

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

FINDINGS AND RECOMMENDATIONS

**Matter: Protest of Diversified Management Solutions, Inc.
Under Solicitation No. DTFAWA-12-R-08591**

Docket No.: 13-ODRA-00636

Appearances:

For the Protester: John Bartlett, Esq.

For the Intervenor:

ATS Meteorology USA, Inc.: Wayne A. Keup, Esq.

For the FAA Product Team: JoAnn J. Wang, Esq.

I. INTRODUCTION

This matter arises from a bid protest (“Protest”) filed with the Federal Aviation Administration (“FAA”) Office of Dispute Resolution for Acquisition (“ODRA”) by Diversified Management Solutions, Inc. (“DMS” or “Protester”), docketed as 13-ODRA-00636 challenging the intended award of a contract (“Contract”) for Contract Weather Observation (“CWO”) Services to ATS Meteorology USA, Inc. (“ATS”) under Solicitation DTFWA-12-R-08591 (Solicitation).¹ The Solicitation sought “to acquire

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 7. The Protest also included challenges to the awards of contracts to C.J.

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.” FF 2. The Solicitation sought services in 17 geographical areas, which have been subdivided 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 Group 11 by the CWO Product Team on the grounds that ATS is affiliated with its proposed subcontractor Control Systems Research, Inc. (“CSR”), making it ineligible for award as a small business pursuant to the terms of the Solicitation.² *Protest*. For the reasons discussed herein, the ODRA recommends that the Protest be sustained as to ATS.

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

Rogers Aviation, Inc., EKO Systems, Inc., and WX Solutions, Inc. docketed as 13-ODRA-00633, -00634, and -00635, respectively.

² In its Comments, DMS no longer challenges the Contracting Officer’s Size Determination with respect to the “Identity of Interest” and the “Newly Organized Concern” Rules. *Comments* at 10.

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. The ODRA finds that this section of the Solicitation establishes the position of Senior Weather Observer to be managerial.

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, DMS filed a protest challenging the award to ATS 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 Protest to 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 ATS Meteorology USA, Inc. is eligible for award. *AR* Tab 11.

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

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. No further support for the Motion was provided.

31. The CO in her Declaration testifies that she reviewed the documents under Tab 9 of the Agency Response for ATS. *Declaration of Katherine Petito-Peverall*, dated May 20, 2013 at ¶ 4; *AR* Tab 12.

32. The Program Manager’s Declaration further states that:

The staffing approach identified in the ATS Proposal is not unusual and does not demonstrate that ATS is unusually reliant upon CSR. The ATS Proposal revealed nothing that would indicate that less than 50% of the personnel costs would be expended for employees of ATS.

Declaration of Thomas Jones, dated April 17, 2013 at ¶ 5; *AR* Tab 13.

C. Contracting Officer’s Size Determination

33. The Size Determination states:

In the ATS Response, ATS has stated that it is affiliated with ATS Services, Ltd. and ATS Technology Systems, Inc. on the basis of a

common owner, [DELETED] is below the \$14.0 million size standard set forth in the SIR. Accordingly, I do not find that ATS exceeds the size standard solely because of its affiliation [DELETED].

AR Tab 11 at 4.

34. The Size Determination proceeds to state:

In connection with determining whether there was an identity of interest between ATS and CSR, I examined whether ATS was economically dependent upon CSR through contractual or other relationships. Mr. Mason does not have any economic interest in CSR. ATS and Mr. Mason share no familial ties or common investments with CSR. ATS filed its Articles of Incorporation with the Delaware Secretary of State on December 14, 2011. ATS has reported no revenue. [DELETED] Based upon the ATS Proposal and the information provided by ATS, I do not find information that indicates that ATS is either economically dependent upon CSR or affiliated with CSR on the basis of an identity of interest.

Id.

35. The Size Determination also states:

I have reviewed the SBA regulations regarding the newly organized concern rule which requires that all of the elements of this rule be satisfied before there can be a finding of affiliation. Both ATS and CSR are in the same industry as both entities provide contract weather observation services. ATS filed its Articles of Incorporation with the Delaware Secretary of State on December 14, 2011. Cameron Mason owns 100% of the shares of ATS. Mr. Mason has not been an officer, director, principal stock holder, managing member or employee of CSR. CSR is not furnishing ATS with contracts, financial or technical assistance, indemnification on bid or performance bonds and/or other facilities, whether for a fee or otherwise. Therefore, I cannot find affiliation between ATS and CSR under the newly organized concern rule.

AR Tab 11 at 5.

36. 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 5 (emphasis in original).

37. The Size Determination also finds 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.* at 6.

38. The Size Determination states that “[i]n addition, I also considered the teaming agreement between ATS and CSR to determine if that revealed any unusual reliance.” [DELETED] AR Tab 11 at 6.

39. The Size Determination also observes that “[t]here is also a Non-Disclosure Agreement between the parties regarding the treatment of confidential information. There is nothing in the Teaming Arrangement or the Non-Disclosure Agreement that leads me to conclude that ATS is affiliated or unusually reliant on its subcontractor for performance of the contract.” *Id.*

40. The Size Determination states:

I looked to ATS's proposal to see who they identified as key personnel that would perform the primary and vital requirements of the SIR. ATS's proposal identified the management level employees as well as the Senior Weather Observers as key. ATS identified the following [DELETED] Based upon the experience of the ATS management level employees identified by ATS and the proposal's description of the Program Manager's responsibility, I do not believe that ATS is unusually reliant upon CSR for the management of this contract.

AR Tab 11 at 7.

41. The Size Determination states:

The Senior Weather Observers were identified as Key Personnel under the SIR and I 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 ATS proposal states [DELETED]

Id.

42. The Size Determination states:

I looked at whether the Senior Weather Observers would be employees of ATS or CSR. [DELETED] I do not find this proposed division of the staffing of sites between ATS and CSR to be unusual or indicative of undue reliance upon CSR since as discussed below, it appears that at least 50% of the employees under the Contract (including the Senior Weather Observers) will be employed by ATS.

Id.

43. The Size Determination further states:

[DELETED] Section L20. 1 stated that, "If an offeror's proposal includes a subcontractor, the subcontractor's past performance and relevant experience may be evaluated. "In addition, L20.2.1 stated in part that. "Offerors that are newly formed entities, without prior contracts, must enter into a subcontracting arrangement with a vendor that possesses the relevant past performance."

AR Tab 11 at 8.

44. The Size Determination states:

[DELETED] Therefore, based on the information reviewed, I believe that ATS will be implementing the transition and quality assurance/training efforts.

AR Tab 11 at 8-9.

45. The Size Determination further states:

There is a reference in ATS's proposal [DELETED] However, this appears to be the extent of the infrastructure assistance CSR will be providing ATS. 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. [DELETED] support is an ancillary support function that would assist ATS 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 ATS or CSR is more relevant for purposes of determining whether ATS or CSR will be performing the primary and vital requirements of the contract. In addition, I do not find that ATS is unusually reliant upon CSR simply based upon CSR's assistance [DELETED]. As I stated above, I found information from ATS's proposal and the other information provided that indicates that ATS is capable of performing the primary and vital requirements of the contract without assistance from CSR.

AR Tab 11 at 9.

46. The Size Determination states:

ATS provided documentation showing that [DELETED] Based upon the information I was provided, I determined that ATS' independent access to financing precluded any notion that it was unusually dependent on its subcontractor in terms of financing.

Id.

47. The Size Determination also states:

Based upon my review of ATS' Proposal, ATS' Response, the agreements between ATS and CSR and all of the facts and circumstances and for the reasons set forth above, which include ATS' access to independent financing, ATS' past performance, the experience of ATS' key management employees and the reasonable division of responsibilities between ATS and CSR, it appears to me that ATS is capable of performing the tasks required under the contract by itself without CSR's assistance. Therefore, since ATS 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 ATS is affiliated with CSR under the ostensible subcontractor theory.

Id.

48. The Size Determination states:

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 ATS is not affiliated with its subcontractor, CSR. I base this determination on the facts and circumstances set forth above, including ATS' access independent financial assistance, ATS' past performance, the experience of ATS' key management employees and the reasonable division of responsibilities between the ATS and CSR. Considering all of these elements together, I conclude that ATS is not affiliated with CSR under the totality or the circumstances theory.

AR Tab 11 at 10.

D. ATS Technical Proposal

49. In its Technical Proposal, ATS states:

[DELETED]

AR Tab 6 at 5 (emphasis added).

50. The ATS Technical Proposal further states:

ATS understands weather observations are a tool that provides the FAA and other Government users with vital information to complete their missions. The information provided is a key resource for the safe management of flight operations in this time of increased security awareness. Our weather observing program and philosophy guarantees that weather observations will be recorded and disseminated as the weather elements change.
[DELETED]

Id. (emphasis added).

51. Further, ATS states that it “draws upon the management expertise of Canadian sister company [DELETED] in the provision of aviation weather observing services.” *AR* Tab 6 at 6.

52. The ATS Technical Proposal states:

ATS’s analysis of the requirements has formed a strategy to recruit and retain quality weather observers to accomplish the contract. [DELETED] Therefore, hiring this highly qualified workforce is paramount in the accomplishment of this effort.

AR Tab 6 at 11.

53. The ATS Technical Proposal states that [DELETED] *AR* Tab 6 at 12.

54. The ATS Technical Proposal states that [DELETED] *AR* Tab 6 at 13.

55. Under Section A10 “Roles and Responsibilities of Weather Personnel,” the ATS Technical Proposal states:

The basic responsibility of ATS 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.

AR Tab 6 at 17.

56. Senior Weather Observer responsibilities are described as follows in the ATS Technical Proposal:

[DELETED]

AR Tab 6 at 17-18.

57. The ATS Technical Proposal describes Senior Weather Observer authority as follows:

[DELETED]

Id.

58. According to the ATS Proposal, the QC/Training Manager [DELETED] *AR* Tab 6 at 18.

59. ATS describes the Weather Program Manager's role [DELETED] *AR* Tab 6 at 17.

60. Section A10.1 of the ATS Technical Proposal describes the Weather Program Manager position as follows:

[DELETED]

AR Tab 6 at 19-20.

61. Section A10.2 of the ATS Technical Proposal describes the Quality Control / Training Manager position as follows:

[DELETED]

AR Tab 6 at 20-21.

62. Section A10.3 of the ATS Technical Proposal "On-Site Personnel" states that [DELETED] *AR* Tab 6 at 21.

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

[DELETED]

AR Tab 6 at 22.

64. The ATS Technical Proposal also states that:

[DELETED]

AR Tab 6 at 23.

65. The ATS Technical Proposal goes to state with respect to the Senior Weather Observer:

[DELETED]

AR Tab 6 at 23 (emphasis added).

66. Section A10.3.2 of the ATS Technical Proposal describes the position of Weather Observer as follows:

[DELETED]

AR Tab 6 at 24.

67. Section A11 of the ATS Technical Proposal “ATS Organizational Structure Chart” includes Senior Weather Observers as key management personnel. It states:

[DELETED] illustrates the organizational structure to be used by ATS 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. ATS presents a lean and responsive Weather Program that provides support to sites without excessive overhead and costly administration.

AR Tab 6 at 24-25.

68. Section A16 of the ATS Technical Proposal “Management Approach for FAA Policies, Procedures and Regulations Enforcement” 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. [DELETED] 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 27.

69. The ATS Past Performance Proposal identified the following as key personnel, [DELETED] AR Tab 6(a) at 29-36.

70. Section A17.15 of the ATS Technical Proposal “Summary” states:

The ATS management approach is driven by our commitment to provide the FAA with uninterrupted highest quality Weather Observation services. Our management philosophy is based on four principles:

[DELETED]

The corporate and program management structures were discussed in detail and represent a comprehensive low risk approach for FAA CWO 2012 contract execution. They clearly show the relationship between the principal managers, their realm of responsibilities and their source of support.

[DELETED] any added QC, training, and/or changes in policy, procedures or requirements levied by the ATS President will apply to all CWO sites. [DELETED]

In summary, the goal of our internal quality control management system is to improve the overall effectiveness and efficiency of our organization to consistently meet or exceed customer requirements and expectations. This simply results in value added for the customer and satisfaction and improved operations for ATS. [DELETED]

AR Tab 6 at 38-39 (emphasis added, bold in original).

71. Section C5.1 of the ATS Technical Proposal “Roles and Responsibilities of Personnel in the QC Process,” in subsection C5.1.4, describes the role of Senior Weather Observer as follows:

[DELETED]

AR Tab 6 at 51 (emphasis in original).

72. Section C6.2 of the ATS Technical Proposal “Senior Weather Observer Procedures” states:

[DELETED]

AR Tab 6 at 53-54.

73. Section D4.1 of the ATS Technical Proposal “Recruiting Qualified Incumbent Personnel” states:

Our primary concern is to eliminate any disruption to on-going activities or services. [DELETED]

AR Tab 6 at 105.

74. Volume III of the ATS Technical Proposal “Performance and Relevant Experience” states that [DELETED] *AR Tab 6(a) at 3.*

75. ATS states in its Technical Proposal that:

[DELETED]

AR Tab 6(a) at 4.

76. The ATS Business Declaration states that ATS Meteorology USA, Inc. has been in business only one year and has three employees. Its gross receipts are listed for years ending:

[DELETED]

AR Tab 6(g).

E. The ATS Response to Contracting Officer Size Determination Investigation

77. In an Email from the CO to David Macphail, dated January-15-13, the CO directs ATS to “[p]rovide certified financial statement and tax returns for the last three Years” as part of its response to the CO’s size determination investigation. *AR* Tab 8 at 2.

78. [DELETED]

AR Tab 10(g)(i)-(iv).

79. [DELETED] *AR* Tab 9(f)(i)-(iii).

80. [DELETED] *AR* Tab 9(f)(iv).

81. A letter from Welch LLP, ATS Meteorology USA, Inc., states that “ATS Meteorology USA, Inc. was incorporated on December 14, 2011 and therefore no year-end financial statements or tax returns have been completed.” *AR* Tab 9(g)(i).

82. [DELETED] AR Tab 9(h)(i).

83. [DELETED] AR Tab 9(h)(ii)-(iv).

84. [DELETED] AR Tab 9(j)(i)-(iv).

85. [DELETED] AR Tab 9(k)(i)-(iv).

86. [DELETED] AR Tab 9(m)(i)-(iv).

87. 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:

[DELETED]

AR Tab 10(i).

III. DISCUSSION

A. The Motions

1. Standing

The Product Team moves to dismiss the Protest of the award to ATS for lack of standing pursuant to 14 C.F.R. § 17.15(a). AR at 7. ATS 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 [DELETED]

FF 30. The Product Team has not provided any supporting documentation, such as the relevant evaluation documentation, in support of its Motion. The conclusory statement by the Contracting Officer that DMS is not the next in line for award under any circumstance is not sufficient to meet the Product Team's 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 ATS would not be in line for award of the Contract involved. The Motion therefore is denied. *Protest of Alaska Weather Operations Services, Inc., supra.*

2. Timeliness

The Product Team also moves to dismiss the DMS Protest of the award to ATS 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 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) (2012); *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 has been made, the Motion is denied.

3. Mootness

The Product Team also moves to dismiss the protests of the award to ATS 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 hear 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 ATS 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 Adsytech, 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 OHA are not binding on the FAA, the ODRA will treat them as persuasive authority to the extent they do not conflict with the AMS. *Protest of Potter Electric Company*, 13-ODRA-00657.

C. Ostensible Subcontractor Rule

DMS asserts that the Contracting Officer’s finding that ATS is not affiliated with CSR as an ostensible subcontractor is erroneous; i.e. that the two companies are affiliated for small business size determination purposes. *Comments* at 11. 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. It is not disputed that the primary and vital requirements of the contract are the weather observation services provided by the Weather Observers. *DMS Comments (ATS)* at 12; *Size Determination (ATS)* at 7. For the reasons set forth below, the ODRA finds that DMS has met its burden, and that the Contracting Officer’s conclusion that ATS is not affiliated with CSR as an ostensible subcontractor lacks a rational basis. Substantial evidence in the record confirms that ATS and CSR are affiliated.

Pursuant to the requirements of the Solicitation, the CO applied 13 C.F.R. § 121.103(h)(4) in determining that ATS’s teaming arrangement with CSR violated the ostensible subcontractor rule. FF 36. 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, “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).

The CO concluded that ATS and CSR were unaffiliated under the ostensible subcontractor rule because:

[DELETED] I do not find this proposed division of the staffing of sites between ATS and CSR to be unusual or indicative of undue reliance upon CSR since as discussed below, it appears that at least 50% of the employees under the Contract (including the Senior Weather Observers) will be employed by ATS.

FF 42. 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 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. Use of managerial employees remains a strong indicator of affiliation. *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*

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, Contracting Officer's Size Determination at 8, 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).

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 STEM 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, ATS in its Proposal states that it plans to hire *all* of the incumbent managerial Senior Weather Observers, and only proposes to utilize a few “key management” personnel from within. FF 52, 54.⁴ [DELETED] FF 69. [DELETED] *See generally* AR Tab 6.

The Proposals also clearly establish under the “Labor Relations Section” that the Senior Weather Observer is a management position. It states:

Labor Relations– [DELETED]

FF 65. The Organizational Chart provided by ATS “illustrates the organizational structure to be used by ATS for the FAA CWO 2012 effort,” and [DELETED] FF 67.

Both the Solicitation and the ATS Proposal make it clear that Senior Weather Observer is a managerial and supervisory position. *See generally*, AR Tabs 1 and 6. 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

⁴ ATS states that “[i]f ATS / CSR are 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.” FF 53. “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).

schedule, implementation and continuation of the contractor's Quality Assurance Management Plan, and initial POC for any NWS or FAA site inspections." FF 5. Provision 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 Proposal describes the Senior Weather Observer as a managerial and supervisory position. Section A10.3.1 Senior Weather Observer describes the position as follows:

[DELETED]

FF 63. The Proposal also provides a detailed job description for Senior Weather Observer that is supervisory in nature. FF 63-64. 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 56-57.

In addition, ATS proposes to rely on CSR's [DELETED] FF 49 and 50. 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). ATS states in its Proposal that:

We will [DELETED] to provide innovative ways to continually improve our processes and reduce the administrative burden on the employees. The [DELETED]

FF 49. ATS goes on to state that:

[DELETED] will ensure they are disseminated in a timely and highly accurate manner.

FF 50. Thus, the degree of reliance on CSR's processes provides further support for finding an ostensible subcontractor relationship.

Accordingly, for the foregoing reasons, the ODRA finds that inasmuch as (1) [DELETED]; (2) [DELETED]; and (3) [DELETED], ATS is affiliated with CSR under the Ostensible Subcontractor Rule.

D. Totality of the Circumstances

DMS asserts that the ODRA “must consider the course of conduct of CSR since graduating from small business status and the sheer number of identical proposals submitted by small business in response to this SIR.” DMS Comments (ATS) at 12. DMS proceeds to broadly challenge the Product Team’s price evaluation under Section K.6 of the Solicitation.” *Id.* at 13. As discussed earlier, DMS has withdrawn its challenges to the Contracting Officer’s Size Determination and the underlying facts with respect to Identity of Interest and the Newly Organized Concern Rules. *Id.* at 10. Moreover, DMS does not cite to the administrative record in its assertions. The Product Team’s price evaluation is also not a part of the record. Inasmuch as the underlying facts at issue are the same as those under the ostensible subcontractor rule, in light of the ODRA’s Recommendation that the Protest be sustained on that basis, the ODRA need not reach the totality of the circumstances protest ground.

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 ATS 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