

¹ The Contracting Officer issued a pre-award notice to all offerors of potential awardees on December 19, 2012. *AR* Tab 7. As of May 20, 2013, the date of the Agency Response, “the FAA has not yet awarded the new CWO contracts.” *AR* at 6. The Protest also included challenges to the awards of contracts to EKO Systems, Inc., WX Solutions, Inc., and ATS Meteorology, Inc. docketed as 13-ODRA-00634, -00635, and -00636, respectively.

observer personnel who will provide augmentation and/or back up to the Automated Observing Systems, and to take manual observations as necessary.” FF 2. The Solicitation sought services in 17 geographical areas, which have been sub-divided into those in which the awards will be set aside for small businesses and those for 8(a) businesses. FF 11. The CWO Product Team intended to make 17 awards under the Solicitation. FF 12. The DMS Protest challenges the planned award of Groups 3 and 13 by the CWO Product Team to CJRA on the grounds that the awardee is affiliated with its proposed subcontractor Control Systems Research, Inc. (“CSR”), which would make CJRA ineligible for award as a small business pursuant to the terms of the Solicitation. *Protest*. For the reasons discussed herein, the ODRA recommends that the Protest be sustained as to CJRA.

II. FINDINGS OF FACT

A. The Solicitation

1. The CWO Product Team issued Solicitation DTFAWA-12-R-08591 for Contract Weather Observation (“CWO”) services on May 3, 2012, and posted four subsequent Amendments to the Solicitation. *Agency Response* (“AR”) Tabs 1-5.
2. The Solicitation’s purpose is “to acquire the services of weather observer personnel who will provide augmentation and/or back up to the Automated Observing Systems, and to take manual observations as necessary.” AR Tab 1 at C1.1.
3. Section 1.2 “Background” states:

The Federal Aviation Administration (FAA) is responsible for providing aviation weather observation services at selected airports throughout the United States. FAA intends to satisfy this responsibility in part, through the use of Automated Observing Systems, FAA employees, and contract weather observer (CWO) personnel.

AR Tab 1 at C1.2.

4. Section 1.4 “Automated Observing Systems Functional Capabilities” states:

There are two types of Automated Observing Systems installed in the locations listed in Section J: 1) Automated Surface Observing System (ASOS) and 2) Automated Weather Observing System (AWOS). The Functional Capabilities are listed below:

1.4.1 **ASOS Functional Capabilities.** ASOS is a modular computerized system, designed to automatically collect, process, and archive weather sensor measurement data. The ASOS weather report is readily available to a variety of users at both local and remote locations on a 24-hour basis. The ASOS weather report is disseminated into the Weather Message Switching Center Replacement (WMSCR), is also broadcast locally via a radio transmitter, and can be accessed by telephone. National Weather Service (NWS) personnel via an ASOS Operations and Monitoring Center (AOMC) remotely monitor the operation and performance of ASOS....

1.4.2 **AWOS Functional Capabilities** The AWOS is a modular computerized system that automatically measures one or more weather parameters, analyzes the data, archives the data, prepares a weather observation that consists of the parameters measured, and broadcasts the observation to the pilot using an integral very high frequency (VHF) radio or an existing navigational aid (NAVAID) which may provide long-line dissemination of the observations....

AR Tab 1 at C1.4.

5. Section C.4.5 “Senior Weather Observer Assignment” states:

The contractor must designate a senior employee at each site as “Senior Weather Observer.” The contractor must assign the DOL Senior Weather Observer employee class to the Senior Weather Observer. An individual designated as “Senior Weather Observer” must possess, at a minimum, one year experience as an NWS certified Weather Observer performing weather observations. The Senior Weather Observer must be the contractor’s on-site representative and as such must be the contractor’s initial point of

contact (POC) at each site by the COTR/TOR, CO, and/or NWS representative. At a minimum, the Senior Weather Observer must be able to discuss and act on behalf of the contractor in the following areas: site staffing/work and leave schedule, implementation and continuation of the contractor's Quality Assurance Management Plan, and initial POC for any NWS or FAA site inspections.

AR Tab 1 at C.4.5.

6. Section H.1 TYPE OF CONTRACT (AMS 3.2.4-1) states that “[t]he FAA intends to award a firm fixed price contract(s) with an economic price adjustment resulting from this screening information request (SIR). This is a Small Business Set-Aside, with three groups set aside for 8a. AR Tab 2 at H.1 (emphasis in original).

7. Section H.13 “WAGE RATE DETERMINATION” states:

H.13.1 The wage determination issued under the Service Contract Act of 1965 by the Department of Labor (DOL) for Occupation Code 30621, Weather Observer, Upper Air and Surface shall apply to this contract. Any and all wage determinations that are applicable to weather observation services are attached and made a part of hereof and must be adhered-to by the contractor and/or subcontractor(s). However, this provision must not relieve the contractor or any subcontractor of any obligation under any State minimum wage law which may require the payment of a higher wage. THE WAGE RATES INCORPORATED UNDER CONTRACT FOR OR DURING A FISCAL YEAR WILL BE THE SAME WAGE RATES, APPLICABLE (FOR ALL COUNTIES UNDER THAT WAGE DETERMINATION) FOR THE ENTIRE FISCAL YEAR.

AR Tab 1 at H.13 (emphasis in original).

8. Section H.24 “Key Personnel and Facilities AMS 3.8.2-17 (May 1997)” states:

(a) The personnel and/or facilities as specified below are considered essential to the work being performed hereunder and may, with the consent of the contracting parties, be changed from

time to time during the course of the contract. (b) Prior to removing, replacing, or diverting any of the specified personnel and/or facilities, the Contractor shall notify in writing, and receive consent from, the Contracting Officer reasonably in advance of the action and shall submit justification (including proposed substitutions) in sufficient detail to permit evaluation of the impact on this contract. (c) No diversion shall be made by the Contractor without the written consent of the Contracting Officer. (d) provides space to fill in The key personnel and/or facilities under this contract are: . . . ***Key Personnel is the Senior Weather Observer.*** (End of clause).

AR Tab 1 at H.24 (emphasis added).

9. Section H.25 “NORTH AMERICAN INDUSTRY CLASSIFICATION SYSTEM CODE (NAICS) AND SMALL BUSINESS SIZE STANDARD” states that “[t]he NAICS for this acquisition is 541990 –Other Professional, Technical and Management Services. The small business size standard under the above NAICS code is \$7.0 million in annual average gross revenue of the concern over the last three fiscal years.” AR Tab 1 at H.25.
10. Section I.12 “AMS CLAUSE 3.6.2-40 NONDISPLACEMENT OF QUALIFIED WORKERS (APRIL 2009)” states:

(a) The contractor and its subcontractors must, except as otherwise provided herein, in good faith offer those employees (other than managerial and supervisory employees) employed under the predecessor contract whose employment will be terminated as a result of award of this contract or the expiration of the contract under which the employees were hired, a right of first refusal of employment under this contract in positions for which employees are qualified. The contractor and its subcontractors must determine the number of employees necessary for efficient performance of this contract and may elect to employ fewer employees than the predecessor contractor employed in connection with performance of the work. Except as provided in paragraph (b), there must be no employment opening under this contract, and the contractor and any subcontractors must not offer employment under this contract, to any person prior to having complied fully with this obligation. The contractor and its subcontractors must make an express offer

of employment to each employee as provided herein and must state the time within which the employee must accept such offer. In no case must the period within which the employee must accept the offer of employment be less than 10 days.

(b) Notwithstanding the obligation under paragraph (a) above, the contractor and any subcontractors:

(1) May employ under this contract any employee who has worked for the contractor or subcontractor for at least 3 months immediately preceding the commencement of this contract and who would otherwise face lay-off or discharge;

(2) Are not required to offer a right of first refusal to any employee(s) of the predecessor contractor who are not service employees within the meaning of the Service Contract Act; and

(3) Are not required to offer a right of first refusal to any employee(s) of the predecessor contractor whom the contractor or any of its subcontractors reasonably believes, based on the particular employee's past performance, has failed to perform suitably on the job.

(c) The contractor must, not less than 10 days before completion of this contract, furnish the Contracting Officer a certified list of the names of all service employees working under this contract and its subcontracts during the last month of contract performance. The list must contain anniversary dates of employment of each service employee under this contract and its predecessor contracts either with the current or predecessor contractors or their subcontractors. The Contracting Officer will provide the list to the successor contractor, and the list must be provided on request to employees or their representatives.

(d) If it is determined, pursuant to regulations issued by the Secretary of Labor (Secretary), that the contractor or its subcontractors are not in compliance with the requirements of this clause or any regulation or order of the Secretary, appropriate sanctions may be imposed and remedies invoked against the contractor or its subcontractors, as provided in Executive Order 13495, the regulations, and relevant orders of the Secretary, or as otherwise provided by law.

(e) In every subcontract entered into in order to perform services under this contract, the contractor will include provisions that ensure that each subcontractor will honor the requirements of

paragraphs (a) through (b) with respect to the employees of a predecessor subcontractor or subcontractors working under this contract, as well as of a predecessor contractor and its subcontractors. The subcontract must also include provisions to ensure that the subcontractor will provide the contractor with the information about employees of the subcontractor needed by the contractor to comply with this clause. The contractor will take such action with respect to any such subcontract as may be directed by the Secretary as a means of enforcing such provisions, including the imposition of sanctions for non-compliance; however, if the contractor, as a result of such direction, becomes involved in litigation with a subcontractor, or is threatened with such involvement, the contractor may request that the United States enter into such litigation to protect the interests of the United States.

AR Tab 1 at I.12.

11. ATTACHMENT J-3 “GEOGRAPHICAL MAPS AND DESCRIPTIONS”
provides:

The following areas are Small Business set-asides:

Area 1: Florida and Puerto Rico

Area 2: Alabama, Georgia, Mississippi, and South Carolina

Area 3: Tennessee, Kentucky, West Virginia, and North Carolina

Area 4: Virginia, District of Columbia, Maryland, Delaware, Pennsylvania, and Western New York State,

Area 5: Maine, New Hampshire, Connecticut, Vermont,

Massachusetts, Rhode Island, and Eastern New York State

Area 7: Texas

Area 8: New Mexico, Oklahoma, Kansas, Arkansas, and Louisiana

Area 9: North Dakota, South Dakota, Nebraska, Minnesota, Iowa, and Missouri

Area 10: Wisconsin, Illinois, and Indiana

Area 11: Michigan and Ohio

Area 13: California and Hawaii

Area 14: Nevada, Arizona, Utah, Colorado, Wyoming, Montana, Idaho, Washington, and Oregon

Area 16: Alaska Peninsula and Gulf Coast Alaska

Area 17: Gulf Coast and South East Alaska

Area 18: North Slope and North Central Alaska

The following areas are 8a set-asides:

Area 6: Maine

Area 12: Ohio

Area 15: California and Nevada

AR Tab 5 at Attachment J.3.

12. Provision L.3 NUMBER OF AWARDS states:

Of the eighteen (18) possible awards under this SIR (i.e. 1 award per group), three groups are set aside for 8a businesses. No more than two groups may be awarded to:

(a) a single business concern that is a potential prime contractor, whether (1) by itself, (2) as part of a joint venture (as defined in AMS clause 3.2.2.7-8) or (3) in a subcontracting arrangement, or

(b) a single mentor, whether as part of a joint venture, or in a subcontracting arrangement.

AR Tab 1 at L.3.

13. Provision L.8 “NORTH AMERICAN INDUSTRY CLASSIFICATION SYSTEM CODE (NAICS) AND SMALL BUSINESS SIZE STANDARD” states:

The NAICS for this acquisition is 541990 –Other Professional, Technical and Management Services. The small business size standard under the above NAICS code is \$7.0 million in annual average gross revenue of the concern over the last three fiscal years. To be eligible for award as a small business, the offeror must meet the small business size standard at the time of proposal submission and through award. Joint ventures are permitted but Mentor-Protégé joint ventures are not permitted.

For size determination purposes, the FAA will consider a company’s affiliation with another entity under the SBA general principles of affiliation. Small businesses may be required to provide organizational documents, organizational charts, and joint venture agreements (if applicable), and must disclose any affiliated relationships.

AR Tab 1 at L.8.

14. Provision L.10 “MINIMUM QUALIFICATION” states:

To be eligible to compete for this procurement, the offeror must have, as a minimum requirement, the experience or capabilities identified below. **FAILURE TO PROVIDE THE REQUESTED INFORMATION WITH THE PROPOSAL SUBMISSION WILL MAKE THE OFFEROR INELIGIBLE FOR CONSIDERATION OF AWARD.**

1. Provide documentation that show the offeror’s ability to cover payroll and other operating and administrative expenses to accommodate Government "in arrears" payments for work performed for period of ninety (90) days. The amount of money required to cover expenses needs to be sufficient enough to cover 90 days of the base year sites (one quarter of the firm fixed price) for the two highest dollar value groups being proposed; or if only one group is proposed, for that group. If the offeror has an existing CWO contract, the required ninety days of funding should be separate from the offeror existing operating funds.

2. Provide a copy of the NWS Certificate that shows that each proposed Senior Weather Observer is a certified weather observer. Additionally, provide a resume(s) that shows the Senior Weather Observer has a minimum of one (1) year’s experience in performing weather observations.

3. Provide a complete proposal, including Volume 1 - Offer and Other Documents, Volume II - Technical Proposal, Volume III – Past Performance and Relevant Experience and Volume IV - Price Proposal.

4. Provide an affidavit disclosing any affiliated relationships pursuant to AMS Clause 3.2.2.3-3 Affiliated Offerors. At the FAA’s request, small businesses may be required to provide documentation relating to affiliation, including but not limited to, organizational documents, organizational charts and joint venture agreements (if applicable).

The offeror is required to submit, along with the proposals, a summary (no more than two pages) which clearly demonstrates that the offeror has the minimum qualification requirements as addressed. To validate subparagraph (1) above, financial

documentation, certified by the financial institution, must be attached to support this requirement.

AR Tab 1 at L.10 (emphasis in original).

15. Provision L.12 “COMPLIANCE WITH INSTRUCTIONS” states that “[w]hen evaluating an offeror’s capability to perform the prospective contract, the FAA will also consider compliance with these instructions included in the SIR. The FAA will consider an offeror’s non-compliance with all instructions as indicative of conduct the FAA may expect from the offeror during contract performance.”

AR Tab 1 at L.12.

16. Provision L.20 VOLUME III – “PAST PERFORMANCE AND RELEVANT EXPERIENCE,” states, in part, that “[i]f an offeror’s proposal includes a subcontractor, the subcontractor’s past performance and relevant experience may be evaluated. All offerors must list all their management level personnel who have relevant contracts and subcontracts experiences.” *AR Tab 1 at L.20.1.*

17. Provision L.20.3.1 requires that:

[T]he offeror must provide the resumes of all its management level and Senior Weather Observer personnel who will have a significant role in the day-to-day management of the contract. The resume must demonstrate the personnel experience in delivering quality weather observation services. The offeror must provide a copy of the NWS Certificate that shows that each proposed Senior Weather Observer is a certified weather observer.

AR Tab 1 at L.20.3.1.

18. Provision L.21.3 requires that:

[i]n accordance with paragraph L.5, the offeror must be able to cover 90 days of contract expenses. The offeror must demonstrate that it has funds and/or a line of credit from a financial institution

equal to one-quarter of the combined base year price of the two highest-priced groups being proposed; or if only one group is proposed, for that group. The offeror shall, if necessary, include in Volume IV a letter from a financial institution documenting that the offeror has satisfied this requirement. Lines of credit from credit cards for personal use may not be applied toward the satisfaction of this requirement.

AR Tab 1 at L.21.3.

19. Provision “M.1 BASIS FOR AWARD” at “M.1.1 AWARD SELECTION” states, in relevant part:

Award will be made to the technically acceptable offeror(s) whose proposal conforms to all requirements of the SIR, has acceptable Past Performance and Relevant Experience, and offers the lowest evaluated reasonable price to the government. Technically acceptable is defined as proposals that meet all requirements of the SIR and demonstrate the technical ability to perform requirements of the Statement of Work.

* * *

The offeror who is deemed technically acceptable and has the lowest reasonable evaluated price will receive the award. However, risk assessment of high may render the proposal unacceptable and the offeror ineligible for contract award.

AR Tab 2 at M.1.

20. Subsection M.1.2 “ELIGIBILITY FOR AWARD” states: “To be eligible for award, the Offeror must meet all the requirements of the SIR. However, the FAA reserves the right to reject any and all offers if it would be in the best interest of the FAA to do so.” *AR* Tab 1 at M.1.2.

21. Subsection M.1.3 “NUMBER OF POTENTIAL CONTRACT AWARDS” states:

Of the eighteen (18) possible awards under this SIR (i.e. 1 award per group), three groups are set aside for 8a businesses. No more than two groups may be awarded to: (a) a single business concern that is a potential prime contractor, whether (1) by itself, (2) as part of a joint venture (as defined in AMS clause 3.2.2.7-8) or (3) in a subcontracting arrangement, or (b) a single mentor, whether as part of a joint venture, or in a subcontracting arrangement.

AR Tab 1 at M.1.3.

22. Provision M.2 “EVALUATION PROCESS,” at M.2.1, states that “[d]uring the evaluation process, the Government Evaluation Teams will evaluate each Offeror’s proposal using information submitted by the Offeror, (or in the case of past performance and relevant experience, obtained from outside references and other points of contact) against evaluation factors contained in Sections M.3 through M.6.” *AR Tab 1 at M.2.1.*

23. Subsection M.2.2. requires that “[a] Technical Evaluation Team will evaluate the Offeror’s technical capabilities against the evaluation sub factors in Section M.4. An unsatisfactory rating in any one of the sub factors under Factor I, Technical Proposal, will render the offeror ineligible for further consideration in the selection process.” *AR Tab 1 at M.2.2.*

24. Under the Questions and Answers with potential offerors, the question was asked: “For purposes of proposal submittal, is it acceptable to use the term ‘Site Supervisor’ or ‘Senior Weather Observer’ interchangeably within the proposal that we submit to the FAA? ‘Site Supervisor’ is the title that FAA used in the previous RFP.”

The Product Team responded, “Answer: Please use the term Senior Weather Advisor for consistency.”

AR Tab 1 at Offeror Q&A.

25. Amended Section H.25 “NORTH AMERICAN INDUSTRY CLASSIFICATION SYSTEM CODE (NAICS) AND SMALL BUSINESS SIZE STANDARD” states: “The NAICS for this acquisition is 541990 –Other Professional, Technical and Management Services. The small business size standard under the above NAICS code is \$14.0 million in annual average gross revenue of the concern over the last three fiscal years.” AR Tab 2 at Amendment 1.

26. Amended Section L.8 “NORTH AMERICAN INDUSTRY CLASSIFICATION SYSTEM CODE (NAICS) AND SMALL BUSINESS SIZE STANDARD” states:

The NAICS for this acquisition is 541990 –Other Professional, Technical and Management Services. The small business size standard under the above NAICS code is \$14.0 million in annual average gross revenue of the concern over the last three fiscal years. To be eligible for award as a small business, the offeror must meet the small business size standard at the time of proposal submission and through award. Joint ventures are permitted.

For size determination purposes, the FAA will consider a company’s affiliation with another entity under the SBA general principles of affiliation. Small businesses may be required to provide organizational documents, organizational charts, and joint venture agreements (if applicable), and must disclose any affiliated relationships.

AR Tab 2 at Amendment 1 SIR at L.8 (emphasis added).

B. Procedural History

27. On January 2, 2013, Diversified filed a protest challenging the award to CJRA on the basis of its status as a small business. *Protest* at 1.

28. On January 10, 2013, counsel for the Product Team filed a Motion to Move the Protest to the Inactive Docket (“Motion”) with the ODRA, stating that the Product Team would conduct a “fact-finding and determination regarding [the] Offeror’s

eligibility.” *Motion* at 1. In response, without objection, the ODRA deferred the adjudication of the matter. *ODRA Letter* dated January 16, 2013.

29. Counsel for the Product Team filed Memoranda from the Contracting Officer, dated March 29, 2013, finding that CJ Rogers Aviation, Inc. eligible for award. *AR* Tab 11.

30. With respect to DMS’s eligibility for award, the Contracting Officer declared:

I examined the next in line offerors for the awards made to ATS Services, and DMS is not the next in line for award because it is not the next lowest priced offeror. Even taking into account the limitation on award of two groups per Offeror under Section M 1.3, DMS would still not be next in line for award. There would still be [DELETED] because they do not exceed the two Groups per Offeror limit set forth in Section M 1.3 of the SIR.

Declaration of Katherine Petito-Peverall, dated May 20, 2013 at ¶ 17; *AR* Tab 12.

C. Contracting Officer’s Size Determination

(a) Identity of Interest

31. The Size Determination quoting SBA regulations, 13 C.F.R. § 121.103(f) states:

Affiliation may arise among two or more persons with an identity of interest. Individuals or firms that have identical or substantially identical business or economic interests (such as family members, individuals or firms with common investments, or firms that are economically dependent through contractual or other relationships) may be treated as one party with such interests aggregated. Where SBA determines that such interests should be aggregated, an individual or firm may rebut that determination with evidence showing that the interests deemed to be one are in fact separate.

AR Tab 11 at 4.

32. The Size Determination states:

CJRA has stated that it shares no familial ties or common investments with CSR. Rogers, a former employee of CSR “does not hold any economic interest in CSR.” “CJRA had no revenue in 2010. CJRA’s 2011 tax return shows total revenue of \$298,226 and CJRA’s income statement for the eleven months ending November 30, 2012 shows total revenue of \$168,190. CJRA disclosed that a portion of its revenue in 2011 and 2012 is from contracts with CSR: (1) Subcontract between CJRA and CSR from September 2011 to December 2011 with receipts to CJRA totaling \$204,034.89; (2) Subcontract between CJRA and CSR from September 2011 to December 2011 with receipts to CJRA totaling \$9,022.89; and (3) Consulting Agreement between CJRA (consultant) and CSR for technical expert consulting work on an Army National Guard Air Traffic Control Procurement from March 2012 to May 2012 with receipts to CJRA totaling \$2,487.55.

Id.

33. The Size Determination states:

I reviewed the information provided and do not find the existence of these contracts to support a finding that CJRA is economically dependent on CSR for its revenue. CJRA filed its Articles of Incorporation with the Florida Secretary of State on October 27, 2010. Prior to that date, the company was in operation as a sole proprietorship from 2005 to 2008. CJRA was dormant from 2008 until it filed its Articles of Incorporation in 2010; therefore, I believe that concluding that CJRA and CSR are affiliated based exclusively upon these 2011 contracts would discourage or hinder start-up operations. CJRA has no revenue from 2010. The bulk of CJRA’s revenue from CSR is from 2011[,] which was CJRA’s first full year of start-up operations; this amount was substantially decreased in 2012. . . CJRA has also shown that it has independent access to financing. CJRA submitted a letter from Coastal Bank & Trust Company[,] which contained the terms under which it would lend CJRA up to \$750,000 as a commercial revolving line of credit and CJRA has access to \$2,000,000 in cash belonging to David and Jane Rogers. . . .

AR Tab 11 at 5.

(b) Newly Organized Concern Rule

34. The Size Determination, quoting SBA regulations, 13 C.F.R. § 121.103(g) states:

Affiliation may arise where former officers, directors, principal stockholders, managing members, or key employees of one concern organize a new concern in the same or related industry or field of operation, and serve as the new concern's officers, directors, principal stockholders, managing members, or key employees, and the one concern is furnishing or will furnish the new concern with contracts, financial or technical assistance, indemnification on bid or performance bonds, and/or other facilities, whether for a fee or otherwise. A concern may rebut such an affiliation determination by demonstrating a clear line of fracture between the two concerns. A "key employee" is an employee who, because of his/her position in the concern, has a critical influence in or substantive control over the operations or management of the concern.

Id.

35. The Size Determination states that "Jane Rogers is the President and owns 51% of the shares of CJRA, while her husband David Rogers is Secretary and Treasurer and owns 49% of the shares of CJRA. Jane and David Rogers are the only directors of CJRA." *Id.*

36. The Size Determination states that

Mr. Rogers has not been an officer, director, principal stockholder or managing member of CSR. David Rogers has previously worked at CSR from 2004 to December 31, 2009 in various roles including a weather site supervisor, program manager, technical lead/business development from 2004 to December 31, 2009. I reviewed the descriptions for each of these positions[,] which

reference discrete functions that are more on a contract/site-specific level. . .

Id.

37. The Size Determination also states that Mr. Rogers’s prior employment with CSR was not in the nature of “to give [him] ‘critical influence in or substantive control over the operations and management of CJRA.’” *Id.*

(c) Ostensible Subcontractor Rule

38. The Size Determination, quoting SBA regulations 13 C.F.R. § 121.103(h)(4) states:

A contractor and its ostensible subcontractor are treated as joint venturers, and therefore affiliates, for size determination purposes. An ostensible subcontractor that performs primary and vital requirements (emphasis added) of a contract, or of an order under a multiple award schedule contract, or a subcontractor upon which the prime contractor is unusually reliant (emphasis added). All aspects of the relationship between the prime and subcontractors are considered, including, but not limited to, the terms of the proposal (such as contract management, technical responsibilities, and the percentage of subcontract work), agreements between the prime and subcontractor (such as bonding assistance or the teaming agreement), and whether the subcontractor is the incumbent contractor and is ineligible to submit a proposal because it exceeds the applicable size standard for that solicitation.

AR Tab 11 at 6 (emphasis in original).

39. The Size Determination states that “CSR is currently an incumbent on the CWO contracts and is ineligible for participation in this procurement as a prime contractor because it exceeds the size restriction.” *Id.*

40. The Size Determination cites to Article 4 of the Teaming Agreement, which states that CJRA and CSR are not forming a joint venture. *Id.*

41. The Size Determination cites to Sections 1.02 and 1.03 of the Teaming Agreement to establish that the Prime Contractor assumes primary responsibility for the contractual obligations and the Subcontractor will assist the Prime. *AR* Tab 11 at 7.

42. The Size Determination quotes Article 4.0 of the Teaming Agreement, Independent Contractors, which states:

The Parties hereto are independent contractors and nothing herein shall be deemed to constitute or create a joint venture, a partnership, a formal business organization, or a relationship of principal or agent. Neither Party shall have any power or authority to accept on behalf of the other any offer, agreement, or contract, or to make, incur, contract or create any claim, promise, guarantee, debt, obligation, expense or liability of any kind whatsoever in the name of or on behalf of or for the account of the other Party. Nothing in this Agreement shall be construed as providing for the sharing of profits and losses of either or both of the Parties.

Section 1.02 Prime Contractor Obligations. During the term of this Agreement, the Prime Contractor will:

a. assume primary responsibility for: i) directing the Parties' strategy and activities in pursuit of the Prime Contract; ii) the preparation and submission of all proposals to the Customer for the Program; and iii) all work under the Prime Contract except for the work to be performed by the Subcontractor under the Program as described in Exhibit A[,] which is attached hereto and incorporated herein by reference (hereinafter, the "Effort");

b. identify the Subcontractor as a proposed subcontractor in all proposals submitted for the Program;

1.03 Subcontractor Obligations. During the term of this Agreement, the Subcontractor will:

a. assist the Prime Contractor in reasonable marketing and sales efforts for the Program;

b. provide reasonable assistance in the development and preparation of proposals for the Program dedicating sufficient

resources and personnel to the proposal efforts (including, but not limited to, providing personnel at the Prime Contractor's facility if deemed necessary by the Prime Contractor);

c. prepare and furnish the Prime Contractor with information including, but not limited to, technical data, pricing data (in a form agreeable to the Prime Contractor and compliant with the requirements of the Customer), cost estimates[,] detailed statements-of-work, and binding proposals for its Effort;

d. respond in a timely manner to the Prime Contractor's requests for additional data and information; and

e. participate in, to the extent deemed necessary by the Prime Contractor, negotiations and other communications with the Customer; and

f. provide whatever support as may be reasonably requested by the Customer during the Subcontract approval process.

Id.

43. The Size Determination references Exhibit A of the Teaming Agreement, which states that CSR's efforts are [DELETED]. *Id.*

44. The Size Determination states that "[f]rom the perspective of the program office and as clearly stated in the purpose or the SIR, the primary and vital requirement of the contract is to acquire the services of contract weather observation personnel at selected airports throughout the United States. Therefore, since this is a services contract, it is important to examine the personnel proposed by CJRA." *Id.*

45. The Size Determination examined the personnel proposed by CJRA. *AR* Tab 11 at 8.

46. The Size Determination states:

CJRA identified the following as the management level employees: CJRA Program Manager, David E. Rogers, the Quality Control and Training Manager, [DELETED], and the CSR Deputy

Program Manager, [DELETED]. [CJRA Proposal Vol. III, pp. 28-32] Both the Program Manager and the Quality Control/Training Manager are current employees of CJRA. Mr. Rogers has been employed with CJRA as a Weather Program Manager since 2009. During Mr. Rogers' tenure as Program Manager at CJRA, CJRA has performed weather observation services for another government agency as a prime contractor with no subcontractor assistance. [DELETED] has been employed with CJRA as a Quality Control/Training Manager since May 2011. [DELETED] prior employer before CJRA was Condor Reliability Services Inc. Both Mr. Rogers and [DELETED] have years of experience in the realm of providing contract weather observation services; according to his resume, Mr. Rogers has approximately 40 years of experience in the weather observation industry including past stints as a Weather Program Manager, while [DELETED] has been in the weather observation industry in the United States since 2006.

Although the Deputy Program Manager, [DELETED], is an employee of CSR, the proposal states that the Program Manager: "will be responsible for the performance of work at all locations and have authority to make decisions on all contract matters. He has the authority within CJRA to allocate professional staff and financial resources to meet task requirements and control overhead expenses." [CJRA Proposal Vol. II, p. 19] The proposal also states that the CJRA Program Manager is the technical lead for the FAA CWO effort and will therefore be the primary contact with the government's FAA CWO COR. [CJRA Proposal Vol. II, p. 19] Based upon the information in the proposal and the experience or title Program Manager, I do not believe that CJRA is unusually reliant upon CSR for the management of this contract.

The Senior Weather Observers were identified as Key Personnel under the SIR and confirmed with the Program Office that these individuals will be performing the day-to-day essential functions at the contract weather observation sites under the contract. The CJRA proposal states that the Senior Weather Observer will be able to discuss and act on behalf of CJRA with respect to site staffing/work and leave schedule, implementation and continuation of the Contractor's Quality Assurance Management Plan, training and act as the initial point of contact for any National Weather Service or FAA site inspections. [CJRA Proposal Vol. II, p. 21] The Senior Weather Observers duties also include: making decisions on day-to-day site activities, evaluating and recommending potential new hires for the sites and recommending

employee terminations as required. [CJRA Proposal Vol. II, p. 17-18]

AR Tab 11 at 8-9.

47. The Size Determination goes on to state:

I looked at whether the Senior Weather Observers would be employees of CJRA or CSR. CJRA's proposal states that it will hire the incumbent site Senior Weather Observers if they meet the qualifications and performance requirements identified in their proposal. [CJRA Proposal Vol. II, p. 12]. The Senior Weather Observers will leave their incumbent positions at the close of business on the last day of the incumbent contract and report to work the following day as employees of CJRA or its subcontractor CSR. [CJRA Proposal Vol. II, p. 12] Therefore, based upon the proposal it appears that the contract weather sites would be divided into those that are staffed by CJRA-employed Senior Weather Observers and those staffed by CSR-employed Senior Weather Observers. I do not find this proposed division of the staffing of sites between CJRA and CSR to be unusual or indicative of undue reliance upon CSR since as discussed below, it appears that the majority of the employees under the Contract (including the Senior Weather Observers) will be employed by CJRA.

AR Tab 11 at 9.

48. The Size Determination quotes Section I of the SIR contains AMS Clause 3.6.1-7 Limitations on Subcontracting (October 2011)[,] in part:

By submission of an offer and execution of a contract, the Offeror/Contractor agrees that in performance of the contract in the case of a contract for: (a) Services (except construction). At least 50 percent of the cost of contract performance incurred for personnel shall be expended for employees of the prime contractor.

Id.

49. The Size Determination states:

Since CJRA submitted an offer and did not modify the terms of the subcontracting clause, it agreed to the limitation on subcontracting clause as originally written in the SIR. CJRA must comply with the

50% requirement and at least 50% of the personnel costs will be expended for employees of CJRA (which includes the Senior Weather Observers). In addition, Exhibit A of the Teaming Agreement between CJRA and CSR affirms the understanding that CJRA will be performing the majority of the work because it lists the Subcontractor's Efforts as [DELETED], which means the Prime's Efforts are [DELETED].

In section M2.2, the CWO Team notified the Offerors of the identified technical capabilities that each Offeror must possess in order to be eligible for award. The Technical Evaluation Team evaluated the technical capabilities against each of the four technical subfactors under Factor I, Technical Proposal: Personnel Plan, Staffing Plans and Schedules, Quality Assurance Management Plan and Transition Plan. Further, in Section M2.2, Offerors were notified that "an unsatisfactory rating in any one of the subfactors under Factor I, Technical Proposal, will render the offeror ineligible for further consideration in the selection process."

CJRA stated that, "The CSR Quality Assurance and Training Plans will continue to be the foundation from which we work" [CJRA Proposal Vol. II, p. 5]. CJRA states that, "CJRA will implement a program-tailored transition plan based upon CSR's lessons-learned in previous comparable contract transitions and proven to work." While the concepts in the Quality Assurance and Training Plans and transition plans may be based upon CSR's prior experience and approach, it is CJRA who will be implementing the approach for this procurement. Implementation of the proposed approach is far more important, in my mind than the concepts outlined in the plan, as it reveals who is performing the task. The Quality Control/Training Manager identified in CJRA's proposal is an employee of CJRA. CJRA's proposal states that the Weather Program Manager has ultimate responsibility for management and oversight of the QAMP. [CJRA Proposal Vol. II, p. 47]. Similarly, the Weather Program Manager is identified in CJRA's Proposal as leading the transition team efforts. [CJRA Proposal Vol. II, p. 105]. The Program Manager and Quality Control/Training Manager[,] which were identified by CJRA as playing a key role in its contract performance efforts are both employees of CJRA with long-standing experience in the realm of contract weather observation. CJRA has also specific transition experience related to its performance as a prime under another government contract. CJRA describes its experience as follows: "transitioned the entire workforce providing weather upper air observations. These unique operations are conducted utilizing a split shift scheduling seven

days per week. Additional staffing were recruited, trained, and certified in 2 week window, resulting in no disruption to operations.” [CJRA Proposal Vol. II, p. 81]. Therefore, based on the information included in the CJRA Proposal, I believe that CJRA will be implementing the transition and quality assurance/training efforts under this contract.

AR Tab 11 at 9-10.

50. The Size Determination further states:

There is a reference in CJRA's proposal to leveraging CSR's IT infrastructure (including a management and scheduling control system). [CJRA Proposal Vol. II, p. 5] However, this appears to be the extent of the infrastructure assistance CSR will be providing CJRA. After consulting with the program office and reviewing the SIR, it appears to me the primary and vital requirement of the contract is to provide the services of qualified weather observer personnel. IT support is an ancillary support function that would assist CJRA in performing the primary and vital requirements of the contract. From my perspective, the key personnel identified in the proposal and whether they are employed by CJRA or CSR is more relevant for purposes of determining whether CJRA or CSR will be performing the primary and vital requirements of the contract. In addition, I do not find that CJRA is unusually reliant upon CSR simply based upon CSR's assistance in the arena of IT support. As I stated above, I found information from CJRA's proposal and the other information provided that indicates that CJRA is capable of performing the primary and vital requirements of the contract.

AR Tab 11 at 10.

51. The Size Determination states:

Section L.5 of the SIR states that a responsible prospective contractor must "[h]ave adequate financial resources to perform the contract for a period of 90 days without government funding, or the ability to obtain financial resources." In support of this requirement, Offerors were asked in Section L.10 to "[p]rovide documentation that show the offeror's ability to cover payroll and other operating and administrative expenses to accommodate Government "in arrears" payments for work performed for period of ninety (90) days. The amount of money required to cover expenses needs to be sufficient enough to cover 90 days of the

base year sites (one quarter of the firm fixed price) for the two highest dollar value groups being proposed; or if only one group is proposed, for that group. If the Offeror has an existing CWO contract, the required ninety days of funding should be separate from the offeror existing operating funds.

Id.

52. The Size Determination further states:

As part of its proposal, CJRA submitted a letter from [DELETED] which contained the terms under which it would lend CJRA up to [DELETED] as a commercial revolving line of credit. CJRA has also provided evidence that it has access to [DELETED] in cash belonging to David and Jane Rogers, The line of credit and cash is enough for CJRA to cover 90 days of expenses of the base year sites for the two groups that it won. Based upon the information I was provided, I determined that CJRA's independent access to financing precluded any notion that it was unusually dependent on its subcontractor in terms of financing.

Id.

53. The Size Determination states:

Based upon my review of CJRA's Proposal, CJRA's Response, the agreements between CJRA and CSR and all of the facts and circumstances and for the reasons set forth above, which include CJRA's access to independent financing, the experience of CJRA's key management personnel, the reasonable division of responsibilities between CJRA and CSR, CJRA's teaming arrangement which states that CJRA will perform [DELETED] or the work and CJRA's past performance, it appears to me that CJRA is capable of performing the tasks required under the contract by itself without CSR's assistance. Therefore, since CJRA is performing the primary and vital requirements of the contract and is not unusually reliant upon CSR for the performance of the contract I cannot find that CJRA is affiliated with CSR under the ostensible subcontractor theory.

AR Tab 11 at 11.

(d) Totality of the Circumstances

54. The Size Determination states:

The totality of the circumstances may serve as a basis for affiliation where "no single factor is sufficient to constitute affiliation." I believe that my role in this investigation is to weigh all of the facts and focus on the totality, not just individual facets, or allegations. When the proposal elements and the teaming agreement is taken as a whole, and in light of all of the facts I have reviewed, I believe that CJRA is not affiliated with its subcontractor, CSR. I base this determination on the facts and circumstances set forth in my analysis above which include CJRA's access to independent financing, CJRA's revenue, the experience of CJRA's key management personnel, the reasonable division of responsibilities between CJRA and CSR, CJRA's teaming arrangement which states that CJRA will perform [DELETED] of the work and CJRA's past performance. Considering all of these elements together, I conclude that CJRA is not affiliated with CSR under the totality of the circumstances theory.

Id.

i. CJRA Technical Proposal

55. The CJRA Technical Proposal is dated June 5, 2012. *AR* Tab 6(c)(i)(a) at 1.

56. The CJRA Technical Proposal states that it "has been in business since 2005 and is a 100% Total Small Business, Service-Disabled Veteran, and Woman Owned and Controlled Business Concern registered in the Central Contractor Registration (CCR) as well as Online Representations and Certifications Application (ORCA), doing business under North American Industry Classification System (NAICS) 541990." *AR* Tab 6 at 6.

57. The CJRA Technical Proposal states that it "possesses a vast amount of experience and expertise in the aviation business, particularly weather services."

Id.

ii. CJRA Technical Proposal – Hiring Incumbent Personnel

58. The CJRA Technical Proposal states that its “goal is to hire all or most of the incumbent CWO personnel to maintain continuity and essential expertise. All incumbent staff shall be given a right of first refusal of employment per AMS Clause 3.6.2-40.” AR Tab 6 at 10.

59. The CJRA Technical Proposal states that if “CJR[A]/CSR is unable to fill all the Senior Weather Observer positions with incumbent CWO personnel, we have resumes of proposed replacements that would be able to fill the CWO sites awarded. Detailed resumes are listed Vol III Past Performance. All of the CJR’s proposed Senior Weather Observers meet SIR requirements.” AR Tab 6 at 11.

60. The CJRA Technical Proposal states:

The first priority of our FAA CWO site staffing approach will be to hire the incumbent site Senior Weather Observers if they meet the qualifications and performance requirements identified in this proposal and as verified by the Government FAA staff. These individuals will be given the right of first refusal. During the one-on-one individual interview sessions, our team of experienced professionals will present an overview of our company business practices and philosophy, and company benefits and assess the individual’s qualifications and capabilities. We will discuss task responsibilities as well as identify their career goals without any group pressure. These private sessions will enable us to answer any questions, reaffirm salary and benefits, discuss potential responsibilities, verify their current responsibilities, and discuss how their current position contributes to their career goals.

AR Tab 6 at 12.

61. The CJRA Technical Proposal states:

The basic responsibility of CJR observers is to ensure timely, accurate and representative weather observations are taken, documented, and disseminated at each awarded site IAW the

applicable regulations and directives. The Senior Weather Observer and weather observers will be trained and certified in the proper operation of all primary and backup weather observing equipment and with the procedures of weather observation documentation and dissemination. Personnel assigned to the FAA CWO program will have clearly defined responsibilities and authority to successfully execute the functions of the Program Manager, QC/Training Manager, Senior Weather Observer, and Weather Observers as shown in Table 1.

AR Tab 6 at 16.

62. The CJRA Technical Proposal describes the Senior Weather Observer's responsibilities as follows:

- Plan, organize, staff direct and control activities on assigned site.
- Monitor task technical, schedule and budget performance.
- Interface and coordinate weather support with local Air Traffic personnel, FAA, and NWS.
- Prepare administrative correspondence as directed by CJR[A].
- Monitor training accomplishment and maintain local records.
- Coordinate completion of the initial and ongoing Facility Level Service Agreement.
- Perform counseling and corrective actions.
- Monitor all on-site programs such as security and safety to ensure compliance with directives and procedures.
- Enforce FAA and corporate policies and procedures.
- Shall ensure all observers are familiar with and comply with FAA security directives, supplements, and badging requirements.
- Restrict access to the CWO site to CJR[A] employees or those approved by the CO or COTR.
- Responsibilities include those listed for the Weather Observer below.

AR Tab 6 at 17-18.

63. The CJRA Technical Proposal describes the Senior Weather Observer's authority as follows:

- Serves as the on-site POC for the COTR/TOR, CO, and NWS and has the authority to discuss items including: site staffing, schedules, QAMP, training, and inspections.
- Make decisions on day-to-day site activities.
- Evaluate and recommend potential new hires.
- Recommend employee termination as required, provide documentation to Weather Program Manager.

Id.

64. Section A10.3.1 of the CJRA Technical Proposal describes the position of Senior Weather Observer as follows:

CJR will designate a Senior Weather Observer for each awarded site. The Senior Weather Observer will be the CJR on-site representative and primary on-site point-of-contact (POC) for the FAA and NWS representatives. The Senior Weather Observer will be able to discuss and act on behalf of CJR in the following areas: site staffing/work and leave schedule, implementation and continuation of the Contractor's Quality Assurance Management Plan, training, and initial POC for any NWS or FAA site inspections.

Experience – The Senior Weather Observer will have a minimum of one year of experience as an NWS certified Weather Observer performing weather observations. CJR will also require at least one year of experience managing weather operations. CJR/CSR has assembled a resume database that greatly exceeds the FAA requirements for Senior Weather Observer. Many of the potential candidates in our database are retired or former DoD weather personnel who have had extensive experience in weather operations and leadership positions.

Certification – All CJR weather observers who are assigned the duties of providing augmentation, back-up and manual observations shall be certified by the NWS. All observer certificates shall be current, station specific, and immediately available to the Government for review during the term of this contract. NWS certification consists of (1) meeting the vision standard, (2) passing the certification examination, and (3) demonstrating proficiency to include accomplishing a correct observation and meeting all transmission schedules IAW NWS Directive, 10-1304, Surface Observing Program, Certification of Observers, July 2, 2010.

Labor Category – The labor category assigned for the Senior Weather Observer is that of Weather Observer, Senior, Occupation Code 30620.

Job Description – The Senior Weather Observer is responsible for the specific CWO site's daily management administrative matters, record keeping, documentation, equipment accountability, safe guarding of government resources, and other applicable tasks. The Senior Weather Observer also manages the technical, administrative and personnel functions of the facility and will perform weather observing duties. The Senior Weather Observer will oversee the site Quality Control program, training requirements, personnel issues, scheduling, administer company policies, and all other issues related to the management of site operations under this contract. On a weekly basis, the Senior Weather Observer will be collecting and sending data to the QCTM and Weather Program Manager for tabulation and review. The Senior Weather Observer will note any administrative suspense's for scheduled work, check vacation rosters, participate in conference calls between the Weather Management Team and Senior Weather Observer, and complete payroll timecards. Monthly tasks will be the compilation of performance and administrative statistics, development of the Quality Control report, the scheduling of personnel for the upcoming month(s), providing feedback to the local FAA customer to ensure that we maintain a strong and direct line of communication with our customers. . . .

The Senior Weather Observer will perform surface weather observation duties by providing ASOS augmentation, back-up and manual weather observation services. Ensures all hourly METAR and required SPECI observations are timely, complete, accurate, representative, and disseminated into the national communication network and to the appropriate agencies. The Senior Weather Observer shall ensure Performance Monitoring is being tracked and reported per FAA requirements. Responsible for performing and enforcing active quality control procedures to ensure error-free products are produced and disseminated. The Senior Weather Observer is responsible for checking his/her observations pre, during and post dissemination as well as the observations disseminated by his employees.

AR Tab 6 at 21-22.

65. The same section proceeds to state:

Labor Relations– If the site is covered by a union’s collective bargaining agreement (CBA), CJR will ensure that the Senior Weather Observer is not elected as the union shop steward. The Senior Weather Observer will be protected by the union, but ***will serve as part of the [CJRA] management structure***. This will allow for the Senior Weather Observer to administer disciplinary actions.

AR Tab 6 at 22 (emphasis added).

66. Figure 1 in Section A11-1 of the CJRA Technical Proposal “CJ Rogers Aviation, Inc. Organizational Chart” “illustrates the organizational structure to be used by [CJRA] for the FAA CWO 2012 effort. The lines of responsibility and authority between each of the key management positions are well defined. The simplicity of our program structure contributes to flexibility and responsiveness. [CJRA] presents a lean and responsive Weather Program that provides support to sites without excessive overhead and costly administration.” Senior Weather Observers are shown as “key management positions.” AR Tab 6 at 24.

67. The CJRA Technical Proposal states:

On-site supervision by the Senior Weather Observer, the QCTM and Weather Program Manager will attribute to the building of knowledge and understanding of the importance of our job to assist the FAA in making our airways as safe as possible. Practical evaluations by management will be used to show how descriptive remarks from the FMH-1C and FAAO 7900.5 can supplement the observation to paint a more complete picture of existing weather conditions. Being fully cognizant of changing elements will permit faster and more accurate observations to be recorded and disseminated to FAA and other using agencies.

AR Tab 6 at 26.

68. In the Summary, the CJRA Technical Proposal states:

Each site’s daily management is performed by the Senior Weather Observer under the specific direction of the Weather Program

Manager and Quality Control Training Manager and any added QC, training, and/or changes in policy, procedures or requirements levied by the [CJRA] President will apply to all CWO sites. Unique and/or specialized tasks, which may be requested by the Government, will be tracked to completion by a task order process wherein metrics of the task are predetermined and cost and schedule are monitored interactively with the site and the Weather Program Manager. Routine operations, the root product of this contract, will be monitored for timeliness, accuracy of performance and quality of interface with the supported sites. The QAMP [Quality Assurance Management Plan] provides the basis of performance, training and feedback/corrective action processes to enhance customer satisfaction.

AR Tab 6 at 38.

69. The CJRA Technical Proposal states the role of the Senior Weather Observer under the QAMP (“Quality Assurance Management Plan”):

The [CJRA] Senior Weather Observer will be responsible for implementing all on-site QC procedures. The Senior Observer will assign various QC duties to other observers. All observation products will be checked for accuracy and compliance by the next shift. For example, every observer is responsible for inspecting the prior observer’s recorded observations and disseminated products for compliance with FMH-1 and FAAO 7900.5. This means a 100% check of all products. Detected errors will be noted and documented on the Quality Control Register. Product monitors will record the date, time, responsible observer, and a brief description of the detected error. Weather observers will review the QC Register for any errors, review the mistake, and list the correct reference on the QC Register including their initials to acknowledge the error. If there is a misunderstanding concerning the detected error, it will be brought to the attention of the Senior Weather Observer. A sample copy of a completed QC Register is provided in Appendix C.

The Senior Weather Observer will review listed references to determine if the correct reference was used. This allows the Senior Weather Observer to evaluate the knowledge level of observers and see what training may be necessary based upon the individual’s understanding of the statement of work and appropriate FAA and NWS directives and regulations.

AR Tab 6 at 52.

70. The CJRA Technical Proposal states that “[t]he [Quality Control Training Manager] QCTM will be involved on a daily basis. As routine, the QCTM will review site forms to determine if QAMP procedures are understood by the Senior Weather Observer and his/her personnel. Detected problems or trends can be immediately brought to the attention of the Senior Weather Observer for fast action.” AR Tab 6 at 53.

71. The CJRA Technical Proposal also states that

[t]he Senior Weather Observer continuously reviews each employee’s error rate and type of error to determine the type of refresher training and/or corrective training that is required. The QCTM and Weather Program Manager review all the sites to detect trends and to conduct an independent analysis of each site’s performance. The results of the analysis are discussed with each Senior Weather Observer. At that time the Weather Program Manager will direct each Senior Weather Observer to ensure employees exhibiting performance that is below standards receive corrective training to reinforce proper weather observation procedures.

AR Tab 6 at 64.

72. With respect to the transition, the CJRA Technical Proposal states:

Our primary concern is to eliminate any disruption to on-going activities or services. To ensure this, we will recruit qualified incumbent staff to the fullest extent possible and desirable. Therefore, a large percentage of the initial staff will enter the contract possessing the requisite knowledge, skills, training, and certifications. Using incumbent personnel makes good sense. They are already local to the area. They are already trained in their positions. They know the contract operations and the locations and requirements of customers. They assure the change in contractors is transparent to the customer.

AR Tab 6 at 103.

73. The CJRA Technical Proposal states that “[t]he first priority of our FAA CWO site staffing approach will be to hire the incumbent Senior Weather Observers if they meet the qualifications and performance requirements identified in this proposal and as verified by the Government FAA staff. These individuals will be given the right of first refusal.” AR Tab 6 at 103.

74. The Key Management Personnel proposed in the CJRA Technical Proposal are: David E. Rogers, Program Manager; [DELETED], Quality Control and Training Manager; and [DELETED] from CSR/Subcontractor, Deputy Program Manager. AR Tab 6(c)(iii)(a) at 28-32.

75. David E. Rogers was employed by CSR from 2003-2009 before moving to CJRA in 2009. Rogers was the Quality Assurance and Training Manager, Technical Expert, and Business Development Manager for CSR from 2007-2009; and Weather Program Manager from 2003-2007. *Id.* at 28.

76. Rogers’ resume states with respect to the Quality Assurance and Training Manager position at CSR:

Responsible for all aspect of quality assurance, training, technical policies and procedures on multiple Government meteorological support services contracts. Organize, manage, and oversee the transition of new meteorological services contracts.

Id.

77. Rogers’ resume states with respect to his Program Manager position at CSR:

Responsible for the management of multiple DoD and FAA meteorological services contracts. Duties included contract adherence,

budgets, resource management, quality assurance, training, policies and procedures, and QAE/COTR interface.

Id.

78. The CJRA Technical Proposal states:

CJ Rogers Aviation, Inc. has the ability to cover payroll and all other operating and administrative expenses to accommodate the Government "in arrears" payments for a period in excess of ninety (90) days. Our financial institution, [DELETED], has certified a [DELETED] Line of Credit for this purpose, an amount sufficient enough to cover the two highest dollar value groups being proposed. A copy of this Line of Credit, certified by the financial institution, to this Minimum Qualification Summary.

AR Tab 6(c)(i)(a) at 91.

79. The CJRA Technical Proposal also states:

CJ Rogers Aviation, Inc. [CJRA] has contacted each incumbent Senior Weather Observer for the locations [CJRA] is proposing and each Senior Weather Observer has verbally confirmed their intent to join the [CJRA] team in their present location after contract award. All meet or exceed the minimum of one (1) year experience performing weather observations. Each person's National Weather Service Certificate (NWS) and their resumes are included in Volume III - Past Performance and Relevant Experience.

Id.

80. As part of its Proposal, CJRA included a proposal for a line of credit in the amount of [DELETED], which states:

Thank you for the opportunity to provide financing for a Commercial Revolving line of Credit. I am pleased to inform you of [DELETED] (lender) proposal to lend [DELETED] subject to the following terms and conditions. ***This is not to be construed as***

a loan commitment, but an expression of interest under which the lender would be willing to consider granting the loan described below.

Id. at 94 (emphasis added).

81. For CSR, there is a revolving credit loan agreement with a ceiling of [DELETED] from [DELETED] included in the CJRA Proposal. A stamp on the note indicates it is a renewal of a prior note, and that the ceiling had been reached and was outstanding. *Id.* at 97-99.

iii. CJRA Reliance Upon CSR's Expertise

82. The CJRA Technical Proposal states:

The CJR approach is to offer the FAA a high quality, minimal risk proposal that will continue to provide the exceptional services as produced by CSR over the past decade. We will combine the ideas of our company with the proven successes of CSR to create an extremely successful and innovative team. We will leverage CSR's extensive IT infrastructure to provide innovative ways to continually improve our processes and reduce the administrative burden on the employees. The CSR Quality Assurance and Training Plans will continue to be the foundation from which we work. Our team will strive to surpass all customer expectations and requirements.

AR Tab 6c(ii) at 5.

83. The CJRA Technical Proposal also states: "Our highly detailed quality control processes, which are based on CSR's extensive CWO experience, will ensure they are disseminated in a timely and highly accurate manner." *Id.*

84. The CJRA Technical Proposal states:

[CJRA] possesses a vast amount of experience and expertise in the aviation business, particularly weather services. The [CJRA] Management Team consists of business professionals with over 40 years of operational meteorological experience. The team's vast experience in providing "full spectrum" weather support to a variety of customers will ensure the CWO team is highly trained, equipped, and productive.

Id. at 6.

85. The CJRA Technical Proposal also states that "[CJRA's] recognized past performance and capabilities ensures the FAA that [CJRA] has the experience, expertise and past performance for this effort." The Proposal proceeds to rely on its past performance as "Subcontractor to Control Systems Research, Inc. (the prime contractor) for Contract Weather Observation (CWO) services to the Federal Aviation Administration (FAA) on FAA contract DTFAWA-08-C-00035."

Id.

86. The CJRA Technical Proposal states:

Our subcontractor, Control Systems Research Inc. (CSR), is a multi-million dollar company with exceptional performance records. CSR's wide range of technical support services will be utilized to provide superior products and services to the FAA and its customers. CSR is a minority controlled company and registered in the CCR as well as ORCA. CSR provides a wide range of experience and qualifications in research and development and service support functional areas. Currently CSR supports Federal programs in the areas of meteorological support services, software development, analysis, test and evaluation, modeling and simulation, avionics interfaces, simulation, Global Positioning System (GPS) technologies, Range planning software development, desktop support services, and 3-D visualization.

[CSR provides] Contract Weather Observation (CWO) services to 17 FAA sites at selected airports throughout the United States.

Id. at 7.

87. The CJRA Technical Proposal states that CJRA and CSR “conducted a detailed analysis of the FAA CWO 2012 SIR. Our resulting methodology and approach is built on CSR’s extensive weather management experience.” *Id.* at 8.

88. The CJRA Technical Proposal discusses its relationship with CSR on emergencies:

Contingency plans for emergency situations. Emergency situations can never be forecasted. We know they occur, but when, how, and in what form is only an estimate. CJR will leverage CSR’s experience in developing a site specific contingency binder for different circumstances.

Id. at 9.

89. The CJRA Technical Proposal discusses a Team Discussion Board:

Establishment of a Team Discussion Board to discuss operational issues, best practices and lessons learned. This Team Discussion Board goes hand in hand with the FAA’s increasing desire for better communication at the local level between the CWO and customer. This tool helps foster a team oriented environment which CSR has proven successful under the current FAA effort.

Id.

90. The CJRA Technical Proposal states with respect to the Initial Qualification Training:

CSR has an established and proven IQT [Initial Qualification Training] program that is based on the foundations listed in FAA

Computer Based Instruction (CBI) and NWS Training Guide in Surface Weather Observations.

Id. at 32.

91. The CJRA Technical Proposal also shows the Quality Control organizational structure with the Program Manager being a direct report to both CJRA's and CSR's President as shown in Figure 2. The Proposal states:

The CJR[A]/CSR QC [Quality Control] Organization structure is provided in Figure 2. The clear lines of authority and short direct-reporting relationship indicate the commitment to quality performance that our management team gives to the FAA CWO Program.

Id. at 48.

iv. The CJRA Response to Contracting Officer Size Investigation

92. As part of the CJRA Response, [DELETED] provided a letter to loan up to [DELETED] to CJR, dated February 4, 2013. AR Tab 9(a)(18).
93. As part of the CJRA Response, the personal assets of David and Jane Rogers were submitted in support of its independent access to financing. AR Tab 9(b)(1)-(12).
94. The Contracting Officer in her fact finding investigation posed the following question to CJRA:

Have any owners, officers, directors, key employees or supervisors of your company ever been employed by or performed similar work for any of the alleged, acknowledged or possible affiliates? If so, provide details (i.e. positions held, dates employed, brief job description, etc.).

AR Tab 9(a)(1) at 4 (emphasis in original).

95. In the CJRA Response, CJRA provided resume bullet points for David E. Rogers, without additional support, as follows:

David E. Rogers

Control Systems Research, Inc. 9/1/2007 – 5/31/2008 and 12/1/2008 -
12/31/2009 (Leave of Absence 6/1/2008 – 11/30/2008)
Weather Business Development/Technical Manager (Part-Time)

Responsible for the technical oversight of multiple Government meteorological support services contracts, business development and customer interaction on existing and new projects, coordination of new technical policies and procedures.

Control Systems Research, Inc., 1/1/2006 – 8/31/2007
Weather Program Manager (Part-Time)

Responsible for the management of multiple DoD and FAA meteorological services contracts. Duties included contract adherence, resource management, quality assurance, training, policies and procedures, and QAE/COR interface.

Control Systems Research, Inc. 10/1/2003 – 12/31/2005 CWO Senior Weather Observer (Full-Time)
Senior Weather Observer - Site supervisor at FAA Contract Weather Office

Responsible for supervision, quality control, work scheduling, and the training and certification of personnel, and performing weather observations.

Id. at 5.

96. The CJRA Response also includes a Consulting Agreement between David Rogers and CSR dated March 8, 2012. AR Tab 9(a)(13) at 1.

97. The Consulting Agreement is directed to David Rogers. It begins:

Dear ***Mr. Rogers***:

Control Systems Research, Inc., (CSR) wishes to retain your services, in a consulting arrangement. Calls for ***your services*** will

be issued by Bob Schmidt for consulting services as required by CSR.

Id.

98. The Consulting Agreement states:

TASK DESCRIPTION: Provide *Subject Matter Expertise with special, in-depth knowledge* of aviation operations that enhances the Weather Division Management Team's understanding on a variety of subjects and operational issues. The Weather Technical Expert provides support and guidance to the Weather Division Management Team on management processes and procedures, and contributes in the development and execution of the Division's management plans and programs to enhance operational effectiveness. The Weather Technical Expert assists the Weather Division Director in business development, marketing and proposal preparation. **All** direction of work will be handled by Bob Schmidt.

Id. at 4 (emphasis added in italics, bold in original).

99. In CJRA's Response to the CO's Fact Finding, dated January 23, 2013, it states:

4. Other than the current bid, have there been or are there any actual or proposed subcontracts between business and any of the alleged or acknowledged affiliates?

YES

1. Subcontract between CJ Rogers Aviation, Inc. and Control Systems Research, Inc. Started 1 June 2011 - terminated 31 December 2011. Total Receipts [DELETED] (Documentation attached)

AR Tab 9(a)(1) at 3.

100. The CJRA Response also states:

2. Subcontract between CJ Rogers Aviation, Inc. and Control Systems Research, Inc. started 1 September 2011 - terminated 31 December 2011. Total Receipts [DELETED].

AR Tab 9(a)(1) at 4.

101. CJRA's 2011 Corporate Income Tax return shows a total revenue [DELETED]. AR Tab 9(a)(7).

102. In CJRA's Response to the Contracting Officer's Fact Finding request, dated January 23, 2013, CJR stated that it "has the financial resources to operate this award without outside assist. CJR has direct access to over \$2 million in cash. This is NOT a line of credit or loan but cash owned by Jane Rogers held in financial institutions the bank, Government Bonds, or mutual funds that can be instantly converted to cash if required. (Statements can be provided upon request)." AR Tab 9(a)(1) at 4.

103. In the CJRA Response, it states that CJRA has existed as an independent small business since 11 December 2005. It began as a sole proprietorship by Jane Rogers and then it incorporated in the State of Florida on 27 October 2010. Jane Rogers owns 51% of the company stock and David Rogers 49%. No other person or company now owns or has ever owned any portion of CJ Rogers or CJ Rogers Aviation, Inc. *Id.* at 4.

104. The record includes a copy of CJRA's Article of Incorporation with the state of Florida filed October 27, 2010. AR Tab 9(a)(3).

105. The CJRA Response provided an unaudited corporate Balance Sheet dated December 31, 2011, but it does not state for what period. AR Tab 9(a)(4).

106. The CJRA Response provided an unaudited corporate Balance Sheet dated November 30, 2012, but it does not state for what period. AR Tab 9(a)(5).

107. CJRA provided a copy of CJRA's 2011 Form 1120, U.S. Corporation Income Tax Return. AR Tab 9(a)(7).

108. The CJRA Response included a copy of its 2011 For Profit Corporation Annual Report filed with the Florida Secretary of State on April 18, 2011. *AR* Tab 9(a)(8).
109. The CJRA Response included a copy of its General Ledger for the Period From Jan 1, 2011 to Dec 31, 2011, but it does not state if it was audited. *AR* Tab 9(a)(9).
110. The CJRA Response included a copy of its Income Statement For the Twelve Months Ending December 31, 2011, but it does not state if it was audited. *AR* Tab 9(a)(10).
111. The CJRA Response included a copy of its Income Statement For the Eleven Months Ending November 30, 2012. *AR* Tab 9(a)(11).
112. The CJRA Response included a copy of its General Ledger Trial Balance As of Dec 31, 2011, but it does not state if it was audited. *AR* Tab 9(a)(12).
113. CSR is a large business. CSR, in response to the Contracting Officer's size investigation the following:

gross sales or receipts of the affiliate for each of the most recently completed 3 fiscal years as of the date of the offer:

2009 - [DELETED]

2010 - [DELETED]

2011 - [DELETED]

AR Tab 10(i).

III. DISCUSSION

A. The Motions

1. Standing

The Product Team moves to dismiss the Protest of the award to CJRA, 13-ODRA-00633 for lack of standing pursuant to 14 C.F.R. § 17.15(a). *AR* at 7. CJRA opposes the Motion. *Comments* at 7. The ODRA has held that “where a party seeks summary disposition of a pending matter, the movant carries the burden of proof.” *Protest of Alaska Weather Operations Services, Inc.*, 08-ODRA-00431; 14 C.F.R. § 17.19(b) (2012). The Product Team merely refers to one paragraph of the Contracting Officer’s Declaration in support of its position. FF 30. The Contracting Officer testifies:

I examined the next in line offerors for the awards made to ATS Services, and DMS is not the next in line for award because it is not the next lowest priced offeror. Even taking into account the limitation on award of two groups per Offeror under Section M 1.3, DMS would still not be next in line for award. There would still be ten (10) technically acceptable Offerors eligible for award for Group 11 with lower pricing than DMS. Nine out of ten of these Offerors would be eligible for award because they do not exceed the two Groups per Offeror limit set forth in Section M 1.3 of the SIR.

FF 30. The Product Team has not provided any other supporting documentation whatsoever, such as the relevant evaluation documentation, in support of its Motion. The ODRA is left with only a conclusory statement by the Contracting Officer that DMS is not the next in line for award. Thus, the ODRA finds that the Product Team has failed to meet its burden. Moreover, given the number of Protests that have been filed in connection with this matter and the number of companies potentially affected by the Protests, the ODRA finds an insufficient basis exists in the record to conclude as a matter of law that CJRA would not be in line for award of the Contract involved under any circumstance. The Motion is therefore denied. *Protest of Alaska Weather Operations Services, Inc., supra.*

2. Timeliness

The Product Team moves to dismiss DMS's Protest of the award to CJRA as untimely pursuant to the ODRA Procedural Regulations at 14 C.F.R. § 17.15(a)(3)(i). *AR* at 9. The Product Team asserts that "Protester knew or should have known of the grounds for the protest on March 29, 2013 when the CO Determination was issued." *Id.*

The Procedural Regulations require that post-award protests be filed with the ODRA either 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. 14 C.F.R. § 17.15(a)(3); *see also Protest of Alutiiq Pacific LLC*, 12-ODRA-00627 ("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.") *citing Protest of Accenture National Security Services*, 08-TSA-045. In the instant case, the Product Team undertook unilateral, voluntary corrective action, FF 28, which resulted in the Contracting Officer's Size Determinations at issue here.

The Product Team states that "[a]s of the date of this Agency Response [May 20, 2013], the FAA has not yet awarded the new CWO contracts." *AR* at 6. Because Section 17.15(a)(3) applies to post-award protests and the record reflects that no award had been made, the Motion is denied.

3. Mootness

The Product Team also moves to dismiss the protest of the award to CJRA on the basis of mootness and failure to state a claim upon which relief may be granted. *AR* at 8-9. The Product Team asserts that "[t]he Protest allegations are moot because they have been fully addressed in the CO Determination." *Id.* at 8. The Product Team further argues that DMS's "speculative conclusions and allegations were completely addressed by the Agency's thorough and complete investigation of the affiliation question. . ." *Id.* at 9. Essentially, counsel argues that the Protest lacks merit and that therefore the ODRA lacks jurisdiction to adjudicate it. The ODRA has exclusive statutory authority to conduct

adjudications on behalf of the FAA Administrator of bid protests and contract disputes for acquisitions conducted under the FAA Acquisition Management System (“AMS”). 49 U.S.C. §§ 40110(d)(2) and (4). The fact that the Product Team has investigated the allegations does not render the matter non-reviewable. The Motion is denied as meritless.

B. Burden and Standard of Proof on the Merits

DMS bears the burden of proving by a preponderance of the evidence that the Contracting Officer’s determination that CJRA is not affiliated with its subcontractor, CSR, lacks a rational basis and is otherwise arbitrary and capricious, and that the challenged decision failed, in a prejudicial manner, to comply with the Acquisition Management System (“AMS”) and the criteria set forth in the underlying Solicitation. *AMS Policy* § 3.2.2.3.1.2.5; *Protest of Alutiiq Pacific LLC 12-ODRA-00627*; see also *Protest of Adsystech, Inc.*, 09-ODRA-00508. In the instant case, the Solicitation requires that “[f]or size determination purposes, the FAA will consider a company’s affiliation with another entity under the SBA general principles of affiliation.” FF 13. Thus, the ODRA will look at the relevant case law of the Small Business Administration (“SBA”) Office of Hearings and Appeals (“OHA”) interpreting the applicable rules and regulations. The ODRA has held that, while the decisions of the OHA are not binding on the FAA, the ODRA will treat them as persuasive authority to the extent that they do not conflict with the AMS. *Protest of Potter Electric Company*, 13-ODRA-00657.

C. Identity of Interest

DMS asserts that “the Rogers Proposal does not comply with the financial requirements of SIR § L.10. The documents submitted are deficient on their face and the material [sic] produced by CSR show that its [DELETED] line of credit was already spoken for.” *DMS Comments (CJRA)* at 10. DMS also asserts that CJRA is economically dependent upon CSR because “[o]ver the 23-month period presented by Rogers in its response, CSR provided over [DELETED] of Rogers [sic] gross revenue.” *Id.* at 14. The Product Team

asserts that “the CO determined that there were no indicia of economic support from CSR to CJRA and no common investments, economic interests or familial ties between CJRA and CSR. *AR (CJRA)* at 14. The Product Team goes on to states that “the CO examined the three prior contracts between CJRA and CSR and did not find the existence of these contracts sufficient to support a finding that CJRA is economically dependent on CSR for its revenue.” *Id.* For the reasons set forth below, the ODRA finds that DMS has not met its burden, and that the Contracting Officer’s conclusion that CJRA is not economically dependent upon CSR is supported by substantial evidence in the record and has not been shown to lack a rational basis.

Pursuant to the requirements of the Solicitation, the CO applied 13 C.F.R. § 121.103(f) in determining that CJRA’s is not economically dependent upon CSR. FF 33. Under SBA regulations:

Affiliation may arise among two or more persons with an identity of interest. Individuals or firms that have identical or substantially identical business or economic interests (such as family members, individuals or firms with common investments, or firms that are economically dependent through contractual or other relationships) may be treated as one party with such interests aggregated. Where SBA determines that such interests should be aggregated, an individual or firm may rebut that determination with evidence showing that the interests deemed to be one are in fact separate.

13 C.F.R. § 121.103(f). First, the Contracting Officer found that:

CJRA’s 2011 tax return shows total revenue of [DELETED] and CJRA’s income statement for the eleven months ending November 30, 2012 shows total revenue of [DELETED]. CJRA disclosed that a portion of its revenue in 2011 and 2012 is from contracts with CSR: (1) Subcontract between CJRA and CSR from September 2011 to December 2011 with receipts to CJRA totaling [DELETED]; (2) Subcontract between CJRA and CSR from September 2011 to December 2011 with receipts to CJRA totaling [DELETED]; and (3) Consulting Agreement between CJRA (consultant) and CSR for technical expert consulting work on an Army National Guard Air Traffic Control Procurement from March 2012 to May 2012 with receipts to CJRA totaling [DELETED].

FF 32. OHA has held that in interpreting 13 C.F.R. § 121.103(f) “that one firm is economically dependent upon another if it derives 70% or more of its revenue from that firm.” *VMX International, LLC*, SBA No. SIZ-5427 (2012). OHA has also held that contractual relationships of this nature, where one of the concerns is heavily dependent on the other for revenue is sufficient alone to find affiliation. *Id.* In the instant case, the record clearly demonstrates that in 2011, CJRA received more than 70% of its revenue from CSR, FF 99-101, and OHA has held that affiliation may be found based on a single year. *Size Appeal of TPG Consulting, LLC*, SBA No. SIZ-5306, at 14 (2011).

As counsel for the Product Team points out, OHA has also held that this interpretation does not apply to “companies that have just started or re-started operations after a period of dormancy.” *AR (CJRA)* at 14 *citing Argus and Black, Inc.*, SBA No. SIZ-5204 (2011) and *Cherokee Nation Healthcare Services, Inc.*, SBA No. SIZ-5343. As OHA stated in *Argus and Black, Inc.*:

[A] mechanical application of the rule in this case would be an injustice. It places too large a significance on too small a contract. It would unduly penalize start-up operations, which may have had the chance to obtain only one or two contracts at the time they face a size determination.

SBA No. SIZ-5204 (2011) at 6-7. In this case, the record demonstrates that CJRA filed its Articles of Incorporation with the Florida Secretary of State on October 27, 2010. FF 103-104. CJRA also asserts in its response to the Contracting Officer’s fact finding inquiry for size determination purposes and in its Proposal that it had been a sole proprietorship from 2005 to 2008. FF 103. Thus, the ODRA finds that CJRA is within the exception for startup or dormant companies.

Finally, the Contracting Officer also concluded that CJRA has “independent access to financing” to “cover 90 days of contract expenses” pursuant to section L.21.3 of the Solicitation in making her determination that the two are not affiliated. FF 33. While the Contracting Officer determined that the issue of independent financing to cover the initial 90 days of contract expenses does not make CJRA economically dependent upon

CSR, FF 33, the ODRA finds that such a conclusion does not address whether CJRA and CSR “have identical or substantially identical business or economic interests” such as “economically dependent through contractual or other relationships” as contemplated by 13 C.F.R. § 121.103(f). The ODRA will address this issue under Section III.E of these Findings and Recommendations. Thus, the ODRA finds that the identity of interest rule does not support a finding that CJRA and CSR are affiliated.

D. Newly Organized Concern Rule

SBA regulations state that:

Affiliation may arise where former officers, directors, principal stockholders, managing members, or key employees of one concern organize a new concern in the same or related industry or field of operation, and serve as the new concern's officers, directors, principal stockholders, managing members, or key employees, and the one concern is furnishing or will furnish the new concern with contracts, financial or technical assistance, indemnification on bid or performance bonds, and/or other facilities, whether for a fee or otherwise. A concern may rebut such an affiliation determination by demonstrating a clear line of fracture between the two concerns. A "key employee" is an employee who, because of his/her position in the concern, has a critical influence in or substantive control over the operations or management of the concern.

13 C.F.R. § 121.103(g). Applying this rule, the Contracting Officer found that, while David Rogers worked for "CSR from 2004 to December 31, 2009 in various roles including as a weather site supervisor, program manager, technical lead/business development," he was not a key employee for purposes of finding affiliation. FF 36. In the Size Determination, the CO states that she "reviewed the descriptions for each of these positions." FF 36. The CO, however, provides no citation to any documents relied upon to support this conclusion. Counsel for the Product Team cites generally to Tabs 6 and 9(a)(1) of the administrative record, which are CJRA's Proposal in its entirety and CJRA's Responses to the Contracting Officer's fact finding investigation, without a reference to specific documents contained therein. *C.f. Consolidated Contract Disputes of Huntleigh USA Corporation*, 04-TSA-008 and 06-TSA-025 citing *Malacara v. Garber*, 353 F.3d 393, 405 (5th Cir. 2003) (The ODRA is not bound to consider evidence unless it is referred to it in the briefs). Nevertheless, the ODRA has searched through the CJRA Proposal and reviewed CJRA's response to the Contracting Officer and concludes that the Contracting Officer misapplied the facts to the law in finding that David Rogers' prior employment with CSR did not "give [him] 'critical influence in or substantive control over the operations and management of' CJRA.'" FF 37.

A “key employee” is defined by the Small Business Regulations as someone who has “critical influence in or substantive control over the operations or management” of the company. 13 C.F.R. § 121.103(g). In *Sabre88, LLC*, OHA, under facts similar to the instant case, found a former Program Manager “for one of [the Subcontractor’s] three regional operations (and manager of 33 of [the Subcontractor’s] 250 employees), and . . . as its Vice President for Government Affairs, with a unique set of responsibilities” to be a key employee. *Size Appeal of Sabre88, LLC*, SBA No. SIZ-5161 (2010). OHA further found that the individual “was so indispensable to [the Subcontractor] that even after he left its employ, [the Subcontractor] retained him as a contractor.” *Id.* He also “was one of about eight department heads reporting directly to [the Subcontractor’s] two owners.” *Id.*

Based on this record in the current Protest, the ODRA finds that Rogers’ Resume establishes that he held positions of significant importance to the Contract Weather Observer Program for CSR. FF 75. Like the key employee in *Sabre88*, Rogers held the positions of Quality Assurance and Training Manager, Technical Expert, and Business Development Manager for CSR, from 2007-2009, and Weather Program Manager, from 2003-2007. FF 75. His Resume states with respect to the Quality Assurance and Training Manager position that he was:

Responsible for all aspect of quality assurance, training, technical policies and procedures on multiple Government meteorological support services contracts. Organize, manage, and oversee the transition of new meteorological services contracts.

FF 76. His resume also states with respect to the Program Manager position that he was:

Responsible for the management of multiple DoD and FAA meteorological services contracts. Duties included contract adherence, budgets, resource management, quality assurance, training, policies and procedures, and QAE/COTR interface.

FF 77.

David Rogers, as in the case of the key employee in Sabre88, also entered into a Consulting Agreement with CSR on March 8, 2012 specifically to retain his services “as required by CSR.” FF 86-87. The Task Description in the Agreement specifically states that Rogers was to “[p]rovide *Subject Matter Expertise with special, in-depth knowledge* of aviation operations that enhances the *Weather Division Management Team's understanding* on a variety of subjects and operational issues.” FF 88 (emphasis added in italics, bold in original). Thus, the ODRA finds that David Rogers is a key employee.

Finding that Mr. Rogers is a former “key employee” of CSR addressed the disputed element of the four elements articulated in the Newly Organized Concern Rule stated in 13 C.F.R. § 121.103(g) and summarized in *Sabre88*. The other elements² are satisfied but are not at issue. The ODRA, accordingly, finds that the Contracting Officer lacked a rational basis for her size determination, and recommends that the Protest be sustained with regards to the Protest under the Newly Organized Concern Rule.

E. Ostensible Subcontractor Rule

DMS asserts that the Contracting Officer’s findings that CJRA is not affiliated with its subcontractor, CSR, as an ostensible subcontractor is erroneous and, accordingly, lacks a rational basis. *Comments* at 14-16. The Product Team asserts in its Agency Response that “[t]he CO’s conclusion that the prime is capable of performing the ‘primary and vital requirements’ of the contract and that the level of subcontractor assistance mentioned in the [] Proposal did not rise to the level of ‘unusual reliance’ is rational and well-supported by the record.” *AR* at 22. Here it is not disputed that the primary and vital requirements of the CWO Contract are the weather observation services provided by the Weather Observers. *DMS Comments* at 14-15; *Size Determination (CJRA)* at 7. For the reasons set forth below, the ODRA finds that DMS has met its burden, and that the

² These include findings that: (1) the firms are in the same or related industry or field of operations; (2) Mr. Rogers is an officer of the new concern; and (3) the prior firm furnished contracts, financial or technical assistance, indemnification on bid or performance bonds, “and/or other facilities.” *Size Appeal of Sabre88, LLC*, SBA No. SIZ-5161, at 7 (*summarizing* 13 C.F.R. § 121.103(g)).

Contracting Officer's conclusion that CJRA is not affiliated with CSR as an ostensible subcontractor lacks a rational basis.

Pursuant to the requirements of the Solicitation, the CO applied 13 C.F.R. § 121.103(h)(4) in determining that CJRA's teaming arrangement with CSR violated the Ostensible Subcontractor Rule. FF 38. Under SBA Regulations:

A contractor and its ostensible subcontractor are treated as joint venturers, and therefore affiliates, for size determination purposes. An ostensible subcontractor that performs primary and vital requirements of a contract, or of an order under a multiple award schedule contract, or a subcontractor upon which the prime contractor is unusually reliant. All aspects of the relationship between the prime and subcontractors are considered, including, but not limited to, the terms of the proposal (such as contract management, technical responsibilities, and the percentage of subcontract work), agreements between the prime and subcontractor (such as bonding assistance or the teaming agreement), and whether the subcontractor is the incumbent contractor and is ineligible to submit a proposal because it exceeds the applicable size standard for that solicitation.

13 C.F.R. § 121.103(h)(4). In other words, "[a] prime contractor and its subcontractor may be treated as affiliates if the subcontractor either performs the primary and vital requirements of the contract, or if the prime contractor is unusually reliant upon the subcontractor." *Size Appeal of DoverStaffing, Inc.*, SBA No. SIZ-5300, at fn. 2 (2011). When applying the Ostensible Subcontractor Rule one must consider "all aspects of the relationship between the prime and subcontractor, including the terms of the Proposal, agreements between the firms (such as teaming agreements, bonding or financial assistance), and whether the subcontractor is the incumbent on the predecessor contract." *Size Appeal of SM Resources Corporation, Inc.*, SBA No. SIZ-5338 (2012). The rationale is to "prevent other than small firms from forming relationships with small firms to evade [] size requirements." *Size Appeal of Fischer Business Solutions, LLC*, SBA No. SIZ-5075, at 4 (2009). The analysis is intensely fact specific, and based on the solicitation and the proposal at hand. *Size Appeal of Four Winds Services, Inc.*, SBA No. SIZ-5260, at 6 (2011). In the present Protest, several aspects of the CJRA-CSR relationship demonstrate a violation of the Ostensible Subcontractor Rule.

1. Hiring of Managerial Incumbent Personnel

The CO concluded that CJRA and CSR are unaffiliated under the Ostensible Subcontractor Rule because:

[B]ased upon the proposal it appears that the contract weather sites would be divided into those that are staffed by CJRA-employed Senior Weather Observers and those staffed by CSR-employed Senior Weather Observers. I do not find this proposed division of the staffing of sites between CJRA and CSR to be unusual or indicative of undue reliance upon CSR since as discussed below, it appears that the majority of the employees under the Contract (including the Senior Weather Observers) will be employed by CJRA.

FF 47. As discussed further below, while the Contracting Officer correctly applied the AMS to determine that the proposed staffing of the contract with incumbent non-managerial, non-supervisory personnel did not constitute affiliation, the Contracting Officer failed to analyze the Proposal with respect to the hiring of incumbent managerial, supervisory personnel, an indicia of an ostensible subcontractor relationship.³ *See, e.g., Size Appeal of SM Resources, supra.*

OHA has held that there is an indication of affiliation where a prime contractor relies heavily on the incumbent personnel of its subcontractor to perform the primary and vital requirements of the contract. *See, e.g. Size Appeal of The Analysis Group, LLC*, SBA No. SIZ-4814, at 6 (2006). However, Executive Order 13,495 (2009) states “[t]he Federal Government's procurement interests in economy and efficiency are served when the

³ Inasmuch as the Product Team relies on AMS Clause 3.6.1-7 Limitations on Subcontracting (October 2011) in support of its finding that there is no affiliation between the prime contractor and its subcontractor, *Size Determination (CJRA)* at 9, OHA has held that “the fact a challenged firm is performing over 50% of the work of the contract and has complied with the Limitations on Subcontracting Clause does not preclude a finding of unusual reliance.” *Greenleaf Construction Company, Inc.*, SBA No. SIZ-4765 (2006).

successor contractor hires the predecessor's employees,” E.O. 13,495, Nondisplacement of Qualified Workers Under Service Contracts, 74 Fed. Reg. 6103 (Feb. 4, 2009), and the OHA has held that “the mere hiring of incumbent non-management personnel is no longer indicative of unusual reliance under the ostensible subcontractor rule.” *Size Appeal of DoverStaffing, Inc.*, SBA No. SIZ-5300, at fn. 2 (2011); *see also Size Appeal of Spiral Technologies, Inc.*, SBA No. SIZ-5279 (2011). However, OHA has also held that EO 13,495 only applies to non-managerial, non-supervisory personnel. *Size Appeal of SM Resources, supra* (“Managerial employees are exempted from the reach of Executive Order 13,495.”).

The Executive Order at issue in *DoverStaffing* also applies to the FAA. Section I.12 of the Solicitation, quoting AMS Clause 3.6.2-40 Nondisplacement of Qualified Workers (April 2009), states in relevant part:

The contractor and its subcontractors must, except as otherwise provided herein, in good faith offer those employees (***other than managerial and supervisory employees***) employed under the predecessor contract whose employment will be terminated as a result of award of this contract or the expiration of the contract under which the employees were hired, a right of first refusal of employment under this contract in positions for which employees are qualified.

FF 10 (emphasis added). AMS Clause 3.6.2-40 is taken verbatim from Executive Order 13,495. *Compare* Executive Order 13,495, 74 Fed. Reg. 6103 (Feb. 4, 2009) *with* AMS Clause 3.6.2-40. Indeed, the plain language of AMS Clause 3.6.2-40, like E.O. 13, 495, expressly omits “managerial and supervisory employees.” Recognizing the similarity of the AMS and other acquisition systems under E.O. 13,495, the ODRA finds the *DoverStaffing* decision to be persuasive.

In *DoverStaffing*, the OHA upheld the SBA Area Office’s Size Determination on the basis “that Appellant is reliant upon [Subcontractor One] not only for the 40% of the contract work assigned to it by the proposal, but for nearly all of Appellant's own staff for this contract and for all of the key employees performing the contract management.” SBA No. SIZ-5300 (2011). OHA stated that “[t]he critical point, which Appellant does

not dispute, is that not only will Appellant be subcontracting to [Subcontractor One] for 40% of the work on this contract, but Appellant will be hiring the [Subcontractor One]'s incumbent employees *en masse* to perform Appellant's 51% of the work.” *Id.* OHA found that “[n]one of Appellant's proposed personnel is currently employed by Appellant” and “[a]ll of the proposed key personnel on this contract, the Project Manager, the Project Support Manager, Youth Services Project Manager, School Services Project Manager, Project Analyst, and Web Specialist, are currently [Subcontractor One] employees based in East Point, Georgia.” *Id.* Only one current employee of the Appellant was proposed to be “involved with the performance and management of this contract ... its President and CEO.” *Id.*

Similarly, in *SM Resources Corporation, Inc.*, OHA again upheld an Area Office Size Determination on the grounds that the “Appellant would be hiring all of its key employees who manage the contract ... as strongly indicative of unusual reliance.” SBA No. SIZ-5338 (2012). OHA observed that “[o]nly 14% of the proposed contract personnel are currently Appellant's employees.” *Id.* “[A]ll of Appellant's managerial and supervisory employees for this contract are currently [Subcontractor] employees.” *Id.* In addition, the Appellant in its Proposal “clearly stated that its goal was to utilize the incumbent key personnel as its own key personnel.” *Id.*

In the instant case, CJRA in its Proposal states that it plans to hire *all* of the incumbent managerial Senior Weather Observers, and only propose a few “key management” personnel from within. FF 58, 60, 65, and 73.⁴ CJRA only proposes as Program

⁴ CJRA states that if “[CJRA]/CSR is unable to fill all the Senior Weather Observer positions with incumbent CWO personnel, we have resumes of proposed replacements that would be able to fill the CWO sites awarded. Detailed resumes are listed Vol III Past Performance. All of the [CJRA's] proposed Senior Weather Observers meet SIR requirements.” FF 59 AR Tab 6 at 11. “While Appellant's proposal mentions the potential of hiring other employees, they are not proposed here, and an ostensible subcontractor case must be analyzed on the basis of the solicitation and proposal at hand.” *DoverStaffing, supra citing Size Appeal of Four Winds Services, Inc.*, SBA No. SIZ-5260, at 6 (2011). Moreover, CJRA states in its Proposal that it already had verbal commitments from all incumbent Senior Weather Observers. FF 79.

Manager, David E. Rogers, and as the Quality Control and Training Manager, Milan Rodic both current employees of CJRA. FF 74. In CJRA's Proposal, incumbent Contract Weather Observation Program Manager Ron J. Plourde, who is and will remain an employee of CSR, is listed as the key personnel position of "Deputy Program Manager," which is not described in the Proposal. *See generally* AR Tab 6.

Both the Solicitation and the Proposal by CJRA make it clear that Senior Weather Observer is a managerial and supervisory position. *See generally*, AR Tabs 1 and 6. The Proposal clearly establishes under the "Labor Relations Section" that the Senior Weather Observer is a management position. It states:

Labor Relations– If the site is covered by a union's collective bargaining agreement (CBA), CJR will ensure that the Senior Weather Observer is not elected as the union shop steward. The Senior Weather Observer will be protected by the union, but ***will serve as part of the CJRA management structure***. This will allow for the Senior Weather Observer to administer disciplinary actions.

FF 65. The Organizational Chart provided by CJRA "illustrates the organizational structure to be used by [CJRA] for the FAA CWO 2012 effort," and "[t]he lines of responsibility and authority between each of the key management positions," which includes the Senior Weather Observers. FF 66.

Section H.24 of the Solicitation designates the Senior Weather Observers as key personnel under the contract. FF 8. The SOW requires the contractor to designate "a senior employee at each site as 'Senior Weather Observer'" and that the "Senior Weather Observer must be the contractor's on-site representative and as such must be the contractor's initial point of contact (POC) at each site by the COTR/TOR, CO, and/or NWS representative." FF 5. The SOW goes on to state that "the Senior Weather Observer must be able to discuss and act on behalf of the contractor in the following areas: site staffing/work and leave schedule, implementation and continuation of the contractor's Quality Assurance Management Plan, and initial POC for any NWS or FAA

site inspections.” FF 5. Subsection L.20.3.1 also states that the Senior Weather Observer has “a significant role in the day-to-day management of the contract.” FF 17.

In addition, the CJRA Proposal describes the Senior Weather Observer as a managerial and supervisory position. Section A10.3.1 Senior Weather Observer describes the position as follows:

The Senior Weather Observer will be the CJR on-site representative and primary on-site point-of-contact (POC) for the FAA and NWS representatives. The Senior Weather Observer will be able to discuss and act on behalf of CJR in the following areas: site staffing/work and leave schedule, implementation and continuation of the Contractor’s Quality Assurance Management Plan, training, and initial POC for any NWS or FAA site inspections.

FF 64. The Proposal also provides the following job description for Senior Weather Observer that is supervisory in nature:

The Senior Weather Observer is responsible for the specific CWO site’s daily management administrative matters, record keeping, documentation, equipment accountability, safe guarding of government resources, and other applicable tasks. The Senior Weather Observer also manages the technical, administrative and personnel functions of the facility and will perform weather observing duties. The Senior Weather Observer will oversee the site Quality Control program, training requirements, personnel issues, scheduling, administer company policies, and all other issues related to the management of site operations under this contract. On a weekly basis, the Senior Weather Observer will be collecting and sending data to the QCTM and Weather Program Manager for tabulation and review. The Senior Weather Observer will note any administrative suspense’s for scheduled work, check vacation rosters, participate in conference calls between the Weather Management Team and Senior Weather Observer, and complete payroll timecards. Monthly tasks will be the compilation of performance and administrative statistics, development of the Quality Control report, the scheduling of personnel for the upcoming month(s), providing feedback to the local FAA customer to ensure that we maintain a strong and direct line of communication with our customers. . . .

The Senior Weather Observer will perform surface weather observation duties by providing ASOS augmentation, back-up and manual weather observation services. Ensures all hourly METAR and required SPECI observations are timely, complete, accurate, representative, and disseminated

into the national communication network and to the appropriate agencies. The Senior Weather Observer shall ensure Performance Monitoring is being tracked and reported per FAA requirements. Responsible for performing and enforcing active quality control procedures to ensure error-free products are produced and disseminated. The Senior Weather Observer is responsible for checking his/her observations pre, during and post dissemination as well as the observations disseminated by his employees.

FF 64. The proposal goes on to describe the Senior Weather Observer's responsibilities and authority, which the ODRA finds are managerial and supervisory in nature. FF 62-63. The analysis does not end here, however, since the Ostensible Subcontractor Rule requires that "[a]ll aspects of the relationship between the prime and subcontractors are considered." 13 C.F.R. § 121.103(h)(4). As discussed below, the ODRA also finds that CJRA is affiliated with CSR on other aspects in addition to the hiring *en masse* of managerial, supervisory personnel.

2. Independent Access to Financing

As initially raised in Section III.C of these Findings and Recommendations, the Contracting Officer concluded that CJRA has "independent access to financing" to "cover 90 days of contract expenses" pursuant to section L.21.3 of the Solicitation in making her determination that the two are not affiliated. FF 33. The Contracting Officer states that:

CJRA has also shown that it has independent access to financing. CJRA submitted a letter from [DELETED] [,] which contained the terms under which it would lend CJRA up to [DELETED] as a commercial revolving line of credit and CJRA has access to [DELETED] in cash belonging to David and Jane Rogers. . . .

FF 33. The record demonstrates no rational basis to support this conclusion. First, the letter, which CJRA submitted in support of its ability to provide 90-days of initial financing from Coastal Bank and Trust Company states that "[t]his is *not to be construed as a loan commitment*, but an expression of interest under which the lender would be *willing to consider* granting the loan." FF 80 (emphasis added). The only other

financing provided in the Proposal is for [DELETED] from the same bank to the subcontractor, CSR. FF 81.

In an attempt to meet the 90 days of working expense requirement, CJRA, in response to the Contracting Officer's fact finding investigation for size determination purposes offered [DELETED] in personal assets of David and Jane Rogers, FF 93, and a letter from [DELETED] for a line of credit in the amount of [DELETED]. FF 92. The Contracting Officer implicitly and correctly rejected the [DELETED] line of credit from [DELETED] in her analysis. *See generally CJRA Size Determination.* However, the Contracting Officer took into account the [DELETED] in personal assets contrary to the requirements of the Solicitation, which requires that "[t]he *offeror* must demonstrate that it has funds and/or a line of credit from a financial institution equal to one-quarter of the combined base year price of the two highest-priced groups being proposed; or if only one group is proposed, for that group." FF 33. In the instant case, David and Jane Rogers are not the offeror. Moreover, the Solicitation discourages the use of personal assets stating: "[l]ines of credit from credit cards for personal use may not be applied toward the satisfaction of this requirement." FF 18. The ODRA finds that the Contracting Officer's determination regarding independent access to financing lacks a rational basis, and finds that CJRA is economically dependent upon CSR to meet the requirement of 90 days of working expenses.

3. Other Grounds

In its Proposal, CJRA relies heavily on the expertise of CSR. FF 82-92. "Our subcontractor, Control Systems Research Inc. (CSR), is a multi-million dollar company with exceptional performance records." FF 86. CJRA states that it and CSR "conducted a detailed analysis of the FAA CWO 2012 SIR. Our resulting methodology and approach is built on CSR's extensive weather management experience." FF 87. CJRA also relies upon CSR for its experience with Quality Control, Initial Qualification Training, emergencies, and Team Discussion Boards. FF 83, 88-91. Accordingly, on this record, the ODRA finds that CJRA is affiliated with CSR as an ostensible subcontractor.

F. Totality of the Circumstances

DMS asserts that CJRA should be found affiliated with CSR based on the totality of the circumstances because the other three bases of affiliation are met, and CJRA's Proposal is identical to "at least three other 'independent' offerors." *DMS Comments (CJRA)* at 16-17. The ODRA notes that, other than the Proposals for ATS and CJRA, the Proposals for any other offerors are not in the record. The Product Team asserts that the Contracting Officer had a rational basis for finding that CJRA and CSR are not affiliated based on the totality of the circumstances. *AR (CJRA)* at 22-23.

"In determining whether affiliation exists, SBA will consider the totality of the circumstances, and may find affiliation even though no single factor is sufficient to constitute affiliation." 13 C.F.R. § 121.103(a)(5). The Contracting Officer concluded that CJRA and CSR are not affiliated on the basis of totality of the circumstances because of "CJRA's access to independent financing, CJRA's revenue, the experience of CJRA's key management personnel, the reasonable division of responsibilities between CJRA and CSR, CJRA's teaming arrangement which states that CJRA will perform 60% of the work and CJRA's past performance." FF 54. Many of these findings have been shown erroneous in the discussion above. The remainder of the record provides substantial indicia of affiliation when the applying the totality of the circumstances standard. These include, but are not limited to:

- Significant financial support of CJRA from CSR through contracts that have contributed over [DELETED] percent of CJRA's revenue in certain years.
- The continued service of Mr. David Rogers for CSR, first as a key CSR employee, and then as a subject matter expert engaged by CSR to assist its management team as a paid consultant.
- The dependence on CSR resources and experience, as referenced throughout the CJRA proposal.
- The reliance on CSR's [DELETED] line of credit to meet the financial requirements found in Provision L.10 of the Solicitation.
- The reliance on CSR's experience to meet the past performance requirements of the Solicitation.

Considering all aspects of the relationship, the ODRA finds that the Contracting Officer's determination on this point was not supported by a rational basis and recommends that the Protest be sustained.

IV. CONCLUSION

For the reasons discussed herein, the ODRA recommends that the Protest be sustained. The ODRA further recommends that the Product Team be directed as follows: (1) award to CJRA not be made under the Solicitation; and (2) if an award already has been made and a contract executed, that the Product Team terminate the Contract; and (3) make a new source selection decision in accordance with the continuing needs of the Agency, the Solicitation, and these Findings and Recommendations from the remaining eligible offerors.

-S-

C. Scott Maravilla
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

.