strive for maximum objectivity, the source selection process, by nature, is subjective and professional judgment is implicit throughout the entire process.

AR Tab 12, § M.8.

B. Proposal Submission

29. The FAA received four proposals in response to the SIR. *AR* Tab 43 at 3. The FAA eliminated one offeror, "Offeror D," from the competition for failing to satisfy the minimum threshold requirement in SIR Section C.3.b that required the prime to "have at least five (5) years of documented experience in providing armed contract SO services." *AR* Tab 43 at 14. The remaining three offerors consisted of Alutiiq, AEPS and another offeror, assigned the pseudonym "Vendor B". *AR* Tab 46 at 2.

30. On February 16, 2012, AEPS and Alutiiq submitted their responses to the SIR, consisting of Volume 1 containing cost, pricing and other information; and Volume 2, the Technical Proposal. *AR* Tabs 18 – 22 (AEPS) and *AR* Tabs 23-26 (Alutiiq).

31. Section L.6.3.1 required offerors to submit up to three customers' Past Performance Questionnaires. *AR* Tab 12, § L.6.3.1. Past Performance Questionnaires were submitted on behalf of Alutiiq and AEPS. *AR* Tabs 5, 8 - 10; - 12 (Alutiiq Questionnaires) and Tabs 15 and 17 (AEPS Questionnaires).

32. Alutiiq's proposal represented that it satisfied the five year requirement of SIR Section C.3.b. In this regard, Alutiiq's proposal stated in Volume II that "Alutiiq's Guard Services has offered contract and task order management, local responsive supervision, and armed/unarmed security officer services across multiple classified and unclassified facilities in the United States and overseas for over five years." *AR* Tab 26 at 35.

33. According to the Product Team, Volume I of Alutiiq's proposal, which included Section K, revealed that it only had four years of experience. *AR* Tab 24, Section K, Business Declaration.

34. The Agency Response included a copy of the proposal submitted by AEPS on February 12, 2012, and which contained the following text identified as "K.3 BUSINESS DECLARATION":

> (Name of Firm) American Eagle Protective Services Corp.
>
> . . .
>
> 5. Controlling Interest in Company ("X" all appropriate boxes)
> a. Black American b. Hispanic American c. Native American
> (checkbox) Checked
> (Specify)
> d. Asian American e. Other Minority f. Other
> (Specify)
> (Specify)
>
> (Specify)
> g. Female h. Male i. 8(a) Certified (Certification letter attached)
>
> (checkbox) Checked
> (checkbox) Checked
>
> j. Service Disabled Veteran Small Business
> 6. Is the person identified in Number 4 above, responsible for day-to-day management and policy decision-making, including but not limited to financial and management decisions?
> a. Yes .
> b. No (If "NO," provide the name and telephone number of the person who has

(checkbox) Checked
this authority.)
(this authority)

AR Tab 20, 1-2, AEPS Proposal Vol. I – Section J Part IV.

35. The copy of AEPS' proposal contained in the Agency Response also contained the following text identified as "K.3 BUSINESS DECLARATION":

> I DECLARE THAT THE FOREGOING STATEMENTS ARE TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE, INFORMATION, AND BELIEF. I AM AWARE THAT I AM SUBJECT TO CRIMINAL PROSECUTION UNDER THE PROVISIONS OF 18 USCS 1001.
>
> (Stamp comment
> Bredgitt Walker astrom
> 2/8/2012 2:42:48 PM
> blank)
> a. Signature b. Date:
> (b. Date) 2/16/2012
> c. Typed Name
> (c. Typed Name) Bredgitt Walker
> d. Title:
> (d. Title) President

Id..

36. Section K of the AEPS proposal additionally contains a certification for Paragon, its subcontractor, stating:

> (a)(1) The Offeror certifies, to the best of its knowledge and belief, that--
>
> (i) The Offeror and/or any of its Principals--
>
> (A) Are [X] are not [ ] presently debarred, suspended, proposed for debarment, or declared ineligible for the award of contracts by any Federal agency;
>
> (B) Have [X] have not [ ] within a three-year period preceding this offer, been convicted of or had a civil judgment rendered against

> them for: commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public (Federal, state, or local) contract or subcontract; violation of Federal or state antitrust statutes relating to the submission of offers; or commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, tax evasion, violating Federal criminal tax laws or receiving stolen property; and
>
> (C) Are [X] are not [ ] presently indicted for, or otherwise criminally or civilly charged by a governmental entity with, commission of any of the offenses enumerated in subdivision (a)(1)(i)(B) of this provision.
> (D) Have [X], have not [ ], within a three-year period preceding this offer, been notified of any delinquent Federal taxes in an amount that exceeds $3,000 for which the liability remains unsatisfied.
>
> . . .
>
> (ii) The Offeror has [X] has not [ ] within a three-year period preceding this offer, had one or more contracts terminated for default by any Federal agency.

AR Tab 18, AEPS Proposal Vol. I – Paragon Section K – Reps and Certs, at K5-7.

37. The AEPS proposal states that with respect to AEPS and its subcontractor Paragon:

> The two companies have clearly defined responsibilities: AEPS is responsible for overall program management, and all security services and employees located in [DELETED]. Paragon has responsibility for all security services and employees in [DELETED].

AR Tab 22, AEPS Proposal Vol. II at 12.

38. The AEPS proposal states that currently [DELETED]. *See AR* Tab 22 at 11.

39. The AEPS proposal states that AEPS has [DELETED] relevant to the FAA contract and that Paragon has [DELETED] relevant to the FAA contract. *See AR* Tab 22 at 45. AEPS also described in detail the contract's management positions and specifies which employees will occupy the key management positions. *AR* Tab 22, Section 1.0 Management Approach, at 7-15. The AEPS proposal shows that at the top of AEPS' management chain, the individual ultimately responsible for execution of the contract is the AEPS' President and CEO, Bredgitt Walker. *Id.* Beneath Ms. Walker is AEPS Vice President of Operations, Dan Walker. *Id.* Finally, it shows that the Project Manager for

the contract is AEPS employee, [DELETED], who is to be responsible for day to day compliance with the contract requirements. *Id.* The AEPS proposal further indicates that Paragon employees will be in management positions only at the local on-site supervisor level, and even then, they will be selected and managed by an AEPS employee. *Id.* at 7-11.

40. Throughout the AEPS proposal there are references to the value that Paragon will bring to what is termed as "Team AEPS," these statements include:

    [DELETED]

    See generally AR Tab 22.

41. In its proposal, AEPS explicitly states that for this contract the relationship between AEPS and Paragon is not that of a mentor-protégé. *AR* Tab 22 at 7.

42. The "Teaming Agreement" between AEPS and Paragon states that it does not "create a joint venture, partnership, or formal business organization of any kind . . . ." *AR* Tab 126, at 1. The agreement further states that Paragon will provide up to forty-nine percent of the total labor costs over the life of the contract and shall not receive more than forty-nine percent of total revenues from the contract. *Id.* at 14.

C. The Technical and Price Evaluations

43. The Product Team sought additional information from another offeror, "Vendor D," to determine whether it satisfied the five year requirement of SIR Section C.3.b. *AR* Tabs 61, 64, and 66.

44. Vendor D provided information indicating that it satisfied the 5 year experience requirement based on the experience of a "sister" or "predecessor" company. *AR* Tab 67. The Product Team sought further information in that regard, and Vendor D explained that as a prime contractor, it had only been providing armed guard services since October 2010, but that due to the experience of its sister company or "affiliated company" it satisfied the

five year requirement of SIR Section C.3.b. *AR* Tab 70.

45. The Product Team sought clarification from both Alutiiq and AEPS as to their Small Business Administration 8(a) Certification. *AR* Tabs 27 and 28. Both Alutiiq and AEPS provided copies of their SBA 8(a) Certification Letters to the Product Team. *AR* Tabs 1 and 6. The Product Team also sought and received from Alutiiq, AEPS and Vendor D, a forty-five day extension of the acceptance period for their offers. *AR* Tabs 41, 42 and 71.

46. As explained in the Technical Evaluation Team ("TET") Report, the evaluators eliminated Vendor D from the competition for failing to satisfy the minimum 5 year experience requirement, even though Vendor D had been evaluated and otherwise was found to meet the solicitation requirements "in a manner that exceeds an acceptable level." *AR* Tab 43.

47. In the FAA's July 23, 2012 Evaluation Report for the SSO, the Contract Specialist and the Team Lead for the Technical Evaluation Team determined that both Alutiiq and AEPS were eligible to compete for the contract award as 8(a) companies. *AR* Tab 45 at 2.

48. The Evaluation Report ranked AEPS, Offeror A, second in Technical Score, first in Total Evaluated Price and classified the offer as "Low Risk." *AR* Tab 45 at 4.

49. The Evaluator Worksheets for AEPS indicate that the evaluators found [DELETED] to be a weakness, but the [DELETED] was viewed as a strength. *AR* Tab 29 at 14; *AR* Tab 30 at 3-5, 8, 13-14; *AR* Tab 32 at 4.

50. The Evaluation Report ranked Alutiiq, Offeror C, first in Technical Score, second in Total Evaluated Price, and classified the offer as "Low Risk." *AR* Tab 45 at 4.

51. The TET Report summarizes the evaluation of AEPS as follows:

> Vendor A provided a technical proposal that demonstrates that both the offeror and subcontractor possess experience exceeding the five (5) year requirement and includes experience providing security officer services to

> the FAA. The weaknesses noted were primarily due to the [DELETED]. The weaknesses noted are minimal compared to the strength of the rest of the proposal.

AR Tab 43 at 9.

52. The TET Report summarizes the evaluation of Alutiiq as follows:

> Vendor C provided a technical proposal that reflects its exceptional experience providing security officer services both domestically and internationally. The one weakness noted was primarily due to [DELETED]. The weakness noted is minor and is far outweighed by the numerous strengths of the rest of the proposal. The offeror's proposal showed a robust management approach that has the strengths to meet the Section C SIR requirements [DELETED] many years of experience providing guard services and the ability to transition to large contracts.

AR Tab 43 at 20-21.

53. On July 29, 2012, the FAA Product Team finalized the Price Evaluation Report, the Risk Assessment Report and the Proposal Evaluation Team Report. None of these reports identify any concerns as to whether Alutiiq met the minimum 5 years of experience based on its proposal Volume II and Section K representations. *AR* Tabs 76-78. Nor do any of the reports identify any concerns as to whether AEPS was eligible for award based on its proposal Volume II and Section K representations. *Id.*

54. The TET Report summarizes the TET's consensus assessment as to the offerors' proposals, stating, "the proposal of Vendor C provided information indicating that Vendor C would be able to perform at a level that exceeds expectations" and should be awarded the contract. *AR* Tab 43 at 28.

D. The Source Selection Decision, Contract Award and Debriefing

55. On July 30, 2012 the Source Selection Official ("SSO"), selected Alutiiq to be awarded the contract. *AR* Tab 48.

56. In the Source Selection Decision Memorandum, dated July 30, 2012, the Source Selection

Official states:

> I have read the Evaluation Report for the Source Selection Official resulting from Screening Information Request (SIR) DTFAWA-11-R-00025, National Security Officer Program – Western Service Area. I concur that Offeror C and Offeror A are responsible and eligible for award. I approved the DTFAWA-11-R-00025 Evaluation Plan and am familiar with Sections L and M of the SIR. I have also reviewed the findings of the Technical Team Evaluation, the Risk Analysis and the Pricing Analysis to further familiarize myself with the proposals submitted by the Offerors responding to the SIR.
>
> After careful consideration of the findings and recommendations of the Integrated Product Team (IPT), I have selected, Offeror C, Alutiiq Pacific, LLC ….

AR Tab 48.

58. On August 29, 2012, the FAA Product Team conducted a debriefing with Offeror D, in which the FAA Product Team explained that Offeror D was eliminated from competition as a result of its noncompliance with the minimum experience requirement found in the SOW. *AR* Tab 73. This same explanation is found in the finalized TET report.

59. On August 30, 2012, the FAA Product Team conducted a debriefing with AEPS. *AR* Tab 51.

60. On August 31, the FAA Product Team conducted a debriefing with Alutiiq. *AR Tab 52.*

E. ODRA Protest Proceedings

61. On September 7, 2012, AEPS filed a protest of the FAA contract award to Alutiiq on the grounds that Alutiiq did not have sufficient experience to merit the scores upon which the final contract award was based. *AR* Tab 53. Alutiiq intervened in the protest as the awardee. *AR* Tab 74.

62. On October 2, 2012, AEPS filed a supplemental protest claiming, among other things, that Alutiiq should have been eliminated from competition for failure to meet the SIR minimum

mandatory experience requirements for armed contract SO services found in Section C.3.b of the SOW. *AR* Tab *74. See also AEPS Motion for Summary Dismissal of Supplemental Protest Ground* at 1.

63. On October 8, 2012, the FAA Product Team provided Alutiiq's counsel with a CD that included a complete copy of AEPS's proposal. *AR* at 18.

64. On October 16, 2012, the FAA Product Team provided Alutiiq's counsel with a second CD that included supplemental documents, including information about the elimination of Offeror D for failure to meet the minimum experience requirements, as requested by AEPS as part of its supplemental protest. *Id.* at 18.

65. On October 25, 2012, the FAA Product Team, AEPS and the ODRA ADR Neutral engaged in mediation pursuant to an executed ADR agreement between the parties in an effort to resolve AEPS's original protest. *Id.*

66. The mediation resulted in a settlement between AEPS and the Product Team. *Id.* at 19.

67. On November 1, 2012, a telephone conference including the mediator, counsel for the FAA and counsel for Alutiiq was conducted in order to inform Alutiiq of the proposed settlement terms reached in the AEPS Protest mediation. *Id.*

68. On November 9, 2012, Alutiiq filed its Initial Protest with the ODRA against the planned settlement agreement between AEPS and the FAA Product Team that had been discussed in the November telephone conference, arguing that the settlement constituted improper corrective action on the part of the FAA. *AR* Tab 117.

69. On December 5, 2012, the FAA Contracting Officer ("CO") prepared a memorandum to the file explaining in detail the Product Team's decision to enter into a settlement agreement with AEPS, highlighting that AEPS's claims presented serious "litigative risk" and the ADR settlement was therefore the best means to resolve the matter. *AR* Tab 115.

70. On December 6, 2012, a settlement agreement ("Settlement Agreement") was executed by the FAA Product Team and AEPS. *AR* Tab 116.

71. On December 7, 2012, Alutiiq received a CD from the FAA containing 116 documents relevant to its protest. The last document on the disc was a copy of the executed ADR Settlement Agreement between the FAA Product Team and AEPS, including the Contracting Officer's determination that the Settlement Agreement was in the best interests of the FAA. *Alutiiq's Response to AEPS Motion for Summary Dismissal* at 3.

72. On December 10, 2012, by letter, counsel for AEPS requested that AEPS' Protests be dismissed *without prejudice*, in accordance with the Settlement Agreement (which was attached to the letter filed with the ODRA). The letter indicates that a copy of the request for dismissal was sent *only* to counsel for the Product Team, and not to the intervenor, Alutiiq.

73. On December 11, 2012, pursuant to the ODRA's ADR Process, Alutiiq and the FAA Product Team participated in a mediation regarding Alutiiq's Initial Protest. *Supplemental Protest* at 2. On December 13, 2012, given the unsuccessful attempt at mediation, the ADR Neutral advised the ODRA Director that the parties requested that the adjudication commence. *ADR Neutral Letter*, dated December 13, 2012.

74. On December 18, 2012, following Alutiiq's review of the exhibits contained in the Agency Response that it received on December 7, 2012, Alutiiq filed a Supplemental Protest against the award of the contract to AEPS based on an alleged violation of the "ostensible subcontractor" rule. *Supplemental Protest* at 1-2.

75. On December 19, 2012, the ODRA issued FAA Order ODRA-12-650, stating: "As the result of a Settlement Agreement reached in an alternative dispute resolution process, American Eagle Protective Services Corporation requests that the Protest be dismissed without prejudice. Pursuant to the ODRA Procedural Regulation, 14 C.F.R. § 17.19(c)

this Protest hereby is dismissed without prejudice pending satisfaction of the terms of the Settlement Agreement."

76. On December 21, 2012, AEPS, as an intervenor, filed a Motion for Summary Dismissal of Alutiiq's Supplemental Protest Ground on the basis that the Supplemental Protest filed by Alutiiq raising the "ostensible subcontractor" ground was untimely. *AEPS Motion for Summary Dismissal* at 1. *AR* Tab 124.

77. On January 9, 2013, Alutiiq filed a response to AEPS's Motion for Summary Dismissal. *Alutiiq's Response to AEPS Motion for Summary Dismissal* at 1.

78. On January 11, 2013, the FAA Product Team filed an Agency Response to both the Initial and Supplemental Protests of Alutiiq. *AR* at 4.

79. On January 25, 2013, AEPS submitted comments to the Agency's Response. *AEPS Comments* at 1.

80. By letter dated April 25, 2013, the ODRA advised the parties that it had reviewed the administrative record and found it necessary to reopen the record for the limited purpose of clarifying certain information Specifically, the ODRA's letter stated:

> The Agency Response in Tab 20 contains a copy of the proposal submitted by AEPS on February 12, 2012, containing a Business Declaration that appears to be incomplete and unsigned. Additionally, the Agency Response in Tab 18 contains a copy of a Section K certification from AEPS' subcontractor, which makes certain representations concerning issues of suspension and debarment, judgments or other offenses, tax delinquency or default terminations. The Product Team is directed to review these documents and confirm whether the information reflected is accurate and whether actual or electronic signatures were obtained. The Product Team further is directed to file and serve any additional documentation that addresses or is otherwise relevant to the completion of the referenced documents.

81. The Product Team's response to the ODRA's request for additional information was filed May 1, 2013, along with additional exhibits to the Agency Response ("Supplemental

Response"). *AR* Tabs 131-135. These additional tabs included a second declaration from the Contracting Officer explaining that physical signatures were not reflected on the electronic copies of AEPS' Section K certifications that were contained in Tab 20 of the Agency Response, but that AEPS indeed had submitted physical signatures for Section K with its proposal. *FF* 34 - 35; *AR* Tab 134 at ¶ 1. The Product Team also supplemented the Agency Response with a tab containing copies of the physically signed Section K certifications. *AR* Tab 131.

82. The Product Team's May 1st Supplemental Response also addressed the representations set forth in AEPS' proposal "concerning issues of suspension and debarment, judgments or other offenses, tax delinquency or default terminations" relative to its subcontractor, Paragon. *AR* Tab 134 at ¶¶ 4-6; *FF* 36. In this regard, the Contracting Officer, in his second declaration, acknowledged that the Product Team had overlooked this information during the preliminary review of the proposal; but in response to the ODRA's request, it sought and received from AEPS, as well as independently verified from other Government sources, information indicating that AEPS' subcontractor was in fact eligible, and that this particular portion of the form had been improperly completed. *Id*.; *AR* Tab 135.

83. On May 6, 2013, replies to the Product Team's May 1st Supplemental Response were filed by AEPS and Alutiiq ("Reply"). The AEPS Reply confirmed the explanation contained in the Product Team's May 1st Supplemental Response. The Alutiiq Reply stated that, due to the inadequacy of the information provided by the Product Team in its May 1, 2013 Supplemental Response, it was unable to assess the significance of the information. *Alutiiq May 6, 2013 Reply* at 1. Alutiiq did, however, question a representation made by Paragon Systems, Inc. that was set forth in a copy of a SAM Report for Paragon Systems, Inc. which the Contracting Officer had reviewed after receiving the ODRA's April 25, 2013 Letter. Specifically, the SAM Report contained a representation by Paragon Systems, Inc. in connection with a Federal Acquisition Regulation clause, FAR 52.219-22 Small Disadvantaged Business Status (October 1999), which identifies its status as being a joint venture and small disadvantaged business concern by the name of "Comprehensive Security Services, Inc." *AR* Tab 135 at 16. The representation further indicates that

Paragon is certified as such by the Small Business Administration and that it complies with the requirements at 13 CFR 124.1002(f). *Id.*

II. DISCUSSION

A. Burden and Standard of Proof

As the Protester in this matter, Alutiiq bears the burden of proof, and must demonstrate by substantial evidence (i.e., by a preponderance of the evidence), that the challenged decision failed in a prejudicial manner to comply with the Acquisition Management System ("AMS"). *Protest of Adsystech, Inc.*, 09-0DRA-00508. Under the AMS, source selection decisions must be supported by a "rational basis." *AMS Policy* § 3.2.2.3.1.2.5. Where the record demonstrates that a decision has a rational basis and is not arbitrary, capricious or an abuse of discretion, and is consistent with the AMS, the evaluation plan, and the award criteria set forth in the underlying solicitation, the ODRA will not substitute its judgment for that of the designated evaluation and source selection officials. *Adsystech, supra (*citing *Protest of Ribeiro Construction Company, Inc.*, 08-TSA-031).

B. Initial Protest of Alutiiq

In its Initial Protest, filed on November 9, 2012, after being advised of a tentative ADR resolution of the AEPS protests, Alutiiq challenged "the FAA's proposed decision" to award the contract to AEPS, as constituting improper "corrective action" due to the "extent it is based upon a conclusion that the SIR at Section C.3.b required a minimum of five years of experience by the *prime* contractor itself [DELETED]." *Protest* at 1. Alutiiq argued that:

1) Section L of the solicitation instructs offerors with little or no experience as to what to submit, providing that offerors without prior experience will be given a neutral rating. If the FAA's current position on Sec. C.3.b were correct, Section L would not have this provision.

2) The FAA did not apply C.3.b as a minimum mandatory requirement when it evaluated Alutiiq Pacific's proposal. Alutiiq Pacific's proposal was clear that the past experience identified [DELETED]. Furthermore, in evaluating Offeror D's proposal, the FAA was unsure whether Offeror D had identified

relevant affiliate past performance, and therefore asked for additional information and sought guidance as to what was required. Had the FAA intended to exclude affiliate past performance and require the prime contractor itself to have five years' experience, it would not have needed to seek guidance on this issue.

3) The FAA cannot rationally conclude that its minimum needs were for a prime contractor that itself had five years' experience, since Alutiiq Pacific did not, and its proposal was the most highly rated.

4) To the extent that the FAA should now assert that question 25 in Amendment 3 stated that only prime contractor experience would be considered, that is not reflected in the plain language of the FAA's answer to that question, nor can the FAA credibly assert that is what it meant when it had to ask that very question in the course of evaluating Offeror D's proposal. In short, the SIR does not unambiguously restrict competition to offerors that have at least five years of prime contractor experience, nor does it specifically and unambiguously exclude affiliate past performance.

Id. at 1-2.

In response to Alutiiq's assertions in the Initial Protest, the Product Team argues that SIR Section C.3.b sets forth the minimum requirement that prime offerors have five years of armed guard experience irrespective of sister or parent corporate experience. *AR* at 25. The Product Team also asserts that this section is distinguishable from language in SIR Sections L and M, which contemplates a subjective evaluation of that experience, *once the minimum requirement is met*. *AR* at 26-31. The Product Team further contends that it rationally and consistently required all offerors to comply with the minimum requirement of Section C, except inadvertently with respect to Alutiiq, as was discovered by the Product Team due to the ADR effort conducted in the AEPS Protests. *AR* at 35 – 39.

Alutiiq's Initial Protest presents a question of contract interpretation as to how the Product Team should have applied SIR Section C.3.b in conjunction with Sections L and M in the evaluation of Alutiiq's proposal. In that regard, "the rules of contract interpretation are applicable to solicitations and are well established at the ODRA as they are elsewhere." *Protest of Apptis, Inc.*, 10-ODRA-00557. These rules provide that the plain and unambiguous meaning of the solicitation controls, and all parts of the solicitation must be read together and harmonized if

possible, without rendering any provision meaningless. *Protest of Johnson Controls Security Systems, LLC*, 05-ODRA-00360, citing *Contract Dispute of Strand Hunt Construction, Inc.*, 99-ODRA-00142. As the ODRA stated in *Johnson Controls*:

> Neither a party's belief nor customary practice can make an unambiguous contract provision ambiguous or justify departure from its terms. *R. B. Wright Construction Co. v. United States*, 919 F.2d 1569 (Fed. Cir. 1990). Under fundamental rules of contract interpretation, an interpretation will be rejected if it leaves a portion of the contract language meaningless, useless, ineffective or superfluous. *See* Restatement, Second, Contracts, Section 203(a); *Fortec Constructors v. United States*, 760 F.2d 1288 (Fed. Cir. 1985).

Id.

The record demonstrates that the language in SIR Section C.3.b and Sections L and M is neither ambiguous nor internally inconsistent. SIR Section C.3 requires the contractor to meet specified minimum criteria, providing, in part:

> a. The contractor's primary business must be providing contract SO services, including armed SOs.
>
> b. The contractor must have at least five (5) years of documented experience in providing armed contract SO services.
>
> c. The contractor must provide written evidence of satisfactory service to large facilities similar to FAA Security Level 3 and 4 type, staffed facilities. ….
>
> ***

FF 6.

These minimum qualification requirements are independent from one another and each one must be met. Furthermore, a plain reading of subparagraph b would be that in order to meet the minimum requirements, an offeror (not a proposed subcontractor) must possess at least five years of documented experience in providing armed contract SO services. Notably, nowhere does Section C.3 specify the magnitude and scope of the five years' experience required. *Id.* Additionally, subparagraph c requires an offeror to provide written evidence of satisfactory service

to large facilities similar to FAA Security Level 3 and 4 type, staffed facilities, but again, nowhere does it specify that such service be performed as a prime contractor. *Id.*

Section L.6.3.1 instructs offerors as to the presentation of information in their proposals regarding experience and past performance, assuming that the minimum qualification requirements are met. *FF* 19. It defines relevant experience and past performance as "experience and performance under contracts currently being performed or performed within the past five (5) years that are of a similar or directly related scope, and magnitude to that described in the solicitation and as defined below." *Id.* Consequently, it is possible that an offeror might be able to provide written evidence that it has provided satisfactory services to large facilities similar to FAA Security Level 3 and 4 types, but lacks the "relevant experience and past performance" as defined in L.6.3.1. *Id.* Particularly in such cases, the SIR expressly contemplates consideration of the relevant experience of a subcontractor. *FF* 19. In this regard, the SIR Section L.6.3.1 provides for a subjective and qualitative evaluation of this information relative to both the prime and its subcontractors in order to assess risk:

> (d) Where an offeror provides contracts performed by its … *subcontractors or other partners for consideration*, the Government will evaluate the past performance of its … *subcontractor or other partners separately* and consider its findings about them, in conjunction with information provided as required in paragraph (a) above [experience performing contracts of a similar or directly related scope and magnitude], when determining the risk associated with the proposal and assigning the appropriate rating to the proposal. The Government will determine whether the past performance of a contractor's … *subcontractors or other partners* offsets the risk of doing business with a prime contractor that has no or limited experience and past performance of its own. The Government may decide not to attribute to the prime contractor, as an organization, the past performance of its … *subcontractors or other partners*.
>
> (e) If the government attributes to the successful offeror the past performance of its … *subcontractors or other partners*, the successful offeror's proposal will be incorporated into the resultant contract as a requirement. In such cases the subject … *subcontractors or other partners* must not be replaced without prior approval of the CO.

FF 18.

Moreover, the Questions and Responses issued by the Product Team before the submission of proposals clarified how the Product Team would treat the evaluation of experience of a joint venture offeror. In response to question number 25, stating: "Can the Prime Contractor be a joint venture comprised of multiple small businesses that collectively fall under the $18.5 million small business threshold? Will the FAA acknowledge this teaming strategy as acceptable?" *FF* 5. The Product Team responded as follows:

> The requested teaming strategy is not acceptable unless the requirements of SIR Section C.3.b are met by the joint venture. SIR Section C.3.b requires the contractor to have at least five (5) years of documented experience in providing armed contract SO services. Pre-existing joint ventures with five (5) years of experience performing work as a joint venture are acceptable; however, individual corporate experience does not apply. Additionally, SIR Section L.6.1.1 requires the offeror to identify clearly the prime contractor and all subcontractor relationships. Also, offerors must submit only one prime contractor per offer.

FF 4. In this regard, AMS policy provides that subcontracting limitations specified in AMS Clauses 3.6.1-7 are applicable to small business joint ventures, and each team member must qualify as small under the applicable size standard in order for a joint venture to submit an offer as a small business without regard to affiliation. *AMS Procurement Guidance* T3.6.1. Particularly taking AMS policies into account, the Product Team's response to question number 25 clearly and unambiguously communicates that an affiliate's past performance will not be counted in determining whether the offeror meets the minimum experience requirements. Likewise, there is no inconsistency between the proposal information required by Section L.6.3.1 and the evaluation scheme set forth in Section M. SIR Section M.4(b) states, in pertinent part:

> Technical proposals will be reviewed by the TET in order to determine whether the minimum requirements of the Statement of Work (SOW) have been met. Technical proposals that have been evaluated to meet the minimum requirements as identified in the SOW will then be further evaluated and scored according to their ability to exceed the requirements identified in the SOW and the evaluation factors listed in Section M.5.1. Technical scores are then ranked in preparation for a Best Value determination. Technical proposals that have been evaluated and determined to not meet the minimum requirements as identified in the SOW will be eliminated from further consideration.

FF 22.

In this case, the Product Team's determination not to attribute the past performance of [DELETED] in order to meet the five year minimum requirement is entirely consistent with both the plain language of the SIR and AMS policy, as well as its treatment of another offeror that was determined to be ineligible for the same reasons. *FF* 37-40. Specifically, during the initial evaluation of proposals, the Product Team sought further information from a third competitor, Offeror D, to clarify if it was the prime or subcontractor with the relevant experience. *Id.* Upon determining that this third competitor did not have five years of experience providing SO services unless the work of its subcontractor was included, the Product Team eliminated this proposal from the competition. *Id.* Alutiiq asserts that, because the Product Team decided not to treat its proposal similarly, the FAA cannot now assert that Alutiiq did not meet the minimum qualifications set forth in the SIR. *Protest* at 2. It is well established in ODRA precedent that a SIR's evaluation criteria must be applied in a manner that is consistent, equal and rational, and that disparate treatment in the evaluation of offers will not stand. *Optical Scientific, Incorporated,* 06-ODRA-00365, *citing Metcalf Construction Company, Inc. v. United States,* 53 Fed. Cl. 617 (2002).

The ODRA concludes in reviewing these provisions that there is no ambiguity in the Solicitation sections, which set forth the minimum requirements and how experience will be evaluated. The ODRA further finds that the Product Team applied these SIR sections reasonably and evaluated this aspect of the proposals rationally. As it is undisputed that Alutiiq did not have five years of SO experience, *Alutiiq Comments* at 9-12, the elimination of its proposal from the competition had a rational basis under the plain language of the SIR. Accordingly, the ODRA recommends that Alutiiq's Initial Protest be denied.

C. Supplemental Protest of Alutiiq

On December 18, 2013, Alutiiq filed its Supplemental Protest against the "December 6, 2012 decision to award a contract to AEPS … based upon small business violations and the Contracting Officer's arbitrary decision to enter into a settlement agreement" with AEPS. *Supplemental Protest* at 1. Specifically, Alutiiq argues that "the arrangement proposed by AEPS with its

subcontractor Paragon constituted a violation of the ostensible subcontractor rule, pursuant to which Paragon (a large business) is deemed affiliated with AEPS for purposes of the procurement, creating a *de facto* joint venture, thereby rendering AEPS other than small and ineligible for a small business award." *Id.* at 2.

With respect to Alutiiq's Supplemental Protest, the Product Team asserts that Alutiiq has failed to satisfy the "higher" burden of proof required when challenging a Product Team's decision to enter into an ADR settlement based on litigative risk. *AR* at 21. The Product Team contends that it acted reasonably when it entered into a settlement agreement with AEPS and the Contracting Officer reasonably perceived "serious litigative risk" based on the original protest of AEPS. *AR* at 21-23. The Product Team explained that the "basis for this perception stems, in part, from the fact that the FAA Product Team clearly followed up with Offeror D, which was subsequently eliminated from the competition, while not doing the same for Alutiiq where it presented a nearly identical approach to aggregating teammate experience as Offeror D." *AR* at 22.

1. Timeliness

On December 21, 2012, AEPS filed a Motion for Summary Dismissal of the Supplemental Protest. *AEPS Motion for Summary Dismissal* at 1. AEPS contends that Alutiiq knew or should have known the basis of its Supplemental Protest ground regarding the "ostensible subcontractor" rule on November 1, 2012, making Alutiiq's filing of the Supplemental Protest on December 18, 2012 untimely and in violation of the ODRA Procedural Regulations. *See id.* at 4; *see also* 14 C.F.R. § 17.15(a)(3)(i). The Product Team did not join in the Motion.

AEPS argues that Alutiiq applied the incorrect standard for timeliness in determining the triggering date for protest time limits. *AEPS Motion for Summary Dismissal* at 5. According to AEPS, Alutiiq applied the Small Business Administration's rules for filing of size protests, which hold that "the time for size protests runs from the date the protestor is notified of a proposed award," but the FAA and ODRA are neither subject to the Small Business Act nor its implementing regulations. *Id.* at 5; *see also Supplemental Protest* at 3 (asserting the protest is timely because it was filed within seven business days of learning that a formal agreement had

been reached between the FAA and the AEPS). AEPS declares that the time for Alutiiq to file a protest began running when Alutiiq "knew or should have known" about the basis for the protest – in this case, the fact that AEPS might not qualify as an eligible small business concern due to its affiliation with Paragon Systems, its proposed subcontractor. *Id.* at 1.

AEPS contends that because Alutiiq had all of the necessary information to substantiate its Supplemental Protest on November 1, 2012, this must be considered the triggering date for purposes of the ODRA filing time limits. *Id.* at 6. According to AEPS, all of the relevant information was readily available to Alutiiq after it both received the first CD of documents on October 8, 2012 and participated in an ADR telephone conference with the ODRA Neutral on November 1, 2012. *Id.* at 4. AEPS reiterated this position on January 24, 2012, when it again highlighted that Alutiiq possessed all of the information required to file its Supplemental Protest as of both October 8 and November 1, 2012, thus obligating Alutiiq to have filed its motion within seven business days of the latter date. *AEPS Comments* at 6-7; *see also* 14 C.F.R. § 17.15(a)(3)(i).

AEPS finds additional support for its contentions in the fact of Alutiiq's Initial Protest filing on November 9, 2012, noting that Alutiiq plainly believed at that time that it possessed enough information as a result of the November 1 telephone conference to file a good faith protest to the proposed settlement agreement as improper corrective action. *AEPS Motion for Summary Dismissal* at 4-5. AEPS argues that the same underlying information Alutiiq relied upon in the November 9 Initial Protest was again relied upon in the December 18 Supplemental Protest. *Id.* at 5. As a result, AEPS contends that under the proper standard for timeliness found in the ODRA Procedural Regulations, Alutiiq's Supplemental Protest was required to be filed by the close of business on November 9, 2012 to be timely. *Id.* at 6. AEPS ultimately requests that Alutiiq's Supplemental Protest filed on December 21, 2012 be summarily dismissed as untimely. *Id.* at 7.

In opposition to AEPS' Motion for Summary Dismissal, Alutiiq asserts that its Supplemental Protest was timely and that AEPS's Motion must be denied. *Alutiiq's Response to AEPS Motion for Summary Dismissal* at 5. Alutiiq argues that, as required by the ODRA Procedural Rule § 17.15(b)(5), Alutiiq included in its Supplemental Protest the factual basis for the protest's

timeliness, asserting that its Supplemental Protest is timely because it was filed within seven business days of the date upon which it learned that there was a formalized settlement agreement awarding a contract to AEPS – December 7, 2012. *Supplemental Protest* at 3.

Alutiiq maintains that the triggering event for the filing time limits was the Contracting Officer's formal agreement to make an award to AEPS as part of the settlement with the FAA. *Alutiiq's Response to AEPS Motion for Summary Dismissal* at 5. It was not, as AEPS claims, triggered by either Alutiiq's receipt of a copy of the original record or its notification by the FAA that a settlement between the FAA and AEPS was being contemplated. *Id.* at 5. Alutiiq contends that it would have been impossible to file any protest before December 7, despite unofficial knowledge of a potential settlement between the parties, because AEPS was not a contract awardee until the Settlement Agreement was finalized. *Id.* Alutiiq notes that until this Settlement Agreement was finalized, Alutiiq was still the functional contract awardee and no official agreement had yet been made to award the contract to AEPS. *Id.* at 3. Thus, the eligibility of AEPS to be awarded a contract based on a small business classification was irrelevant until the contract was actually awarded to AEPS through the Settlement Agreement. *Id.* Before the finalized Settlement Agreement, there had been no formal action taken by the Contracting Officer which could be protested by Alutiiq. *Id.* at 4.

The ODRA Procedural Rules regarding timeliness of bid protests are strictly construed and provide for summary dismissal of untimely protests. *Protest of Security Aviation*, 11-ODRA-00577; *see also* 14 C.F.R. § 17.19(a). The ODRA Regulations at §17.15(a)(3) require that protests related to matters other than alleged solicitation improprieties be filed by the later of seven business days after the date the protestor knew or should have known of the grounds for the protest, or five business days after the date on which the FAA Product Team holds a post-award debriefing requested by the protestor. 14 C.F.R. § 17.15(a)(3). While the Regulations make clear that the ODRA has the general authority to modify timeframes in connection with bid protests, it nevertheless lacks authority to modify the time limitations specifically regarding the filing of protests. 14 C.F.R. § 17.13(c); *Protest of Security Aviation, supra*.

The timeliness rules set forth in §17.15(a)(3) for the filing of protests at the ODRA apply only to "post-award" protests filed by interested parties. *Protest of Accenture National Security Services*, 08-TSA-045; *see also Protest of CGH Techs. Inc.*, 10-ODRA-00556 (discussing the two filing timelines for post-award protests); *Protest of Water & Energy Sys. Tech., Inc.*, 06-ODRA-00373 (denying motion to dismiss for lack of timeliness with regard to post-award bid submission protests). The ODRA consistently has held that the regulations found in Rule 17.15(a)(3) only apply to protests made after "post-award debriefings" have been held or "final award decisions" have been rendered. *Id.*

Because Section 17.15(a)(3) applies only to post-award protests, Alutiiq's Supplemental Protest was filed in accordance with the ODRA timeliness regulations. The proper date on which the filing deadlines are triggered is the date on which a final award decision is rendered by the FAA Product Team. Here, the record shows that the final award decision was made on December 6, 2012 – the date on which the FAA Product Team and AEPS executed the ADR settlement agreement, *AR* at 20,[1] because an award is not considered final until a contract award has actually been made.[2] Instead of focusing on the date that the ADR settlement agreement was executed, however, AEPS focuses on the date when Alutiiq purportedly was in possession of the knowledge of the proposed settlement between the FAA Product Team and AEPS cancelling Alutiiq's contract. *AEPS Motion for Summary Dismissal* at 4. AEPS' belief that this date is the triggering date for protest filing is incorrect. Because there had been no final contract awarded to AEPS at the time it claims that Alutiiq should have filed its Supplemental Protest grounds, any protest by Alutiiq at that time regarding the eligibility of AEPS would have been improper, premature and

[1] The FAA appears to concede that Alutiiq did not consider the contract award to AEPS to be final at the time at which it filed its Initial Protest. *AR* at 19 (recognizing that Alutiiq initially protested the proposed award rather than a final contract award).

[2] The GAO has previously held that informal meetings discussing possible contract awards are insufficient to be considered final such that an interested party's protest timeline begins running. *Tosco Corp.*, 1997 U.S. Comp. Gen. LEXIS 2603, *10 (1977) (holding protestor reasonably construed correspondence to mean that no final award decision had been made). There is no reason for a bidder to file a protest when it reasonably believes, based on correspondence with the offeror, that a contract is still in a pre-decisional stage. *Id.* at 9. A "reasonable misinterpretation of the substance of a conversation does not operate to deny a party of [a bidder's] right to protest in an otherwise timely manner." *Id.* at 11. Additionally, under the ADR rules applied in the District Court for the District of Columbia, mediation agreements will not bind the parties unless they are reduced to writing and signed by counsel and the parties. D.D.C. LCvR 84.7(f). . The ODRA adopts this reasoning and holds in this case that any mediation agreement, including the discussed settlement agreement, did not bind the parties until it was fully executed on December 6, 2012.

speculative. *Protest of Accenture National Security Services*, 08-TSA-045 ("any filing of the grounds prior to the completion of the re-evaluation process would have been both premature and speculative"); *cf. Tosco Corp.*, 1997 U.S. Comp. Gen. LEXIS 2603.

In *Accenture*, the leading ODRA decision on this issue, the protestor challenged an award of a contract for implementation and business operations support services in connection with the Transportation Security Administration's ("TSA") Secure Flight Program. *Id*. After bids had been submitted and a protest filed by the losing bidder and sustained by the ODRA in the *Protest of Deloitte Consulting*, 08-TSA-036, TSA issued an amended solicitation and re-evaluated certain factors in order to properly conduct a life cycle cost analysis for the contract's option years as required by the original solicitation. *Id.* While Accenture had won the contract award during the original round of bidding, it became the losing bidder upon re-evaluation of the bids under the amended solicitation. *Id.* The timeliness of Accenture's protest to the final award was challenged because it was not filed within seven business days of the receipt of the letter informing the parties that certain technical factors would not be re-evaluated. *Id.* The ODRA held that any filing of a protest to the final contract award by Accenture prior to the completion of the re-evaluation process would have been improper, because Accenture remained in contention for the award until the award decision was announced and because Accenture was still considered the winning bidder until its status was re-evaluated. *Id.*

To require an awardee to file a protest as a precautionary, and potentially unnecessary protection in the event that it might not win the contract under a possible re-solicitation, would be directly contrary to the policy of the FAA's Acquisition Management System ("AMS"). *Id.* (finding that it cut against the purpose of the AMS to require Accenture to file a precautionary protest). The AMS is designed to promote streamlined procedures and efficiency in the government contract disputes process. *Id.* Obligating Alutiiq to file its Supplemental Protest grounds before the contract was even officially awarded to a different bidder would be impractical and inefficient.

Because Alutiiq's Supplemental Protest was filed within seven days of the effective date of the ADR settlement agreement that awarded the contract to AEPS, the ODRA finds Alutiiq's Supplemental Protest filed on December 18, 2012 to be timely pursuant to ODRA Rule

17.15(a)(3). The ODRA, therefore, denies AEPS's Motion for Summary Dismissal of the Supplemental Protest for lack of timeliness.

2. Review of Settlement Agreements

The Product Team asserts, based on ODRA precedent established in the *Protest of Communication Technologies, Inc. ("COMTek")*, 03-ODRA-00257 and the *Protest of Computer Assocs. Int'l, Inc.*, 00-ODRA-00173, that "[t]he ODRA grants deference to a [contracting officer's] determination as to the extent of litigative risk that exists and, absent extraordinary circumstances, has been unwilling to second-guess such a decision by the [contracting officer]." *AR* at 21. The Product Team further contends that if the ODRA were to overturn the settlement with AEPS, it would create a "chilling effect for future ADR efforts and negotiations." *AR* at 21, 24. To the extent that the Product Team asserts that the ODRA is precluded from any meaningful review of a decision to enter into an ADR settlement agreement or the terms of the corrective action taken, it misconstrues these ODRA precedents.

In the *Protest of Computer Associates International, Inc*., the ODRA reviewed a reverse protest by the intervenor in the *Protest of Tivoli Systems, Inc*., 00-ODRA-00171, against corrective action that was agreed upon between the protester and a product team, and that was formalized in an ADR settlement agreement. The challenged corrective action involved a re-evaluation of technical proposals of the protester and intervenor after the issuance of an amendment to the solicitation and the submission of revised technical proposals. *Id.* The intervenor filed its reverse protest against the corrective action, prior to the issuance of the solicitation amendment and before the withdrawal of the protest by the protester based on the ADR resolution. *Id.* The reverse protest challenged the propriety of the decision to enter into a settlement agreement by alleging that the original protester could not have been able to demonstrate prejudice. *Id.* The reverse protest also challenged the nature of the corrective action as causing "prejudice, confusion and uncertainty" that would be "more damaging to the integrity of the procurement process" than it would prejudice the protester. *Id.*

The product team defended its corrective action on the merits, arguing that it was reasonable and appropriate based on the facts. The ODRA consolidated the protests of *Computer Associates* and *Tivoli Systems* for adjudication and issued a decision recommending that the intervenor's protest be denied and holding that the issue was not whether it would have sustained the protests, but rather, whether the product team acted properly and in accordance with the AMS when it entered into a settlement agreement with the protester. *Id.* The ODRA explained that under the AMS, such settlements are to be "encouraged and enforced" when there is a reasonable perception of "litigative risk" on the part of the contracting officer. *Id.*

The ODRA distinguished the issues of (1) whether there was a reasonable perception of litigative risk in support of the decision to settle from (2) whether the nature of the ensuing corrective action was appropriate and had a rational basis. *Id.* Moreover, it was in the context of reviewing whether the contracting officer's perception of litigative risk had a rational basis that the ODRA declined to conduct a "trial within a trial." *Id.* In a case where the protester had not intervened in the challenge to its contract award, the ODRA refused to adjudicate the underlying protest in the context of a challenge to a settlement agreement reached in ADR. *Id.* The ODRA then found that the issue for adjudication in that case was whether the corrective action set forth in the settlement agreement had a rational basis and was consistent with the AMS. *Id.* The ODRA went on to review the issue of whether the corrective action constituted an impermissible auction under the AMS. *Id.* In that case, the ODRA concluded that the corrective action arising from the ADR settlement had a rational basis, was supported by substantial evidence, and was not "arbitrary, capricious, or an abuse of discretion." *Id.*

Similarly, in the *Protest of Communication Technologies, Inc. ("COMTek")*, 03-ODRA-00257, the protester challenged, as lacking a rational basis, a decision to take corrective action as well as the corrective action itself. Specifically, the protester challenged a determination made pursuant to ADR proceedings in a prior protest challenging the protester's eligibility for award due to its affiliation with a large business. *Id.* Notably, in the prior protest, the protester had decided not to participate as an intervenor, despite its status as awardee. *Id.* As part of the ADR effort in the prior protest, the contracting officer sought additional information from the protester as to whether

it was eligible for award due to its affiliation with a large business, but the protester provided only incomplete information. *Id.* Reviewing the information received, the contracting officer determined that the protester in fact was not eligible and took corrective action. *Id.* In this regard, the ODRA observed,

> There were two opportunities for [the protester] to make sure that the Product Team had complete information about its relationship with [its subcontractor]. First, there is not dispute that [the protester] was notified of the [prior] protest and afforded an opportunity to participate as an interested party intervenor and that, for unexplained reasons, it did not do so. Second, when asked for a copy of the [protester's] Teaming Agreement, there is no dispute that [the protester] did not furnish what it now contends was the complete document.

Id. In the protester's subsequent challenge to this determination, the ODRA found that there was a rational basis for the contracting officer's perception of litigative risk and decision to take corrective action, which included termination of the protester's contract for convenience. *Id.*

In the instant Protests, the Product Team's interpretation of *Computer Associates* and *Communication Technologies* could be viewed as advocating that a contract award made pursuant to an ADR process is unreviewable, even in circumstances where a protester might be ineligible, or its proposal nonresponsive. *AR* at 24-25. Such an approach would actually subvert, rather than promote, the goals of ADR by allowing decisions made thereunder to be shielded from review. The result would be inconsistent with the principal fundamentals of the AMS, i.e., competition, high standards of conduct, professional ethics, and public trust. *AMS Policy §* 3.1.3 (Jan. 2013).

The precedents established in *Computer Associates, supra,* and *Communication Technologies, supra,* provide that, in reviewing a contracting officer's determination to settle a protest and take corrective action, the ODRA first considers whether the protester participated in the earlier proceeding, which Alutiiq did in this case. The ODRA next considers whether the contracting officer had a rational basis to believe that the grounds of protest might be successful and presented litigative risk, based on the information he or she had at the time. Here, the ODRA already has concluded that as part of the corrective action Alutiiq properly was found ineligible for award.

See Discussion infra at 34 – 39. Finally, the ODRA considers whether the end result of the corrective action has a rational basis and is consistent with the AMS. *Id.* The ODRA accordingly addresses this aspect of Alutiiq's Supplemental Protest in the discussion below.

3. AEPS' Relationship with its Subcontractor

By law the FAA is exempted from the normal small business contracting rules for Government procurements. 49 U.S.C. § 40110(d)(2)(D) (2006). Small Business Administration ("SBA") rules, regulations, and decisions therefore are not binding on the FAA. They may, however, be viewed as persuasive authority as long as they do not conflict with the principles of the AMS. *Protest of HyperNet Solutions Inc.*, 07-ODRA-00416; *See also* 49 U.S.C. § 40110(d)(4) (stating that all bid protests and contract disputes shall be resolved through the authority of the FAA Administrator).

Determinations of whether an offeror complies with the ostensible subcontractor rule are "intensely fact-specific given that they are based upon the specific solicitation and specific proposal at issue." *Size Appeals of CWU, Inc., et al.*, SBA No. SIZ-5118, at 12 (2010). The question of whether an offeror is unduly reliant on a subcontractor is determined by considering the overall circumstances. *Alutiiq Educ. & Training*, SBA No. SIZ-5192, at 13. Thus, an ostensible subcontractor relationship will more likely be found when the facts show a subcontractor will exercise substantial control over the project through: (1) the use of the subcontractor's personnel in key positions, (2) the use of substantial numbers of subcontractor personnel in rank and file positions, and (3) the use of the subcontractor to perform work that is "primary and vital" to contract performance. *Id.* The fact that a subcontractor will perform a solicitation requirement does not, by itself, establish an ostensible subcontractor relationship. *Onopa Mgmt.*, SBA No. SIZ-5302, at 16. Rather, the subcontractor's performance must be considered in the context of the overall goal of the contract. *Id.* at 16; *Size Appeal of The Patrick Wolffe Group, Inc.*, SBA No. SIZ-5235, at 9-10 (2011).

In the instant procurement, the Solicitation sought to award a comprehensive contract for "National Security Officer Program services to the FAA Western Service Area." *FF* 1. The statement of work goes on to state in greater detail that the services encompass "all labor, supervision, materials, equipment, transportation, training, and management necessary to provide SO services in accordance with the stated requirements . . . ." *FF* 8. The AEPS proposal indicates that its relationship with its subcontractor, Paragon, is clearly defined. *FF* 37. Specifically, it states that AEPS is responsible for providing overall program management of the Contract. *Id.* Additionally, AEPS is responsible for providing all security services and employees for sites in [DELETED] of the nine states covered by the Western Service Area. *Id*. Its subcontractor, Paragon, is responsible for providing security services and employees for sites in [DELETED] of the nine states. *Id.* Even though Paragon may be responsible for providing a number of the SOs to the sites in these states, the objective of the contract is to deliver *overall security and management* services to the entire Western Service Area.

A primary factor to be considered in determining compliance with the ostensible subcontractor rule is which concern is managing the contract, and will be providing the key employees. *Size Appeal of Alutiiq Educ. & Training, LLC.*, SBA No. SIZ-5371, at 8 (2012), *citing Size Appeal of Paragon TEC, Inc*., SBA No. SIZ-5290 (2011). Although undue reliance may be inferred from an offeror's use of a large number of rank and file employees from a subcontractor combined with subcontractor personnel in key contract positions, such facts may be insufficient to establish the existence of an ostensible subcontractor relationship if other facts show all control and decisionmaking responsibility reside with the prime contractor. *Size Appeal of J.W. Mills Mgmt., LLC*, SBA No. SIZ-5416, at 8 (2012).

In the present case, the record demonstrates that AEPS provided a detailed description of the contract's management positions. *FF* 39. AEPS' proposal specifies which employees will occupy the key management positions. *Id*. At the top of AEPS' management chain, the individual ultimately responsible for execution of the contract is the AEPS President and CEO, Bredgitt Walker. *Id*. Beneath Ms. Walker is AEPS Vice President of Operations, Dan Walker. *Id.* Finally, the Project Manager for the contract is AEPS employee, [DELETED], who is to be

responsible for day to day compliance with the contract requirements. *Id.* It is only at the local on-site supervisor level at designated locations that Paragon employees will be in management positions, and even then, the Paragon employees will be selected and managed by an AEPS employee. *Id.* Thus, the record indicates that AEPS and not Paragon will exercise substantial control over management of the project.

As for terminology used in AEPS' proposal, the determination of whether an ostensible subcontractor relationship exists between a prime and subcontractor turns on the substance of the relationship, i.e., whether "a large subcontractor is performing or managing the contract in lieu of a small business . . . ." *Id.* at 9 (quoting *Size Appeal of Colamette Constr. Co.*, SBA No. SIZ-5151, at 7 (2010)). In this regard, the ODRA does not consider passing references in AEPS' proposal to Paragon as its teammate to establish an ostensible contractor relationship. The SBA has held that simply stating that a contractor and subcontractor are a "team" is insufficient to find the prime contractor is unduly reliant on the subcontractor. *E.g.*, *J.W. Mills*, SBA No. SIZ-5416, at 8; *Size Appeal of Paragon TEC, Inc.*, SBA No. SIZ-5290, at 10 (2011).[3] As discussed above, the record shows that AEPS' proposal expressly contemplates that AEPS will take the lead in performing and managing the primary and vital functions of the contract. *FF* 39. Therefore, the mere fact that AEPS and Paragon are referenced as a "team" in the proposal does not establish that a joint venture exists between the companies or a violation of the ostensible subcontractor rule.

Under the AMS, in order for AEPS to be eligible for award, the relationship between AEPS and Paragon must comport with AMS Clause 3.6.1-7, Limitations on Subcontracting, and AMS Guidance T3.6.1.A. 9.c.[4] FF 4. When considered as a whole, AEPS' proposal indicates that the ultimate management decisions and control of the contract will reside with AEPS rather than with Paragon. *FF* 39. The record further shows that AEPS and Paragon are not in a mentor-protégé relationship. *FF* 41. Moreover, the record reflects that, while Paragon may perform specific

[3] Moreover, even when the term "team" refers to a relationship where the subcontractor will provide consulting and administrative support, such a reference, standing alone, does not justify classifying the two companies as affiliated. *J.W. Mills*, SBA No. SIZ-5416, at 7-9.

[4] The AMS rules in this regard are similar to those promulgated by the SBA. *Compare* 13 C.F.R. Parts 121 and 124 with *AMS Guidance* T3.6.1.A.8 – 9.

tasks at some of the sites involved, AEPS will provide the staff for key contract positions and will exercise overall control and management of the contract. *FF* 37-42. Also, the record shows that Paragon will be performing less than 50 percent of the work under the Contract, as required by the AMS and in accordance with the Solicitation's requirements. *FFs* 4 and 42. The ODRA thus finds that Alutiiq has not demonstrated by substantial evidence that the use of Paragon by AEPS creates an ostensible subcontractor relationship. Therefore, the end result of the corrective action taken in this case is consistent with the AMS and does not lack a rational basis.

D. Deficiencies in the Administrative Record

By statute and by delegation, the ODRA prepares Findings and Recommendations based on substantial evidence that is presented in the Administrative Record. The ODRA prepares findings and recommendations for the FAA Administrator which are adopted in a Final Order which is subject to appeal under 46 U.S.C. §46110. Consistent with the Administrative Procedure Act, 5 U.S.C. §§ 554 and 556, which applies to ODRA adjudications, the phrase "substantial evidence" means that the ODRA weighs whether the preponderance of the evidence shows a lack of a rational basis due to a failure to comply with the AMS. *Protest of Adsystech, Inc.*, 09-ODRA-00508. In reviewing the record, the ODRA cannot ignore patent and unexplained defects in the record that could have potentially ethical or criminal implications.

It is well established that offerors are responsible for providing accurate information in their proposals, as well as on the Business Declaration form, which must be completed in accordance with the AMS. *AMS Procurement Guidance* T.3.6.1 (April 2011); *Protest of International Services, Inc.*, 02-ODRA-00224. Given that certification fraud may result in criminal penalties, the ODRA considers a signed certification as establishing a rational basis for acceptance by a

contracting officer, *unless* there is evidence to the contrary.[5] *Protest of Miller Prot. Servs., Inc.*, 12-ODRA-00616 (finding that it was not irrational for the contracting officer to accept the 8(a) certification of the contract awardee when the contracting officer had been provided with verification from the SBA that the company was 8(a) certified and the CEO for the contractor had signed a Business Declaration form stating the company was an 8(a) company).

After the administrative record had been closed in this case, the ODRA noted during its review of the record that the copies of the certifications provided in the Agency Response with respect to AEPS and its subcontractor potentially raised serious factual issues of responsibility and eligibility. In this regard, the AEPS' Proposal expressly included statements that its subcontractor, Paragon, *is* currently debarred, suspended, proposed for debarment, or declared ineligible for the award of contracts by at least one Federal agency. *FF* 36. In addition, the Proposal stated that Paragon or its principles *have been* convicted of civil judgments for fraud or criminal offences in relation to the procurement or performance of a Government contract. *Id.* The Proposal further indicated that Paragon or its principles *currently are* under indictment for civil or criminal charges for fraud or criminal offences in relation to the procurement or performance of a Government contract. *Id.* Moreover, the Proposal indicated that within the past three years Paragon *has been* delinquent on Federal taxes in an amount greater than $3,000 and has had Federal contracts terminated for default. *Id.* While the ODRA recognized that it was possible that the answers contained in the referenced certifications were the result of clerical error, there was no evidence in the record that any clarification or correction had been sought by the Product Team. *FF* 45.

Additionally, the record contained text only copies of the Business Declarations submitted by both AEPS and Paragon. *FF* 34-35. From this text, it was unclear exactly what AEPS was claiming its status to be. *Id.* Furthermore, the text did not contain any actual signatures for AEPS, and the section for Paragon stated that the "Signature field is unsigned." *Id.* Again, the ODRA

[5] Title 18 of the United States Code provides for criminal penalties if a party makes materially false, fictitious, or fraudulent statements or submission of documents containing such statements in any matter within the jurisdiction of an executive branch of the Government. 18 U.S.C. § 1001 (2006).

recognized that, while it is possible that the proposal submission process contemplated the use of electronic signature, the documents submitted by the Product Team in the Agency Response evidenced neither a physical or electronic signature. Given that the record showed that AEPS' subcontractor could be responsible for performing a substantial portion of the work under the contract, *FF* 42, and the technical evaluators considered favorably the strong experience of AEPS' subcontractor in the evaluation of AEPS' proposal, *FF* 49, these patent and unexplained defects in the record required clarification and resolution.

The ODRA therefore reopened the record and directed the parties to address these issues. *FF* 80. In response to the ODRA's direction, the Product Team conducted an investigation and confirmed that physical signatures were not reflected on the electronic copies of AEPS' Section K certifications provided to the ODRA in the Agency Response. *FF* 81. The Product Team also provided copies of the physically signed Section K certifications in supplemental exhibits to the Agency Response. *Id.*

In its May 1, 2013 Supplemental Response, the Product Team also addressed the representations set forth in AEPS' proposal "concerning issues of suspension and debarment, judgments or other offenses, tax delinquency or default terminations" relative to its subcontractor, Paragon. *FF* 83. In this regard, the Product Team acknowledged that it had overlooked the information during its preliminary review of the AEPS proposal, but that it had received from AEPS, and independently verified from other Government sources, information indicating that AEPS' subcontractor was in fact eligible. *FF* 82. AEPS further confirmed the explanation set forth in the Product Team's Supplemental Response on this issue. *FF* 83.

The record thus establishes that Alutiiq was found properly to be ineligible for award; that AEPS' representations in question were inadvertent errors that did not render it ineligible; and the required signatures had been provided. *FF* 82. The ODRA accordingly finds no prejudicial impact as a result of the Product Team's failure to seek clarification and correction of these issues. *Protest of Adsystech, Inc.*, 09-ODRA-00508 (In order to sustain a protest, a protester must

demonstrate that but for the agency's inappropriate action or inaction, the protester would have had a substantial chance of receiving the award). [6]

III. CONCLUSION

In accordance with the foregoing, the ODRA recommends that Alutiiq's Initial Protest and Supplemental Protest be denied.

-*S*-
Marie A. Collins
Dispute Resolution Officer and Administrative Judge
FAA Office of Dispute Resolution for Acquisition

APPROVED:

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

[6] Alutiiq, in its May 6, 2013 Reply, raised a question regarding the information reflected in the SAM Report for Paragon Systems, Inc., which was submitted by the Product Team in a supplemental exhibit. *FF* 84. Upon review of the information, the ODRA does not consider this comment by Alutiiq to rise to the level of an allegation and has no bearing on the limited issues that the parties were directed to brief. *FF* 81. The ODRA further notes that the particular representation by Paragon Systems pertains to a Federal Acquisition Regulation clause that is not applicable to FAA acquisitions.