

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

**Matter: Protests of IBEX Weather Services
Under Solicitation No. DTFWA-R-12-08591**

For the Interveners: CJ Rogers Aviation, Inc. by William K. Walker, Esq. of Walker Reausaw; and ATS Meteorology USA Inc. by Wayne A. Keup, Esq.

- 13-ODRA-00641, concerning two awards to CJ Rogers Aviation, Inc. (“CJ Rogers”);
- 13-ODRA-00644, concerning one award to ATS Meteorology USA Inc. (“ATS”);
- 13-ODRA-00666, concerning one award to Midwest Weather, Inc.;
- 13-ODRA-00667, concerning two awards to Vero Technical Support, Inc.; and
- 13-ODRA-00668, concerning one award to Alaska Weather Observation Services, Inc.

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These Findings and Recommendations address the first two cases, i.e., the awards to CJ Rogers and ATS. These post-award protests have been consolidated for decision purposes.¹

As discussed more fully below, the Solicitation established a complex award procedure designed to use one solicitation for the award of as many as 17 separate contracts to provide weather observation services for the Federal Aviation Administration (“FAA”). Through these contracts, the FAA seeks to “acquire the services of weather observer personnel who will provide augmentation and/or back up to the Automated Observing Systems, and [] take manual observations as necessary.” *Finding of Fact (“FF”) 3*. The contracts awarded to CJ Rogers and ATS were set aside for small businesses. *FF 10*.

IBEX raises five grounds² challenging the awards. The first ground applies to only one of the CJ Rogers awards, and alleges that the FAA improperly provided different collective bargaining agreement rates to the various offerors. *Protest at 13; IBEX Comments at 2-10*. According to the Protest, CJ Rogers received older labor rates to use in its proposals, which likely resulted in lower overall prices compared with IBEX’s proposal based on more current rates. *Id.* Secondly, IBEX challenges the size of awardees CJ Rogers and ATS based on affiliation principles developed by the United States Small Business Administration (“SBA”). In the third and fourth grounds, respectively, IBEX challenges the responsibility determinations, and the past-performance evaluations for both CJ Rogers and ATS. Finally, IBEX’s “fourth supplemental protest”³ alleges that the striking similarity between the CJ Rogers proposal and the ATS proposal shows a violation of their warranties under AMS Provision 3.2.5-2, “Independent Price Determination (October 1996),” which the Product Team failed to investigate. *IBEX First Supplemental Comments at 7*.

¹ IBEX also protested awards made to three other companies under the Solicitation. Two of those protests, docketed as 13-ODRA-00642 and -00643, were voluntarily withdrawn and dismissed on July 10, 2013. The third protested award, docketed as 13-ODRA-00669, was withdrawn on September 20, 2013 and dismissed on September 24, 2013.

² A “second supplemental protest” found in IBEX’s Comments raised a fifth ground against the awards to CJ Rogers and ATS by arguing that the Agency failed to adequately document its award decision. *IBEX’s Comments at 30*. This ground was later withdrawn. *IBEX Supplemental Comments at 4*.

³ IBEX filed a “third supplemental protest,” against the award to CJ Rogers premised on the belief that CJ Rogers failed to provide resumes and National Weather Service certifications as required by the Solicitation. *IBEX Comments at 27, n.8*. IBEX withdrew this ground of protest after receiving a supplemental Agency Response showing that CJ Rogers provided the required documentation. *IBEX First Supplemental Comments at 4*.

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For reasons stated more fully below, the ODRA finds substantial evidence in the record shows that CJ Rogers and ATS are affiliated under the applicable standards, that the definitive responsibility determinations lacked a rational basis, and that the Product Team improperly failed to consider possible misrepresentations under the Independent Price Determination provision. The ODRA, accordingly, recommends that the Protests be sustained to the extent discussed herein.

II. Findings of Fact

A. The Solicitation as Amended

1. The Solicitation was issued on May 3, 2012. *Agency Response* (“AR”) Tab 1 at § A.
2. The Solicitation was amended four times. AR Tabs 2 to 5.
3. As amended,⁴ the Solicitation explained the purpose of the procurement as:

1.1 Objective. The objective of this contract 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 3 at § C.1.1.

4. As amended, Section B of the Solicitation contained fixed-pricing tables for 17 separate “groups.” AR Tab 5 § B.⁵ Each “group” contained several contract line item numbers (“CLINs”), with each CLIN corresponding to services for a specific geographical location within the group’s regional boundaries. *Id.* Each CLIN was priced using monthly fixed-prices, and included an extended price for the year. *Id.* Each group had tables for a base year (of ten months) and four option years (each for twelve months). *Id.* By way of example, the base year for Group 13 is set forth below:

⁴ All findings of fact herein that discuss the Solicitation refer and cite to the last amendment applicable to the Solicitation section discussed.

⁵ Group 6 was eliminated as a separate group by Amendment 00004. AR Tab 5 § B.

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B.2 BASE YEAR

CLIN#	Airport Location	Site ID	Year	Quantity	Unit	Unit Price	Total Price
01301	Fresno Yosemite Int'l, Fresno, CA	FAT	1	10	Mo.	-\$	-\$
01302	Honolulu Int'l Arpt., Honolulu, HI	HNL	1	10	Mo.	-\$	-\$
01303	Los Angeles Int'l, Los Angeles, CA	LAX	1	10	Mo.	-\$	-\$
01304	Metropolitan Oakland Int'l, Oakland, CA	OAK	1	10	Mo.	-\$	-\$
01305	Ontario Int'l Arpt., Ontario, CA	ONT	1	10	Mo.	-\$	-\$
01306	San Diego Int'l Linbergh Field, San Diego, CA	SAN	1	10	Mo.	-\$	-\$
01307	San Francisco Int'l Arpt., San Francisco, CA	SFO	1	10	Mo.	-\$	-\$
01308	San Jose Int'l Arpt., San Jose, CA	SJC	1	10	Mo.	-\$	-\$
01309	John Wayne-Orange County, Santa Ana, CA	SNA	1	10	Mo.	-\$	-\$
01310	Van Nuys Arpt., Van Nuys, CA	VNY	1	10	Mo.	-\$	-\$
	TOTAL						

AR Tab 5 at Group 13, § B.2.

5. Section B for each group also explained (and emphasized by a border around the text):

B.1.1 FULLY BURDENED FIXED PRICE COSTS:

The proposed fixed priced costs in “Section B” are fully burdened. Other than the annual economic adjustments, the government will not recognize any additional costs which are not made a part of the contractor’s proposed firm-fixed price amount.

For example, the Prime and subcontractor proposed fixed price amount should be fully burdened and include all costs associated with necessary desk-top computer equipment, micro-computers, computer usage, telephones, reproduction services, and any other costs associated with running a successful company in the business of performing contract weather observation. The fixed price amount must also include the profit.

AR Tab 5 at Groups 1 to 18, § B.1.1.

6. Section H of the Solicitation explained that: (1) the Service Contract Act applied to weather services under the contract; (2) collective bargaining agreements (“CBA”) may apply; and (3) how applicable CBAs may be obtained. Specifically, the Solicitation stated:

H.12 SCA MINIMUM WAGES AND FRINGE BENEFITS (Applicable to Successor Contract Pursuant to Predecessor Contractor Collective Bargaining Agreements (CBA))

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This clause is incorporated in full text as follows

SERVICE CONTRACT ACT (SCA) MINIMUM WAGES AND FRINGE BENEFITS

An SCA wage determination applicable to this work has been requested from the U.S. Department of Labor. If an SCA wage determination is not incorporated herein, the offerors shall consider the economic terms of the collective bargaining agreement (CBA) between the incumbent contractor and the union (See Section J for the sites that have CBA). If the economic terms of the collective bargaining agreement or the collective bargaining agreement itself is not attached to the solicitation, copies can be obtained from the Contracting Officer. Pursuant to Department of Labor Regulation, 29 CFR 4.1b and paragraph (g) of the clause "Service Contract Act of 1965, As Amended," the economic terms of that agreement will apply to the contract resulting from this Screening Information Request (SIR), notwithstanding the absence of a wage determination reflecting such terms, unless it is determined that the agreement was not the result of arm's length negotiations or that after a hearing pursuant to section 4(c) of the Act, the economic terms of the agreement are substantially at variance with the wages prevailing in the area.

AR Tab 2 at § H.12.

7. Section H further explained how the fixed prices would be adjusted for future wage determinations by the Department of Labor:

H.13 WAGE RATE DETERMINATION

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.

H.13.2 The contractor MUST NOT pay its employees less than the established DOL minimum wage rate or the applicable rate in the CBA incorporated under contract for the performance year.

H.13.3 Wage rate adjustments will be allowed under this contract under the following circumstances:

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At the beginning of each fiscal year, DOL wage rate determinations will be established under this contract for the period October 1 through September 30. If the DOL minimum wage rate or the CBA rate exceeds the established rate indicated in Attachment J-2 for an option period, the FAA will make an upward price adjustment to meet the DOL minimum wage rate requirement. Any such adjustment will be limited to increases in wages or fringe benefits as described above, and the concomitant increase in social security and unemployment taxes and workmen's compensation insurance, but will not otherwise include any amount for general and administrative costs, overhead, or profits. The FAA will not make any adjustments if the DOL wage rate or CBA rate is lower than the contractor's rate. In this instance, the contractor shall pay its employees the higher of the two rates.

H.13.4 When incorporated under this contract, Wage Determinations will be provided under Section J, Attachment 2.

AR Tab 2 at § H.12.

8. The Solicitation also incorporated by reference Acquisition Management System ("AMS") Clause 3.2.4-4, "FIXED-PRICE CONTRACTS WITH ECONOMIC PRICE ADJUSTMENT-LABOR AND MATERIAL (APR 1996)." AR Tab 1 at § I. It also included provision 3.2.2.3-1 FALSE STATEMENTS IN OFFERS (JULY 2004). *Id.*
9. Section I also incorporated by reference AMS Clause 3.6.1-7, "LIMITATION ON SUBCONTRACTING (OCTOBER 2011)." That clause states in pertinent part:
3.6.1-7 Limitations on Subcontracting (October 2011)
 - (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.
 - (b) Supplies (other than procurements from a regular dealer in such supplies). The prime contractor shall perform work for at least 50 percent of the cost of manufacturing the supplies, not including the cost of materials.
10. Groups 2, 11, and 13 (at issue in these Protests) were set aside for award to small businesses. AR Tab 5, Groups 2, 11, and 3, at § B.2. The Solicitation further identified the applicable size standard:

H.25 NORTH AMERICAN INDUSTRY CLASSIFICATION SYSTEM CODE (NAICS) AND SMALL BUSINESS SIZE STANDARD

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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 § H.25.

11. Section K of the Solicitation included AMS Provision 3.2.5-2, “Independent Price Determination (October 1996).” AR Tab 39 at § K.6.

12. Section L provided directions and information to offerors regarding preparation of proposals. One section reiterated the NAICS size standards found in § H.25, and incorporated by reference the SBA’s principles of affiliation:

L.8 NORTH AMERICAN INDUSTRY CLASSIFICATION SYSTEM CODE (NAICS) AND SMALL BUSINESS SIZE STANDARD

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 4 at § L.8.

13. Section L.5 addressed responsibility requirements, explaining:

L.5 RESPONSIBLE PROSPECTIVE CONTRACTORS

Notwithstanding the evaluation methodology outlined in this SIR, an offeror must be found responsible by the Contracting Officer prior to the award of any resultant contract. At a minimum, a responsible prospective contractor must:

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- (a) Have adequate financial resources to perform the contract for a period of 90 days without government funding, or the ability to obtain financial resources.
- (d) Be able to comply with the required or proposed delivery or performance schedule, taking into consideration all other commercial and Government business commitments;
- (c) Have a satisfactory record of integrity and business ethics;
- (d) Have a satisfactory performance record;
- (e) Have the necessary organization, experience, accounting and operational controls, or the ability to obtain them;
- (f) Be otherwise qualified and eligible to receive an award under applicable laws and regulations.

An unrealistically low proposal price will raise serious responsibility concern regarding the offeror's ability to perform under the terms and conditions of the SIR.

AR Tab 4 at § L.5.

14. Section L also included a "minimum qualification" provision addressing "eligibil[ity] to compete" for the procurement. It stated:

L.10 MINIMUM QUALIFICATION

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.

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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 4 at § L.10.

15. Offerors were required to submit four separate volumes addressing:

VOL. I OFFER AND OTHER DOCUMENTS

Section A	Table of Contents
Section B	SIR SECTION A, OMB #2120-059 Solicitation, Offer and Award -- Signed
Section C	SIR SECTION B, Supplies or Services And Prices/Cost - Completed
Section D	SIR SECTION K, Representation, Certifications and Other Statement of Offerors, Minimum Qualification Summary, Affidavit of Affiliation - Signed

VOL. II TECHNICAL PROPOSAL

Section A	1. Personnel Plan
Section B	2. Staffing Plan and Schedules
Section C	3. Quality Assurance Management Plan
Section D	4. Transition Plan

VOL. III PAST PERFORMANCE AND RELEVANT EXPERIENCE

VOL. IV PRICE PROPOSAL

AR Tab 4 at § L.16.

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16. Section L. described how proposals would be evaluated:

L.11 SOURCE SELECTION PROCESS

During the evaluation process, the FAA will evaluate each offeror's proposal, using information submitted to the FAA, presented in written form by each offeror, to determine who meets the minimum qualifications as addressed in Paragraph L.10. The FAA will evaluate each offeror's capability to perform the effort required by Section C of this SIR, as evaluated by the following:

- (a) Evaluation of the "Offer and Other Documents" submission,
- (b) Evaluation of the offeror's Technical proposal,
- (c) Evaluation of the offeror's Past Performance/Relevant Experience,
- (d) Evaluation of the Price proposal, and
- (e) An assessment of the risks inherent in each offeror's proposal that would accrue to the FAA should that offeror be selected for award.

At any point during the evaluation of Offers, the FAA may determine, based on information submitted by an offeror, that the offeror does not have a reasonable chance of receiving an award and that offeror will be rendered no longer eligible for award and will be eliminated from further consideration. Any offeror eliminated from further consideration will be officially notified in writing.

AR Tab 4 at § L.11.

17. Offerors were to provide information about their past performance on “a minimum of three and no more than five contracts per offeror” that were of a “similar size and scope (complexity and magnitude).” AR Tab 4 at § L.20.2. For newly formed companies, the Solicitation stated:

L.20.2.1 Information regarding each offeror, garnered from a variety of individuals familiar with each offeror’s past efforts will be used to compile a past performance history which will then be used to determine the acceptable or unacceptable rating of an offeror. **Offerors that are newly formed entities, without prior contracts, must enter into a subcontracting arrangement with a vendor that possesses the relevant past performance.**

Id. at § L.20.2.1 (emphasis added).

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18. Section M of the Solicitation addresses the evaluation process for award. AR Tab 2 at § M. Given the nature of the current Protests, a detailed discussion of the award factors is not necessary. Relevant language, however, included provision M.1.1, which stated in part:

M.1.1. AWARD SELECTION: 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 meets all requirements of the SIR and demonstrate the technical ability to perform requirements of the Statement of Work.

...

In the event that any Offeror is determined to be technically acceptable, has an acceptable past performance/relevant experience and offers the lowest evaluated reasonable price for more than two (2) groups the Government will award two groups to the offeror at its discretion[.]

The awards will be based on technically acceptable proposal, acceptable past performance and relevant experience and lowest evaluated reasonable price.

The FAA intends to make multiple awards resulting from this Screening Information Request (SIR). The FAA reserves the right not to make an award if such action is in its best interest.

...

AR Tab 2 at § M.1.1.

19. The Solicitation also states:

M.1.2 ELIGIBILITY FOR AWARD: 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 2 at § M.1.2.

20. The Solicitation limited the number of awards a firm could receive, stating:

M.1.3 NUMBER OF POTENTIAL CONTRACT AWARDS

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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 2 at § M.1.3.

21. The limitation on two awards in provision M.1.3 applied only to “potential prime contractors,” (i.e., small businesses or 8(a) firms) and to mentors in the FAA Mentor-Protégé Program. AR Tab 2 at § M.1.3. As a result, a large business that was not a mentor in the program (like CSR) had the possibility to serve as a principal subcontractor for many awards under this Solicitation.

22. Past performance was to be evaluated “on an Acceptable/Unacceptable basis.” AR Tab 2 at § M.5.1. Regarding a subcontractor’s past performance, the Solicitation stated, “If an offeror’s proposal includes a subcontractor, the subcontractor’s past performance and relevant experience may be evaluated.” AR Tab 2 at § M.5.5.

23. As finally amended, proposals were due on July 9, 2012, and performance was to start on December 1, 2012. AR Tab 4 at § L.1.

B. The CJ Rogers Proposal

24. CJ Rogers’ proposal is dated June 5, 2012. AR Tab 23.

25. Volume I contains the Offer and Other Documents. AR Tab 23.

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26. Volume I included a Standard Form 33 signed by “[REDACTED] [,] President, CJ Rogers Aviation, Inc.” on “06/05/2012.” AR Tab 23 at 14.

27. Volume I contained CJ Rogers’ unqualified warranty of Independent Price Determination required by the Solicitation. AR Tab 23 at 58.

28. Volume I contained CJ Rogers’ Business Declaration. AR Tab 23 at 62. It states that CJ Rogers is a corporation, that it has been in business for five years, and that it had the following gross receipts:

<u>Year Ending</u>	<u>Amount</u>
2009	\$(REDACTED)
2010	\$(REDACTED)
2011	\$(REDACTED)

Id. It also states that CJ Rogers is in the Weather and Aviation Services business identified by NAICS codes 488111, 541990, and 561110. *Id.* It is signed by [REDACTED], President of CJ Rogers Aviation, Inc. *Id.*

29. Volume I included CJ Rogers’ Minimum Qualification Summary. AR Tab 23 at 91. It identifies “Control Systems Research, Inc.” as its subcontractor. *Id.* It also states:

4. CJ Rogers Aviation, Inc. (CJR) and its sub-contractor Control Systems Research, Inc. (CSR) have no affiliated relationships pursuant to AMS Clause 3.2.2.3-3. CJ Rogers Aviation, Inc. (CJR) does not any [sic] affiliated relations with any company or business entity. CJR has attached the subscribed and sworn affidavit to this qualification letter attesting that no affiliation exists between CJ Rogers Aviation, Inc. (CJR) and its sub-contractor Control Systems Research, Inc. (CSR). Our affidavit disclosing no affiliated relationships exist is attached to this Minimum Qualification Summary.

Id. at 92. The referenced affidavit, signed by [REDACTED], states in pertinent part, “Per Section L.10(4) of the 2012 FAA SIR, I affirm CJ Rogers Aviation, Inc. has no affiliations per AMS Clause 3.2.2.3-3.” *Id.* at end.

30. CJ Rogers included financial information behind its Minimum Qualification Summary. The first document is a letter from [REDACTED]. AR Tab 23 at 94. It states in part:

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Thank you for the opportunity to provide financing for a Commercial Revolving line of Credit. I am pleased to inform you of [REDACTED]'s (lender) proposal to lend \$[REDACTED] 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. The detailed terms that followed included a limitation on advances in the amount of 75% of billing, and “confirmation of approval for payment from the U.S. Government.”

Id. It also required execution of a Promissory Note, Guarantees, and other agreements.”

Id. at 95.

31. CJ Rogers also included after its Minimum Qualification Summary a note renewing CSR’s open ended credit with [REDACTED]. AR Tab 23 at 96. It states it is a renewal for “no new money,” and extends a prior loan in the “original principal amount of \$[REDACTED] of which \$[REDACTED] is currently outstanding.” *Id.*

32. Volume II contained CJ Rogers’ Technical Proposal. AR Tab 7.b.

33. The Technical Proposal demonstrates that CJ Rogers and CSR are in the same industry inasmuch as it repeatedly cites to prior Contract Weather Services contracts with the FAA, Department of the Navy, Department of the Army, and the Air Force. *See, e.g.,* AR Tab 7.b. at 8.

34. CJ Rogers’ proposal confirms that CSR is an incumbent contractor for FAA Contract Weather Observation Services. *See e.g.,* AR Tab 7.b.i. at 7; Tab 7.a.i. at 17.

35. CJ Rogers’ technical proposal repeatedly uses the term, the term “CJR/CSR,” rather than simply “CJR.” *See* AR Tab 7.b.i at 4, 8, 10, 11, 13, 21, 25, 26, 28, 29, 31, 44, 48, 50, 54, 77, 83, 84, 88, 99, and 105. It is used in many contexts such as quality control (*id.* at 48), technical methodology (*id.* at 8), staffing and recruiting (*id.* at 10 and 13), management (*id.* at 25 and 99), training expertise (*id.* at 26), and “CJR/CSR ... self-inspections” (*id.* at

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54). Indeed, the proposal touts that “CJR/CSR blended seamlessly in an Integrated teaming approach” to mitigate program management risk factors. *Id.* at 105.

36. The volume describes the Senior Weather Observer position as a management function or involving management responsibilities. For example, section A10.3.1 of CJ Rogers’ proposal describes the Senior Weather Observer position, in part, 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.

AR Tab 7.b.i. at 21. CJ Rogers also explained in the proposal,

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 CJR management structure***. This will allow for the Senior Weather Observer to administer disciplinary actions.

Id. at 22 (emphasis added). That the Senior Weather Observer is a front-line management position also is confirmed in the proposal, which further 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.

Id. at 38 (emphasis added). Based on the foregoing statements, the ODRA finds that the position of Senior Weather Observer is a management position.

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37. CJ Rogers' stated its intended method of filling the Senior Weather Observation positions:

The 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 7.b.i. at 103. The Qualifications Summary, found in Volume I of the CJ Rogers proposal states further:

CJ Rogers Aviation, Inc. (CJR) has contacted each incumbent Senior Weather Observer for the locations CJR is proposing and each Senior Weather Observer has verbally confirmed their intent to join the CJR 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.

AR Tab 23 at 91. Finally, the proposal indicates that if new hires are needed, they will work for either CSR or CJ Rogers, i.e., "the Senior Weather Observers will leave their incumbent positions at the close of business on the last day of October 2012 and report to work the following day as employees of CJRA or its subcontractor CSR." AR Tab 7.b.i. at 12.

38. The Technical Proposal demonstrates CJ Rogers' reliance on CSR in many areas of contract administration or other functions. These include recruiting (AR Tab 7.b.i. at 23 and 104), quality assurance (*id.* at 5, 44, and 79), training (*id.* at 23, 28, and 79), contingency planning (*id.* at 9), information technology ("IT") support (*id.* at 5), and their overall "method and approach" to performance of the contract (*id.* at 8). *See also infra*, Part IV.A.1.c.(7) (quoting various language in CJ Rogers' technical proposal).

39. Volume III contains the resumes of CJ Roger's key employees. AR Tab 7.a.i at 28 – 32. The first resume is for the proposed Program Manager, [REDACTED]. It includes his experience at CSR:

Control Systems Research, Inc., 2007 - 2009
Quality Assurance and Training Manager / Technical Expert / Business Development Manager- Responsible for all aspect of quality assurance,

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training, technical policies and procedures on multiple Government meteorological support services contracts. Organize, manage, and oversee the transition of new meteorological services contracts.

Control Systems Research, Inc., 2003 - 2007

Weather Program Manager- 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.

AR Tab 7.a.i. at 28.

40. Volume III also contains the resume of CSR's proposed "Deputy Program Manager," [REDACTED]. He is currently a CSR employee serving as the "Weather Program Manager" managing CSR's incumbent contracts with the FAA. AR Tab 7.a.i. at 31.
41. CJ Rogers submitted in Volume III five examples of past performance, including one under its own name, and four by CSR. AR Tab 7.a.i. at 11 to 16.
42. The example from CJ Rogers cited a National Weather Service Weather Support contract servicing the Oakland International Airport for two four-hour shifts a day, 365 days per year. AR Tab 7.a.i. at 11. The contract began in May of 2011 and continues until December of 2016. The total contract amount is \$702,711. *Id.*
43. Three of the CSR past performance examples in CJ Roger's Volume III were for FAA Contract Weather Observation Support. AR Tab 7.a.i. at 12 – 15. The last example cited a Department of the Navy contract to support twenty Naval Air Stations. *Id.* at 16. Each of these four examples from CSR involved multiple sites, coverage for 24 hours a day, 7 days a week, and was priced between \$8.4 million to \$16.2 million over several option years. *Id.* at 12-16.

C. ATS's Proposal

44. ATS' proposal is dated June 5, 2012. AR Tab 22.

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45. Volume I contains ATS's Offer and Other Documents. AR Tab 22.
46. Volume I included a Standard Form 33 signed by "[REDACTED] [,] CEO/President," on "06/05/2012." AR Tab 22 at 14.
47. Volume I contained ATS's unqualified warranty of Independent Price Determination required by the Solicitation. AR Tab 22 at 69.
48. Volume I contained ATS's Business Declaration. AR Tab 22 at 73. It states that "ATS Meteorology USA Inc." is a corporation, that it has been in business for one year, and that it had the following gross receipts:

<u>Year Ending</u>	<u>Amount</u>
May 31, 2009	\$(REDACTED)
May 31, 2010	\$(REDACTED)
May 31, 2011	\$(REDACTED)

Id. It also states that ATS has [REDACTED] employees, and is in the Weather and Aviation Services business identified by NAICS code 541990. *Id.* It is signed by "[REDACTED]." *Id.* at 74.

49. Volume I included ATS's Minimum Qualification Summary. AR Tab 22 at 105. It identifies "Control Systems Research, Inc." as subcontractor. *Id.* at 106. Attached to the Minimum Qualification Summary is an affidavit, signed by [REDACTED], which states in pertinent part, "Per Section L.10(4) of the 2012 FAA SIR **DTFAWA-12-R-08591**, I affirm ATS Meteorology Inc. has no affiliations with its subcontractor, Control Systems Research (CSR), per AMS Clause 3.2.2.3-3." *Id.* at end (emphasis in original). The affidavit acknowledged affiliation with ATS Technology Systems, Inc. and ATS Services Ltd. *Id.*
50. ATS also included financial information behind its Minimum Qualification Summary. AR Tab 22, near end. It is a letter from [REDACTED]. AR Tab 22 near end. It states in part:

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Please be advised that [REDACTED].

Also, please be advised that [REDACTED].

[REDACTED].

Id.

51. Also attached to the Minimum Qualification Summary was an identical copy of the note renewing [REDACTED], and that is found in the CJ Rogers proposal. AR Tab 22, near end; *see also* FF 31, *supra*.
52. Volume II contained ATS's Technical Proposal. AR Tab 6.e.ii.
53. ATS's proposal confirms that CSR is an incumbent contractor for FAA Contract Weather Observation Services. *See e.g.*, AR Tab 6.e.ii. at 8; Tab 6.a. at 17.
54. ATS's technical proposal repeatedly uses the term, the term "ATS / CSR," rather than simply "ATS." *See* AR Tab 6.e.ii at 6, 8, 9, 11, 12, 14, 16, 22, 23, 26, 29, 31, 45, 49, 50, 52, 56, 79, 85, 86, 90, 101, and 107. It is used in many contexts such as technical methodology (*id.* at 9), staffing and recruiting (*id.* at 14), management (*id.* at 26 and 45), training expertise (*id.* at 29), quality control (*id.* at 49) and "ATS / CSR ... self-inspections" (*id.* at 56). Indeed, the proposal touts that "ATS / CSR blended seamlessly in an Integrated teaming approach" to mitigate program management risk factors. *Id.* at 105. Notably, many of these representations are identical to those found in the CJ Rogers proposal. *See supra* FF 35.
55. The Technical Proposal demonstrates ATS's reliance on CSR in many areas of contract administration or other functions. These include quality assurance (AR 6.e.ii. at 5, and 45), training (*id.* at 5, 23, and 29), contingency planning (*id.* at 10), information technology ("IT") support (*id.* at 5 and 31), compliance with Defense Contract Audit Agency ("DCAA") procedures (*id.* at 39), and their overall "method and approach" to

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performance of the contract (*id.* at 9). *See also infra*, Part IV.B.2.b.(7) (quoting various language in ATS’s technical proposal).

56. In describing the roles of certain position, section C5.1.1 was entitled, “ATS President.”

AR Tab 6.e.ii. at 50. It states,

The ATS / CSR Presidents ([REDACTED] / [REDACTED]) shall provide the commitment and resources necessary to assure a quality program is enforced throughout the organization. The corporate philosophy, attention to detail, interface with the customer, and interface with company management and employees start with the President. The President inspires the professionalism and corporate work ethics and attitude.

Id.

57. The technical volume describes the Senior Weather Observer position as a management function or involving management responsibilities. For example, section A10.3.1 of ATS’s proposal describes the Senior Weather Observer position, in part, as follows:

The Senior Weather Observer will be the ATS 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 ATS 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.

AR Tab 6.e.ii. at 21. But for the reference to “ATS,” this is identical to the corresponding language in the CJ Rogers proposal. *See supra* FF 36.

Labor Relations– If the site is covered by a union’s collective bargaining agreement (CBA), ATS 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 ATS management structure***. This will allow for the Senior Weather Observer to administer disciplinary actions.

AR Tab 6.e.ii. at 23 (emphasis added). Again, but for the reference to “ATS,” this is identical to the corresponding language in the CJ Rogers proposal. *See supra* FF 36. That the Senior Weather Observer is a front-line management position also is confirmed in the proposal, which further states:

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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 ATS 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.e.ii. at 39 (emphasis added). Yet again, this language is identical to a portion of the CJ Rogers' proposal. *See supra* FF 36. The foregoing statements indicate that ATS considered the position of Senior Weather Observer to be a management position. Further, it used identical language as CJ Rogers in its proposal.

58. ATS stated its intended method of filling the Senior Weather Observation positions:

The 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. 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.

AR Tab 6.e.ii. at 13. ATS's newly hired Senior Weather Observers will, at least in part, be employed by CSR, i.e., "They will leave their incumbent positions at the close of business on the last day of September 2012 and report to work the following day as employees of ATS or its subcontractor CSR." *Id.*

59. The Technical Proposal discusses the organizational structure and transition plan. AR Tab 6.e.ii. at 24 and 86.

60. The organizational structure is depicted graphically in the proposal. AR Tab 6.e.ii. at 24. Below the President is the "ATS Program Manager," who in turn oversees the Senior

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Weather Observers. Branching off of this line of supervision is the “QA/Training Manager.” *Id.*

61. The description of functions in the transition plan gives the Presidents of CSR and ATS responsibility “overall management from the contract from a financial stand-point” during the transition period.” AR Tab 6.e.ii. at 86.
62. During the transition period, [REDACTED] from ATS Group and [REDACTED] from CSR, were to serve as in the area of “QA/Training/Qualifications/Certifying.” AR Tab 6.e.ii. at 87. Their joint function is described as “provide instructions to Senior Weather Observer[s], implement programs, SOPs, guidance, train[ing], etc.” *Id.*
63. [REDACTED] is identified as responsible for “Security,” which involves security paperwork, background checks, security training, and ensuring employees follow procedures. AR Tab 6.e.ii. at 87.
64. The Technical Proposal explained that the same personnel who perform functions during the transition period would continue to perform those functions as part of on-going operations. AR Tab 6.e.ii. at 91. Specifically, it states, “personnel comprising the Transition organization will still support those activities and functions performed during the Transition Phase that will continue as part of on-going operations.” *Id.*
65. Volume III contains the resumes of ATS’s key employees. AR Tab 6.a. at 29-36. The first resume is for [REDACTED], and describes him as the “CEO-President” of “ATS Services Limited,” “ATS Technology Systems, Inc.,” and “ATS Meteorology USA Inc.” *Id.* at 29.
66. ATS also listed two employees of the “ATS Group,” i.e., [REDACTED] and [REDACTED]. AR Tab 6.a. at 31-35. The resumes provided do not indicate the intended position they will occupy during performance of the contract. *Id.*

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67. Volume III also contains the resume of the proposed “CSR Deputy Program Manager,” [REDACTED]. He is currently a CSR employee serving as the “Weather Program Manager” managing CSR’s incumbent contracts with the FAA. AR Tab 6.a. at 31-36.
68. ATS submitted in Volume III five examples of past performance, including two identified with the ambiguous use of “ATS,” and three by CSR. AR Tab 6.a. at 11 to 16. Elsewhere, Volume III described the “ATS” work as being performed by “ATS Services Ltd.” *Id.* at 4.
69. The first example for “ATS” [REDACTED]. AR Tab 6.a. at 11. Performance started on “1 Apr 09.” *Id.*
70. The second example for “ATS” served [REDACTED]. AR Tab 6.a. at 12. Although listed as Canada’s busiest airport, [REDACTED]. *Id.* Performance started on “1 Apr 11.” *Id.*
71. The two CSR past performance examples in ATS’s Volume III were for FAA Contract Weather Observation Support. AR Tab 6.a. at 13-16. The last example cited a Department of the Navy contract to support twenty Naval Air Stations. *Id.* at 16. Each of these three examples from CSR involved multiple sites, coverage for 24 hours a day, 7 days a week, and was priced between \$8.4 million to \$16.2 million over several option years. *Id.* at 13-16.

D. Evaluation and Awards

72. IBEX submitted offers on Groups 1 to 5, 7 to 11, and 16 to 18. AR Tab 33 at spreadsheet “Revised Bid Sheet.” *See also IBEX Letter to the ODRA*, dated July 18, 2013, attaching Section B of IBEX’s Proposal; and *IBEX Letter to the ODRA*, dated July 21, 2013.
73. CJ Rogers (offeror “E”), ATS (offeror “C”), and IBEX (offeror “O”) received satisfactory ratings on all areas evaluated, a “low” risk rating, and were not deemed

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ineligible for award. AR Tab 33 at spreadsheet “Revised Bid Sheet” (listing letter designations); Tab 36 at 24, 28, and 48 (ratings summaries for C, E, and O, respectively). Notably, the evaluators’ cited identical language in CJ Rogers’ and ATS’s proposals regarding extended hours at three sites. AR Tab 36 at 24 and 28.

74. CJ Rogers received an acceptable past performance rating, but there is no textual discussion explaining this determination or how the evaluators treated single example of past performance by CJ Rogers. See AR Tabs 27, 29 at spreadsheet page “CJ Rogers Aviation_CSR,” 35, and 37 at 45.
75. ATS received an acceptable past performance rating, but there is no textual discussion explaining this determination or how the evaluators treated its two examples of past performance by ATS Services Ltd. See AR Tabs 27, 29 at spreadsheet page “ATS Meteorology_CSR,” 35, and 37 at 45.
76. The Contracting Officer chaired the Price Evaluation Team. AR Tab 34 at 1. She created Tab 30, and oversaw the development of Tab 31. AR Tab 38, *Contracting Officer’s Supplemental Decl.* ¶ 6. (For further discussion of these materials, see *infra* FFs 98 and 101-106).
77. Tab 33 analyzes the total prices from the various offerors. AR Tab 33, “Price Team Revised Bid Matrix v2.” It shows that the Product Team received offers from 28 firms. *Id.* Eleven of these firms proposed to use CSR as a subcontractor. *Id.* at “Revised Bid Sheet.” One of the 28, which did not use CSR, was found ineligible due to unacceptable past performance. *Id.* at “Control Sheet.” The exhibit is a complex matrix that was necessary because of the “‘two award per offeror’ limitation contained in Section M.1.1 of the SIR.” AR Tab 38, *Contracting Officer’s Supplemental Decl.* ¶ 6.
78. CJ Rogers received the award for Group 3, containing 11 airports, for \$16.7 million; and for Group 13, containing 10 airports, for \$18.0 million. AR Tab 5 at Attachment J-2; Tab 37 at 46-47; and Tab 38, *Contracting Officer’s Supplemental Decl.* ¶ 1.

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79. ATS received the award for Group 11, containing nine airports, for \$12,837,104. AR Tab 5 at Attachment J-2; Tab 37 at 47; and Tab 38, *Contracting Officer's Supplemental Decl.* ¶ 1.

80. By letter dated December 18, 2012, IBEX and the other offers were informed of the award decisions. *Initial Protest* at 11. IBEX did not receive an award of any contract. *Id.* The same letter identified the awards made to ATS and CJ Rogers. *Id.* Although IBEX requested a debriefing, one never has been provided. *Id.*

81. On January 2, 2013, another offeror protested the awards to ATS and CJ Rogers. AR at 6.

E. The Fact-Finding and Size Determination Regarding CJ Rogers

82. In response to the protest of January 2, 2013, the Contracting Officer initiated a size determination relating to CJ Rogers and provided CJ Rogers with a set of questions and requests for documents. AR Tab 10; *see also* Tab 16 at 1.

83. CJ Rogers responded on January 23, 2013, and provided many documents. AR Tab 12.a.1. The response included:

- a. *A legal position paper* by CJ Rogers' attorney. AR Tab 12.a.2.
- b. *CJ Rogers' articles of incorporation*. These indicate that incorporation, occurred on October 27, 2010. AR Tab 12.a.3. The document shows that [REDACTED] is the President and a Director. [REDACTED] is the Secretary, Treasurer, and a Director. *Id.* at 2.
- c. *Balance sheets and an income statement for the year ending December 31, 2011*. AR Tabs 12.a.4, and 12.a.10, respectively.
- d. *Balance sheets and an income statement for the period from January 2012 to November 2012*. AR Tabs 12.a.5 and 12.a.11, respectively.

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- e. A “Consulting Agreement and Task Order.” This was between CJ Rogers and CSR retaining “Mr. Rogers” to serve as a consultant at the direction of “Bob Schmidt.” AR Tab 12.a.13 at 1. The task order described the task as:

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. The maximum value of the task order was \$[REDACTED], and had a period of performance from “[REDACTED].” *Id.* Notably, CJ Rogers indicated several months later that the amount billed was \$[REDACTED]. AR Tab 12.a.1 at 5.

- f. A “Teaming Agreement” between CJ Rogers and CSR dated November 11, 2011. AR Tab 12.a.15. The agreement was for the stated purpose of collaborating on “the preparation and submission of a proposal” for the Solicitation. *Id.* at recitations. It was not a subcontract, but anticipated that if CS Rogers won the competition, a firm fixed priced subcontract would be issued to CSR provided that “the parties mutually agree to acceptable subcontract provisions.” *Id.* at Article 2. The teaming agreement included an attachment that indicates a split of effort between CJ Rogers and CSR as [REDACTED]% and [REDACTED]%, respectively. *Id.* at Exh. A.
- g. A table of “Cash Assets [of] [REDACTED]” as of 31 December 2012, along with various supporting statements. AR Tab 12.b.7; Tabs 12.b.1-6 and 8-12. As the table summarizes, the personal assets [REDACTED]. AR Tab 12.b.7. In total, the sum of deposits in these various accounts on the stated date was \$[REDACTED]. *Id.*

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84. CJ Rogers' response of January 23, 2013 also provided information on specific points:

- a. It indicated that CJ Rogers began as a sole proprietorship and filed income taxes in 2005, 2006, and 2007. *AR* Tab 12.a.1 at 1. It did not file income taxes in 2008 to 2010 because of a period of dormancy that ended in 2010. *Id.* It had income again in 2011 and filed a corporate tax return. *Id.*
- b. In 2011, CJ Rogers received \$[REDACTED] and \$[REDACTED] for performing two subcontracts for CSR. *AR* Tab 12.a.1. at 4-5. The tax return for 2011 reported total income as \$[REDACTED]. *AR* Tab 12.a.7., line 1 (IRS Form 8879-C). Based on these figures, CJ Rogers earned [REDACTED]% of its income in 2011 from CSR.
- c. CJ Roger income statement for the period of January 2012 to November 2012, used in the Contracting Officer's size determination, shows total revenues of \$[REDACTED]. *AR* Tab 12.a.11.
- d. [REDACTED] holds 51% of the ownership. *Id.* at 2. [REDACTED] serves as the President and as a Director. *Id.* [REDACTED] holds 49% of the ownership, and serves as the Secretary, Treasurer, and a Director. *Id.* They are the only Directors. *Id.*

85. The Contracting Officer reviewed these documents and cited many in her size determination, dated March 16, 2013. *AR* Tab 16. Quotations from, descriptions of, and citations to the size determination, as stated in the Discussion, Part IV. *infra*, are incorporated into this finding. The size determination found that CJ Rogers was not affiliated with CSR under the SBA's identity of interest regulation, its newly organized concern rule, the ostensible subcontractor rule, and the totality of the circumstances. *AR* Tab 16.

F. The Fact-Finding and Size Determination Regarding ATS

86. In response to the protest of January 2, 2013, the Contracting Officer initiated a size determination relating to ATS and provided ATS with a set of questions and requests for documents. *AR* Tab 9; *see also* Tab 15 at 1.

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87. ATS responded on January 22, 2013 and on January 23, 2013, and provided many documents. AR Tab 11.a and c, respectively. The response included:
- a. A forwarding letter by ATS's attorney. AR Tab 11.a.
 - b. A *four-page response signed by [REDACTED]*. AR Tab 11.a. at 3-9 (of the exhibit). This document provided a summary of gross sales for ATS Services and ATS Technology Systems for the fiscal years of 2010, 2011, and 2012, each ending on May 31. *Id.* at exhibit page 6. It used exchange rates from the U.S. Department of Treasury. *Id.*
 - c. *ATS Meteorology USA Inc. Certificate of Incorporation*. This indicates that incorporation in Delaware occurred on December 14, 2011. AR Tab 11.g.IV.
 - d. *A collection of tax returns and financial statements*. These documents were for "ATS Meteorology USA Inc.," (the intervenor); "ATS Technology Systems, Inc.," "ATS Services Ltd.," and "[REDACTED]." AR Tab 11 a. – e.
 - e. A "*Non-Disclosure Agreement*," and a "*Teaming Agreement*." AR Tab 11.c.i. The Teaming agreement was executed for the purpose of establishing a mentor-protégé relationship to submit a proposal in response to solicitation DTFAWA-12-R-08591." *Id.*, at Teaming Agreement recitations. It anticipated that if a prime contract was awarded, then the parties would use "good faith commercial efforts to complete a definitive subcontract." *Id.*, at Teaming Agreement ¶ 3.
88. The Contracting Officer reviewed these documents and cited many in her size determination, dated March 29, 2013. AR Tab 15. Quotations from, descriptions of, and citations to the size determination, as stated in the Discussion, Part IV. *infra*, are incorporated into this finding. The size determination found that ATS was not affiliated with CSR under the SBA's identity of interest regulation, its newly organized concern rule, the ostensible subcontractor rule, and the totality of the circumstances. AR Tab 15.
89. The sized determination did not explain the basis for the conclusion that the four firms of ATS Meteorology USA Inc. (the intervenor), ATS Technology Systems, Inc., ATS Services Ltd., and [REDACTED] were "below the \$14.0 million size standard set forth in the SIR." AR Tab 15 at 4; *see also* AR Tab 21 at ¶ 9.

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G. Information on CSR Gathered for the Size Determinations

90. CSR also provided information to the Contracting Officer for the purposes of her size determinations regarding ATS and CSR. AR Tab 13.
91. [REDACTED], is identified as one of four “owners” of CSR and serves as CSR’s “Chief Operations Officer / President.” AR Tab 13.i.i. at 2.
92. [REDACTED], as the record shows, is identified as one of four “owners” of CSR and serves as CSR’s “Chief Administrative Officer / Facility Security Officer.” AR Tab 13.i.i. at 2.
93. CSR is not a small business under the Solicitation’s NAIC standard. According to its own response to the Contracting Officer for purposes of the Size Determination, CSR stated that its gross sales or receipts for the most recently completed 3 fiscal years as of the date of the offer were:

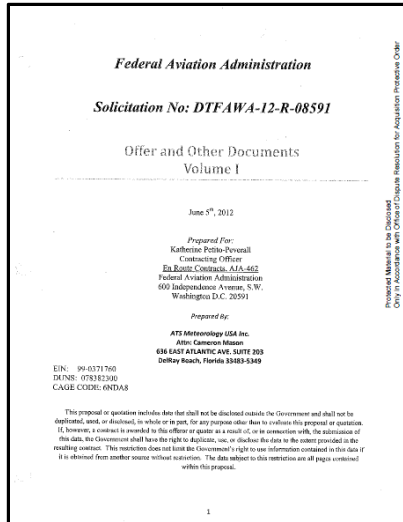
2009 - \$[REDACTED]
2010 - \$[REDACTED]
2011- \$[REDACTED]

AR Tab 13, ii., i. at 3 (the unusual tab hierarchy (“ii., i.”) is found in the Agency Response for this document). These figures average to \$17.6 million, which exceeds the size limitation of \$14 million. See *FF* 12.

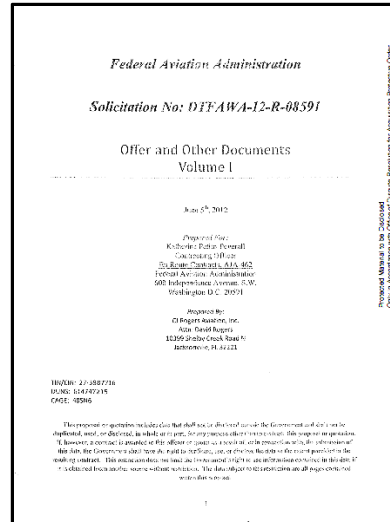
H. Specific Comparisons of the Proposals

94. The covers of the volumes from CJ Rogers and ATS are identical in layout, fonts, and other presentation issues. This is best shown graphically:

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ATS Vol. I Cover (AR Tab 22)



CJ Rogers Vol. I Cover (AR Tab 23)

95. The tables of contents are identical in every material aspect, differing only in the use of the phrase “CJR” or “ATS,” and the fact that the CJ Rogers table is double spaced. The section numbering is identical, even down to the minutest indexing level such as “C.6.4.3 Capabilities and Limitations Secondary Equipment.” Similarities continue to the last entry, a reference to “Figure 14 D5 – 1 ATS’ [or CJR’s] Proactive Risk Mitigation Approach Ensures an Effective Transition.” Compare AR Tab 22 (ATS) at 3 with Tab 23 (CJ Rogers) at 3.
96. The presidents of CJ Rogers and ATS provided nearly identical “Declaration[s] of Commitment” with their technical proposals. The ATS declaration states:

DECLARATION OF COMMITMENT

ATS Meteorology USA Inc. is pleased to have this opportunity to provide support for the FAA CWO Program. We are committed to supplying comprehensive, innovative, high quality support to assist the FAA in accomplishing their mission.

ATS Meteorology USA Inc. is committed to providing superior products and services that meet or exceed the expectations of the FAA and its customers. We shall perform the services as set forth in the Statement of Work with due diligence and utmost attention to detail.

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Our teaming approach is to establish clear lines of communication and working relationships that are seamless to the customer. Our structuring for the FAA CWO program enables us to minimize and effectively control overhead costs to the program. Our program manager will have full responsibility and authority to make all critical and timely decisions affecting the FAA CWO program.

ATS Meteorology USA Inc. has selected an outstanding and well-qualified individual to lead this program. We are fully committed to providing the support, guidance, and corporate resources needed by our Program Manager to successfully execute this effort. ATS Meteorology USA Inc. looks forward to providing weather observational services to the FAA.

AR Tab 6.e.ii. at 9. It is signed by [REDACTED]. The CJ Rogers declaration states:

DECLARATION OF COMMITMENT

CJ Rogers Aviation, Inc. is pleased to have this opportunity to provide support for the FAA CWO Program. We are committed to supplying comprehensive, innovative, high quality support to assist the FAA in accomplishing their mission.

CJ Rogers Aviation, Inc. is committed to providing superior products and services that meet or exceed the expectations of the FAA and its customers. We shall perform the services as set forth in the Statement of Work with due diligence and utmost attention to detail.

Our teaming approach is to establish clear lines of communication and working relationships that are seamless to the customer. Our structuring for the FAA CWO program enables us to minimize and effectively control overhead costs to the program. Our Program Manager [REDACTED] will have full responsibility and authority to make all critical and timely decisions affecting the FAA CWO program.

CJ Rogers Aviation, Inc. has selected an outstanding and well-qualified individual to lead this program. We are fully committed to providing the support, guidance, and corporate resources needed by Name to successfully execute this effort. CJ Rogers Aviation, Inc. looks forward to providing weather observational services to the FAA.

AR Tab 7.b.i. at 8 (underline added). CJ Rogers' declaration was not physically signed, but its text indicates it is from [REDACTED]. Both declarations appear in a text box with identical blue shading. *Compare* AR Tab 6.e.ii. at 9 *with* Tab 7.b.i. at 8. They also appear in the same "A4." sections of the respective proposals. *Id.*

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97. The same scrivener's handwriting appears in block 14 on both proposals. *Compare AR Tab 22 (ATS) at SF-33 in Section B with Tab 23 (CJ Rogers) at SF-33 in Section B.* The handwriting is shown below:

14. ACKNOWLEDGMENT OF AMENDMENTS (The Offeror acknowledges receipt of amendments to the SOLICITATION for Offerors and related documents numbered and dated)	AMENDMENT NO.	DATE	AMENDMENT NO.	DATE
	Amendment 1	3 May 12	Amendment 2	29 June 12
	Amendment 3	3 July 12		

AR Tab 22 (ATS).

14. ACKNOWLEDGMENT OF AMENDMENTS (The Offeror acknowledges receipt of amendments to the SOLICITATION for Offerors and related documents numbered and dated)	AMENDMENT NO.	DATE	AMENDMENT NO.	DATE
	Amendment 1	3 May 12	Amendment 2	29 June 12
	Amendment 3	3 July 12		

AR Tab 23 (CJ Rogers).

98. The Product Team prepared several tables used to analyze the prices from various offerors:

- a. Tab 30 contains the G&A rate, the fee rate, the overhead rate and the annual cost for each offeror, at each site in each group.
- b. Tab 31 contains the hourly labor rates, "health and welfare" (H&W) hourly benefit valued as a monetary figure, and the estimated number of labor hours that the offeror proposed per site. *AR Tab 31.*
- c. Tab 33, containing a comparison of offeror's price for each Group.

99. The minimum values for labor rates and H&W were dictated by CBAs or Wage Determinations referenced in the Solicitation. *AR Tab 5 at attachment J-2.* Overhead, G&A, fee rate, and the estimated number of employee-hours per location were not dictated by the Solicitation.

100. Both CJ Rogers and ATS submitted bids for Groups [REDACTED]. *Compare AR Tabs 22 and 23, at Section C of both volumes.*

101. Tab 31 includes the intervenor's labor estimates for Groups [REDACTED]. Similar data for the other Groups that both intervenors bid is not in the exhibit.⁶ The exhibit

⁶ The ODRA makes these finding based on the record before it even though Tab 31 does not include ATS data for groups [REDACTED], and CJ Rogers' estimates for groups [REDACTED].

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was prepared by an undisclosed member of the Price Evaluation Team. AR Tab 38, *Contracting Officer's Second Decl.* at ¶ 6. Nevertheless, the Contracting Officer served as Chairperson of the Price Evaluation Team (AR Tab 34, coversheet), and certified Tab 31 as "authentic and complete." AR Tab 38, *Contracting Officer's Second Decl.* at ¶ 9.

102. Tab 31 reveals substantial similarity in the labor hour estimates for both ATS and CJ Rogers:

Group	Sites in Group	Total No. of Estimates for Base and Option Years ⁷	No. of Different Yearly Estimates	ATS Labor Hour Est. for Group	CJ Rogers Labor Hour Est. for Group
[REDACTED]					
TOTALS					
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]

AR Tab 31. As shown by the table, ATS and CJ Rogers provided matching labor hour estimates for [REDACTED] groups with complete data in Tab 31. The variation in [REDACTED] is found for just [REDACTED]. AR Tab 31, at spreadsheet "[REDACTED]." Within those sites, [REDACTED] of the estimates were identical, but [REDACTED] varied. In percentage terms, Tab 31 shows that [REDACTED] % of the labor estimates from ATS and CJ Rogers are identical.

There is no explanation from the Product Team for these omissions. Moreover, the Product Team did not provide Volume IV of either offeror's proposal (or even relevant portions), which would contain the fundamental data estimates for each site and program year. See AR Tab 4, at provision L.21.2. Inasmuch as the Fourth Supplemental Protest concerns alleged violations of the warranties to provide independent pricing, no credible argument can be made that the Price Volumes are not relevant. This information should be in the possession of the Product Team, which has a regulatory duty to include in the Agency Response "all relevant documents, which shall be chronologically indexed, individually tabbed, and certified as authentic and complete." 14 C.F.R. § 17.21(d) (2012). This does not prejudice the intervenors: they are represented by counsel, had notice of the allegations, had access to the complete record pursuant to an ODRA Protective Order, but they also did not submit their own proposals into the record.

Finally, the ODRA does not draw an adverse inference from the failure to produce Volume IV of either proposal. Rather, it renders these findings on the record before it. See *Protest of Adsystech, Inc.*, 09-ODRA-00508.

⁷ For each site, offerors provided labor hour estimates for a base year, and four options years. This means that for each site, 5 separate labor hour estimates were provided.

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103. Tab 30 records the offerors' rates for G&A, Fee, and Overhead. The Contracting Officer prepared this document personally, and certified it as "authentic and complete." AR Tab 38, *Contracting Officer's Second Decl.* at ¶¶ 6 and 9. For those Groups that ATS and CJ Rogers offered, analysis of the exhibit reveals remarkable similarity between G&A rates for ATS and CJ Rogers:

Group	Sites in Group	Number Sites with Different G&A Estimates	Total No. of G&A Rates for Base and Option Years	No. of Different Yearly G&A Rates
[REDACTED]	[REDACTED] ⁸		[REDACTED]	
TOTALS				
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]

Whether measured by sites or the yearly estimates, these figures, in percentage terms, show that ATS and CJ Rogers offered identical G&A rates for [REDACTED]% of the figures provided.

104. The ODRA also compared the Fee Rates listed in Tab 30 and found variation between ATS and CJ Rogers at [REDACTED] that were bid. For those Groups that ATS and CJ Rogers offered, analysis of the exhibit again reveals remarkable similarity:

⁸ Data for the last line of ATS's estimates for [REDACTED] is missing. Without data to compare, the ODRA does consider the corresponding CJ Rogers data.

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Group	Sites in Group	Number Sites with Different Fee Rates	Total No. of Fee Rates for Base and Option Years	No. of Different Yearly Fee Rates
[REDACTED]	[REDACTED] ⁹		[REDACTED]	
TOTALS				
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]

Whether measured by sites or the yearly estimates, these figures, in percentage terms, show that ATS and CJ Rogers offered identical Fee Rates for [REDACTED]% of the figures provided.

105. The ODRA also compared the Overhead Rates listed in Tab 30 and found variation between ATS and CJ Rogers at [REDACTED] that were bid. For those Groups that ATS and CJ Rogers offered, analysis of the exhibit again reveals remarkable similarity:

Group	Sites in Group	Number Sites with Different OH Rates	Total No. of OH Rates for Base and Option Years	No. of Different Yearly OH Rates
[REDACTED]	[REDACTED] ¹⁰		[REDACTED]	
TOTALS				
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]

Whether measured by sites or the yearly estimates, these figures, in percentage terms, show that ATS and CJ Rogers offered identical OH rates for [REDACTED]% of the figures provided.

⁹ *Id.*

¹⁰ *Id.*

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106. Finally, Tab 30 also reveals that in [REDACTED]% of ATS's and CJ Rogers' bids, all three rates - G&A, Fee Rate, and OH – were identical:

Group	Sites in Group	Number Sites with Identical G&A, Fee, & OH rates	Total No. of Base and Option Years	No. of Identical Base and Option Years Rates
[REDACTED]	[REDACTED] ¹¹		[REDACTED]	
TOTALS				
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]

I. Proceedings Before the ODRA

107. Although IBEX requested a debriefing shortly after receiving the notice letter of December 18, 2012, a series of correspondence from the Contracting Officer repeatedly postponed the date for the debriefing. *Initial Protest* at 11-12. The last of these communications delayed the debriefing until “NLT March 31, 2013.” *Id.* at 12.

108. Electing not to wait for the repeatedly postponed briefing, IBEX filed the Initial Protest on March 13, 2013. *Initial Protest*, at 1 (ODRA date stamp). IBEX filed its Initial Protest before the Contracting Officer had completed the size determinations for ATS and CJ Rogers. *See supra* FFs 85 and 88.

109. The Product Team and IBEX executed an Alternative Dispute Resolution (“ADR”) agreement on March 22, 2013. *See ODRA Case File.*

110. By letter dated June 11, 2013, IBEX gave notice to the ODRA that it was terminating its

¹¹ *Id.*

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mediation with the Product Team, and requested the adjudication to commence. *See* ODRA Case File.

111. On June 14, 2013, IBEX filed its Supplemental Protest. *Supplemental Protest* at 1 (ODRA date stamp).

112. On July 8, 2013, the Product Team filed its Agency Response, which included Tabs 1 to 21. *AR* at 1 (ODRA date stamp).

113. On July 16, 2013, IBEX filed its Comments on the Agency Response. *IBEX Comments* at 1 (ODRA date stamp). These Comments included supplemental protests alleging that the evaluation record was not adequately documented. *Id.* at 30-31.

114. CJ Rogers did not file Comments on the Agency Response. *See ODRA Letter of July 17, 2013*, at 1.

115. ATS filed Comments on the Agency Response. *See ATS Comments*, dated July 12, 2013.

116. In a letter to the parties, the ODRA observed that relevant documents were missing from the Agency Response that relate to the allegations in the Initial Protest “of unreasonable responsibility determinations and improper past performance evaluations.” *ODRA Letter of July 17, 2013*, at 1. The ODRA directed the Product Team to provide:

- Volume I of the Proposals for ATS and CJ Rogers; and
- Technical evaluation reports, price evaluation reports, risk assessments, responsibility determinations, and any other contemporaneous documents that explain the basis and conclusions of evaluators, the contracting officer, and source selection official(s) leading to the award of the contracts to ATS and CJ Rogers.

Id. at 2. The ODRA directed that these items be included in the Agency’s Supplemental Response to the new protest allegations found in IBEX’s Comments.

117. One issue raised in the Supplemental Protest concerned disparate treatment regarding

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labor rates required under Collective Bargaining Agreements (“CBAs”). *Supplemental Protest, passim*. This issue required notice to be given to other awardees, so that they could intervene if desired. Based on a narrow interpretation of the protest, the Agency had not provided such notice by the time it filed its Agency Response, and the ODRA established a process to identify those awardees and give them the opportunity to intervene. *See ODRA Letter of July 17, 2013*, at 2-3. A conference call was conducted thereafter, and briefing on the CBA issue was delayed. *ODRA Conference Memorandum dated July 30, 2013*.

118. The Product Team filed a Supplemental Agency Response on July 31, 2013. Supplemental Agency Response. It included Tabs 22 through 38.

119. IBEX filed Supplemental Comments on August 5, 2013. Once again, IBEX added a new protest ground, this time challenging the responsibility determination vis-à-vis the warranties stated under AMS Provision 3.2.5-2, “Independent Price Determination (October 1996).” *IBEX’s Supplemental Comments* at 7.

120. CJ Rogers also filed Comments on the Second Supplemental Protest. *CJ Rogers Comments on Second Supplemental Protest* of August 6, 2013.

121. On August 8, 2013, ATS filed Supplemental Comments on the Supplemental Agency Response. *ATS Supplemental Comments* at 1.

122. In response to factual allegations relating to Independent Pricing allegation in *IBEX’s Supplemental Comments*, the ODRA directed both CJ Rogers and ATS to provide a “declaration executed in accordance with 28 U.S.C. § 1746, from a competent and knowledgeable declarant” to explain who prepared the proposal, and specifically, “whose handwriting appears in Block 14 of the SF-33” submitted by the respective offeror. *ODRA Letter of August 8, 2013*.

123. ATS provided a declaration from its Director of Operations, who responded, “I do not

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know the identity of the person whose handwriting appears in block 14 of the SF-33.” *Declaration of Director of Operations for ATS*, at ¶ 4. He acknowledged the participation of CSR in developing the proposal. *Id.*, at ¶¶ 4, 6, 7, 9, and 10. He indicated that the acknowledgements of the amendments likely were added by a former administrative employee of CSR. *Id.* at ¶ 10.

124. CJ Rogers’ President filed a declarant, stating, “I do not know the identity of the person whose handwriting appears in block 14 of the SF-33 contained in AR Tab 23.” *Declaration of President of CJ Rogers*, ¶ 2.a. She is “reasonably confident” that it was a CSR employee during the final stages of review. *Id.*, at ¶ 2.c. and d. She acknowledges CSR’s participation in the development of the proposal. *Id.* at ¶¶ 2.c. and d.

125. Upon receiving these declarations, the ODRA established a briefing schedule for the Independent Pricing protest issue. *ODRA Letter of August 16, 2013*. The letter included direction to the Product Team to provide section K of the Solicitation, which had been inexplicably omitted from Tabs 1 through 5 of the Agency Response. *Id.*

126. In response to a request from the Product Team, without objection, the ODRA extended the deadlines established in its August 16 letter. *ODRA Letter of August 20, 2013*. The Product Team was also directed to supplement the record by informing the ODRA of the status of contract execution (as distinguished from the “award”) for CJ Rogers and ATS. *Id.*

127. In a letter dated August 16, 2013, the ODRA noted deficiencies in the record regarding the ATS size determination, and directed the Product Team to provide:

... the contemporaneous calculations used in the assessment of the ATS Group’s gross revenue. If contemporaneous records do not clearly demonstrate her calculations, the sources of the figures used, and a treatment of exchange rates, then a declaration may be filed [that] explains the basis for the conclusion.

ODRA Letter of August 16, 2013.

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128. The Product Team filed a Second Supplemental Agency Response on August 27, 2013, which included Tabs 39 to 44 to add to the record. *Second Supplemental Agency Response*. The calculations provided are contained in a spreadsheet that uses published exchange rates, and relies on figures derived from source documents such as Canadian tax returns and financial statements. AR Tab 42.
129. On September 3, 2013, IBEX filed its Comments on the Second Supplemental Agency Response. *IBEX Second Supplemental Comments*.
130. CJ Rogers filed supplemental Comments on September 4, 2013. *CJ Rogers Supplemental Comments* at 1.
131. ATS filed its Second Supplemental Comments on September 5, 2013. *ATS Second Supp. Comments*, at 1.
132. The last outstanding item concerned the CBA Issue. This issue, which involves several other docketed cases, was the subject of negotiation between the various parties. Ultimately, resolution was not possible, and during a Status Conference held on August 23, 2013, the ODRA established a briefing schedule. Under that schedule, the Agency was to respond separately to each case involving the CBA issue, and file its Agency Responses by September 9, 2013. Comments from the intervenors and IBEX, also separately filed, were due on September 23, 2013. Although permitted by the schedule, no additional responses or comments were filed in 13-ODRA-00641.
133. The record closed on September 24, 2013.

III. Burden of Proof

The protester bears the burden of proof, and must demonstrate by substantial evidence that the challenged decision failed in a prejudicial manner to comply with the Acquisition Management System ("AMS"). *Protest of Alutiiq Pacific LLC*, 12-ODRA-00627 (citing *Protest of Adsystech, Inc.*, 09-ODRA-00508). Consistent with the Administrative Procedure Act, 5 U.S.C. §§ 554 and 556, which applies to ODRA adjudications, the phrase "substantial evidence" means that the ODRA weighs whether the preponderance of the evidence shows that the challenged Agency action lacks a rational basis. *Id.* Under the AMS, source selection decisions must be supported by a "rational basis." *Id.* (citing *AMS Policy* § 3.2.2.3.1.2.5). Where the record demonstrates that a decision has a rational basis and is not arbitrary, capricious or an abuse of discretion, and is consistent with the AMS and the underlying solicitation, the ODRA will not substitute its judgment for that of the designated evaluation and source selection officials. *Id.*

IV. Discussion

The various protests by IBEX are consolidated for decisional purposes only. Consolidation for decision is appropriate because the same underlying facts set the stage for each protested award. Nevertheless, the following discussion proceeds case-by-case to ensure that the awards to CJ Rogers are fully discussed and differentiated from the award to ATS. The ODRA finds merit in many of the issues raised.

Several of the issues in these protests involve questions of whether the awardees and their affiliates satisfied the size standard stated in the Solicitation. In that regard, the Solicitation itself explained, "For size determination purposes, the FAA will consider a company's affiliation with another entity under the SBA general principles of affiliation." *FF* 12. Moreover, the FAA's Acquisition Management System ("AMS") defines a "small business" as one that "qualifies as a small business under the federal government's criteria," which the ODRA previously has interpreted to refer to the SBA's regulations. *AMS Policy*, Appendix C, "Definitions"; *Protest of Enterprise Engineering Services, LLC*, 09-ODRA-00490. Use of precedent from the Small Business Administration's Office of Hearings and Appeals ("SBA OHA") is therefore appropriate, but only to the extent that such precedent comports with FAA statutes, regulations, and policy. As the ODRA has previously explained,

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

Protest of Alutiiq Pacific LLC, 12-ODRA-00627.

A. 13-ODRA-00641 (CJ Rogers)

As discussed in the Findings of Fact and below, CJ Rogers is a firm with strong ties to its proposed subcontractor, CSR. IBEX challenges CJ Rogers’ eligibility to compete for the award based on affiliation theories rooted in 13 C.F.R. §121.103 (2012). IBEX also challenges the Product Team’s assessment of CJ Roger’s financial ability, its past performance, and the acceptance without investigation of CJ Roger’s warranty under AMS Provision 33.2.5-2, “Independent Price Determination (October 1996).” The ODRA recommends sustaining most of these grounds.

1. Affiliation with CSR

a. Identity of Interest through Economic Dependence

IBEX asserts that CJ Rogers is affiliated with CSR by virtue of economic dependence under 13 C.F.R. § 103(f) (2012), contrary to the conclusion reached by the Product Team in its size determination. *Compare Initial Protest* at 20 and *IBEX Comments* at 13 with *AR Tab 16* at 4 – 5. In the Initial Protest, IBEX charged economic dependency due to the limited number of contract awards to CJ Rogers, the “aborted mentorship” with CSR under the FAA’s Mentor-Protégé program, and an allegation that CJ Rogers receives over 70% of its revenue from CSR. *Initial Protest* at 20.

Persuasive precedent from the SBA OHA establishes several principles for analyzing economic dependency through contractual relationships. The first principle relates to timing, i.e. the analysis addresses whether the offeror was economically dependent on another firm on the date it

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submitted its self-certification regarding its size. *Size Appeal of OBXtek, Inc.*, SBA No. SIZ-5451 (2013), citing 13 C.F.R. § 404(a). Second, “OHA has held, as a matter of law, that one firm is economically dependent upon another if it derives 70% or more of its revenue from that firm.” *Size Appeal of Larry Grant Construction*, SBA No. SIZ-5337 (2012), (*citing Size Appeal of Faison Office Prods., LLC*, SBA No. SIZ-4834, at 10 (2007)). Regarding this 70%-measure, it “is settled law that ‘affiliation through contractual relationships may be based on findings from a single fiscal year.’” *Larry Grant Const.* (*citing Size Appeal of TPG Consulting, LLC*, SBA No. SIZ-5306, at 14 (2011)). A third principle is that the analysis is not to be a mechanical exercise, *OBXtek, supra*, and the SBA OHA will give consideration to:

- (a) The start-up nature of new businesses (*Size Appeal of Argus and Black, Inc.*, SBA No. SIZ-5204);
- (b) Evidence of economic autonomy in later years despite earlier dependence (*Size Appeal of C2G*, SBA No. SIZ-5186); or,
- (c) Evidence of a change (severance, etc.) in the business relationship between the alleged affiliates (*Size Appeal of SP Technologies, LLC*, SBA No. SIZ-5319 (2012)).

As discussed below, the Contracting Officer’s size determination was not flawed to such an extent that the ODRA would deem it irrational.

The Contracting Officer determined that CJ Rogers was not economically dependent on CSR because she considered the special treatment accorded start-up firms, and because she found that CJ Rogers had sufficient financing independent of its relationship to CSR. *FF* 85; *AR* Tab 16 (CJ Rogers Size Determination) at 5. As to the start-up nature of the firm, the Contracting Officer found that CJ Rogers was incorporated on October 27, 2010. *FF* 85; *AR* Tab 16 at 5; *see also FF* 83.b. The Contracting Officer accepted the representation that CJ Rogers was a dormant sole-proprietorship from 2008 until it filed its articles of incorporation in 2010. *FF* 85; *AR* Tab 16 at 5; *see also FF* 84.a. and b. The record provided by CJ Rogers, as relied upon by the Contracting Officer, also revealed that the company had no revenue in 2009 and 2010, and further, that [REDACTED]% of its income in 2011 came from two contracts with CSR.¹² *FF* 85; *AR* Tab 16 at 4 - 5; *FF* 84.a. and b. Observing that the “bulk of CJ [Rogers’] revenue from

¹² The size determination did not render the figures as percentages. The ODRA uses percentage figures to facilitate the application of SBA OHA precedent.

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CSR is from 2011, which was CJRA's first full year of start-up operations," she then noted that "this amount was substantially decreased in 2012 and only constituted \$[REDACTED] of CJRA's total revenue." *FF* 85; *AR* Tabs 16 at 4. Further, the Contracting Officer found that CJ Rogers' financial status was independent from reliance on CSR because of a [REDACTED] it had from [REDACTED]. and based on the substantial personal assets of [REDACTED]. *FF* 85; *AR* Tabs 16 at 5. Given these observations, the Contracting Officer determined that CJ Rogers was not economically dependent on CSR. *FF* 85; *AR* Tabs 16 at 5.

(1) Non-probative Findings in the Size Determination

The size determination at issue relied on certain data that was not probative on the question of economic dependence of CJ Rogers on CSR.

First, the size determination addresses CJ Rogers' revenue from the eleven-month period from January 2012 to the end of November 2012, and noted that CJ Rogers' revenue from CSR in March to May comprised only 1.5% of the total for the period.¹³ *FF* 85; *AR* Tab 16 at 4. The SBA OHA recognizes the probative value of using information for the period after the last full tax year to determine economic dependence, but only up to the date of self-certification.¹⁴ The ODRA finds that this portion of the sized determination is flawed to the extent it relied on revenues from after July 9, 2012 to November 30, 2012 because this period is after the date that CJ Rogers submitted its self-certification regarding its size.¹⁵

The second non-probative matter relates to the putative \$750,000 line of credit.¹⁶ The ODRA finds that the letter from the Coastal Bank & Trust Company does not constitute evidence of

¹³ See *supra* footnote 12 regarding use of percentages.

¹⁴ *Size Appeal of OBXtek, Inc.*, SBA No. SIZ-5451 (2013), (citing *Size Appeal of Larry Grant Construction*, SBA No. SIZ-5337 (2012)), for the principle that "it was appropriate to use financial information from outside the three-year period for the purpose of assessing economic dependence, so long as it was not from a time subsequent to the date for determining size."

¹⁵ The record is not clear as to the date the proposal (including the business declaration) was submitted to the FAA. While the cover of the proposal and the date of the signatures is June 5, 2012 (*FFs* 24, 26, and 28), two acknowledged amendments came after that date (*FF* 97), and proposals were not due until July 9, 2012 (*FF* 23).

¹⁶ As required by provision L.10, the document was attached to the Summary of Minimum Qualifications, and is found near the end of *AR* Tab 23.

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economic independence. The letter is not a loan or a line of credit. It states in fact 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 described below.” *FF* 30 (emphasis added). Moreover, it expressly envisioned further promissory notes and other necessary documents, but CJ Rogers did not provide such documentation to demonstrated that the line of credit had actually been established. *Id.* Thus, the letter from Coastal Bank & Trust Company is of little probative value because it does not demonstrate CJ Rogers’ financial independence from CSR.

(2) The Contracting Officer Properly Treated CJ Rogers as a Start-Up Firm after a Period of Dormancy

The issue of economic dependence reduces to a question of whether CJ Rogers should be treated as a “start-up firm” so as to avoid a finding of economic dependency.¹⁷ In *Argus and Black*, the firm of Argus and Black, Inc. was a previously dormant company that resumed operations in March of 2010, and received the protested set-aside contract award in June of 2010. During that very short interval, it received one contract valued at less than \$11,000, and the majority ownership transferred to a new owner only days before the set-aside award. In those specific circumstances, the SBA OHA refused to find economic dependence based on the single prior contract, and explained:

I conclude that 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.

Size Appeal of Argus and Black, Inc., SBA No. SIZ-5204 (2011). The SBA OHA also applied this approach in the *Size Appeal of Cherokee Nation Healthcare Services, Inc.* SBA No. SIZ-5343, which involved an awardee that had operated for two years, and received two contracts from its alleged affiliate that totaled to approximately 2.17 million dollars and represented one-hundred percent of the firm’s revenue for the period.

¹⁷ The ODRA considers the start-up issue to overshadow the relative importance of the Contracting Officer’s reliance on the personal assets of [REDACTED].

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The ODRA finds that circumstances surrounding CJ Rogers fall between the bounds established by *Argus and Black* and *Cherokee Nation*. Like the firm of Argus and Black, CJ Rogers experienced dormancy before re-establishing business operations. Compared to *Cherokee Nation*, CJ Rogers operated for less time since its incorporation, and its contracts with its alleged affiliate were of lesser value as a percentage of overall revenue, i.e., 71.4% versus 100%. *FF* 84. b. The ODRA therefore finds that despite the flaws in the analysis, the size determination correctly applied the exception for start-up operations, and had a rational basis in the record. The ODRA therefore recommends that the Protest, on this ground, be denied.

b. Newly Organized Concern Rule

IBEX's Initial Protest and its Comments include the ground that CJ Rogers and CSR should be deemed affiliated under the newly organized concern rule found in 13 C.F.R. § 121.103(g) (2012). *Initial Protest* at 19; *IBEX Comments* at 22. The newly organized concern rule consists of four required elements:

- (1) The former officers, directors, principal stockholders, managing members, or key employees of one concern organize a new concern;
- (2) The new concern is in the same or related industry or field of operation;
- (3) The persons who organized the new concern serve as the new concern's officers, directors, principal stockholders, managing members, or key employees; and
- (4) 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.

Size Appeal of Rio Vista Mgmt., LLC, SBA No. SIZ-5316, at 11 (2012); *Size Appeal of Sabre88, LLC*, SBA No. SIZ-5161, at 7 (2010) (emphasis added). In this case, there is essentially no dispute that the second, third, and fourth elements of the above test are met; rather, both the Product Team and IBEX center the dispute on whether [REDACTED], currently a minority shareholder and officer of CJ Rogers, is a former "key employee" of CSR. *AR* at 21; *IBEX Comments* at 22.¹⁸ If the first element is not met, affiliation will not be found based on the newly organized concern rule. *Size Appeal of Audioeye, Inc.*, SBA No. SIZ-5477 (2013).

¹⁸ See also *AR* Tab 12.a.2., which is a statement by counsel for CJ Rogers provided in response to the Contracting Officer's request for information as part of the fact-finding process that preceded the size determination.

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A “key employee” has a “critical influence in *or* substantive control over the operations *or* management” of the concern. 13 C.F.R. § 121.103(g) (emphases added). The size determination described the review under this standard as follows:

[REDACTED] has previously worked at CSR from 2004 to December 31, 2009 in various roles including as 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** and do not appear to give Mr. Rogers “critical influence in or substantive control over the operations and management of” CJRA. Therefore, I do not believe that Mr. Rogers qualifies as a former “key employee” of CSR and cannot find affiliation between CJRA and CSR under the newly organized concern rule.

FF 85; AR Tab 16 at 5 (emphasis added). The conclusion that [REDACTED’s] work was at a “contract/site-specific level,” however, is not supported by the proposal. Specifically, Volume III of CJ Rogers’ proposal contains the resume for Mr. Rogers, and describes his former role at CSR as follows:

Control Systems Research, Inc., 2007 - 2009

Quality Assurance and Training Manager / Technical Expert / Business Development Manager- 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.

Control Systems Research, Inc., 2003 - 2007

Weather Program Manager- 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 39. Contrary to the “contract/site-specific” conclusion in the size determination, this language demonstrates broad managerial responsibilities spanning multiple contracts for multiple agencies. Moreover, while discrete functions are mentioned, collectively they form a picture of a manager responsible for a significant line of business.¹⁹ SBA OHA precedent establishes that a key employee need-not manage the whole concern; a significant portion suffices. *Size Appeal of*

¹⁹ A list of discrete functions in a resume, *per se*, does not mean a position lacks authority. Every position, great or small, can be broken into discrete functions.

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Pointe Precision, LLC, SBA No. SIZ-4466 (2001) (managers at divisional- or lower-levels of the company were key employees); *Size Appeal of Wireless Technology Equipment Co., Inc.*, SBA No. 4204 (1995) (regional and local managers “had substantial control over a portion of Motorola’s operations and management, and [met] the regulatory definition of a key employee.”). Guided by SBA OHA precedent, CJ Rogers’ description in the proposal demonstrates that Mr. Rogers was a “key employee” within the meaning of the newly organized concern rule.

CJ Rogers’ attorney submitted a position statement to the Contracting Officer. *FF* 83.a. CJ Rogers’ counsel cites the *Size Appeal of Willow Environmental, Inc.* SBA No. SIZ-5403 (2012) as an analogous case. Although *Willow* found that a former “Government Services Manager” was not a key employee, the case turned on a declaration filed by the Chief Executive Officer and President of the putative affiliate, who explained that the alleged former key employee was “not authorized to make any decisions on behalf of [her former firm].” *AR* Tab 12.a.2., quoting *Willow, supra*. The declarant in *Willow* also explained that the alleged key employee had “no substantive influence or control over the government contracts work that [the company] performed,” that she was easily replaced during two three-month absences, and that other aspects of the employee’s tenure that demonstrated she was not “key” to her former firm’s operations or management. *Id.* In stark contrast, CJ Rogers did not provide evidence in the form of a declaration (or otherwise) describing Mr. Rogers as a non-influential, easily-replaced employee with no control over operations or management of CSR.²⁰ See generally *AR* Tab 12 (CJ Rogers’ “fact finding responses”). Reliance on *Willow*, therefore, is misplaced. In short, nothing in the record demonstrates that CJ Rogers’ own proposal -- which lauded [REDACTED’s] broad

²⁰ In fact, the record shows that after Mr. Rogers departed CSR as an employee, he was brought back as a consultant through a task order to CJ Rogers. Under that task order, he was to 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. ...

AR Tab 12.a.13. As the text shows, his expertise as a contractor supported the management efforts of CSR’s Weather Division, thereby supporting the conclusion that he was a key employee at CSR. See *Size Appeal of Sabre88, LLC*, SBA No. SIZ-5161 (2010) (key employee returned as a consultant).

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experience and responsibilities as CSR's Quality Assurance and Training Manager, Technical Expert, Business Development Manager, and Program Manager for multiple federal contracts – was mere puffery.²¹ *FF* 39, 83, and 84.

The ODRA therefore finds that [REDACTED] was a key employee of CSR, and that the size determination lacked a rational basis in the record to reach a contrary conclusion. Further, the ODRA has found – and the parties do not contest – that the other elements of the newly organized concern rule are present. *FFs* 33 (same industry); 39, 83.b. (officer in new concern); and 84.a and b. (contractual support). The ODRA therefore recommends that the Protest be sustained on this ground.

c. Ostensible Subcontractor Rule

The ostensible subcontractor rule is found in SBA regulations, and states:

(4) A contractor and its ostensible subcontractor are treated as joint venturers, and therefore affiliates, for size determination purposes. An ostensible subcontractor is a 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 subcontractor are considered, including, but not limited to, the terms of the proposal (such as

²¹ *Post hoc* arguments against these representations deserve scant attention. As SBA OHA explains:

OHA has repeatedly held that documents created after the final proposal may not be used to contradict an offeror's actual proposal. *See, e.g., Size Appeal of Onopa Mgmt. Corp.*, SBA No. SIZ-5302, at 16 (2011); *Size Appeal of Earthcare Solutions, Inc.*, SBA No. SIZ-5183, at 6 (2011) (“The Area Office must base its ostensible contractor determination solely on the relationship between the parties at that time, which is best evidenced by Appellant's proposal (and anything submitted therewith, including teaming agreements.”). Any assertions not in accord with the proposal and teaming agreements are, therefore, irrelevant.”); *Size Appeals of CWU, Inc., et al.*, SBA No. SIZ-5118, at 16 (2010) (rejecting contentions as to how much work would be performed by a subcontractor, because those contentions were inconsistent with the offeror's proposal); *Size Appeal of Smart Data Solutions, LLC*, SBA No. SIZ-5071, at 20 (2009) (“Appellant's representation of their incumbency status in its Proposal, which predates the current dispute, is entitled to great if not controlling weight. Thus, it is too late for Appellant to attempt to claim otherwise now and it will not be entertained.”). Accordingly, Dr. Skerl's declaration has little probative value, because it sheds no light on whether Petitioner complied with the ostensible subcontractor rule as of the date of its final proposal.

Size Appeal of Competitive Innovations, LLC, et. al., SBA No. SIZ-5392 (2012). In the present context, Mr. Rogers' position descriptions were provided before the IBEX or others challenged the relationship with CSR. Unsupported, post-hoc arguments by CJ Rogers' counsel (*FF* 83.a.) cannot withstand the weight of the proposal language.

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contract management, technical responsibilities, and the percentage of subcontracted 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) (2013). The SBA OHA recently explained its view of the analysis conducted under the rule:

The ostensible subcontractor rule provides that when a subcontractor is actually performing the primary and vital requirements of the contract, or the prime contractor is unusually reliant upon the subcontractor, the two firms are affiliated for purposes of the procurement at issue. 13 C.F.R. § 121.103(h)(4). The rule “asks, in essence, whether a large subcontractor is performing or managing the contract in lieu of a small business [prime] contractor.” *Size Appeal of Colamette Constr. Co.*, SBA No. SIZ-5151, at 7 (2010). To determine whether the relationship between a prime contractor and a subcontractor violates the ostensible subcontractor rule, the Area Office must examine all aspects of the relationship, including the terms of the proposal and any agreements between the firms. *Size Appeal of C&C Int'l Computers and Consultants Inc.*, SBA No. SIZ-5082 (2009); *Size Appeal of Microwave Monolithics, Inc.*, SBA No. SIZ-4820 (2006). Ostensible subcontractor inquiries are “intensely fact-specific given that they are based upon the specific solicitation and specific proposal at issue.” *Size Appeals of CWU, Inc., et al.*, SBA No. SIZ-5118, at 12 (2010).

Size Appeal of Ingenesis, Inc., SBA No. SIZ-5436 (2013). ODRA precedents are in accord with this summary. *See Protest of Potter Electric Co.*, 13-ODRA-00657; *see also Protest of Alutiiq Pacific LLC*, 12-ODRA-00627. As discussed below, after examining all aspects of the relationship, the ODRA finds that CJ Rogers and CSR are affiliated under the ostensible subcontractor rule, and the size determination was in error as a matter of law in reaching the opposite conclusion.

(1) CSR is the Incumbent Contractor

The size determination and CJ Roger’s own proposal acknowledge that CSR is an incumbent contractor for FAA weather observation services. *FF* 85; *AR* Tab 16 at 6; *FFs* 33 and 34. The Contracting Officer found that CSR itself is “ineligible for participation in this procurement as a prime contractor because it exceeds the size restriction,” and no party has challenged this

finding. *FF* 85; *AR* Tab 16 at 6; *see also FF* 93.

The finding of incumbency in the size determination is not discussed further, and it is not clear from the document whether CSR's incumbency was treated as indicator of affiliation under the rule. Indeed, IBEX argues that the it failed to consider incumbency under a "heightened scrutiny" standard, as the SBA OHA states when analyzing a prime offeror's subcontract with the incumbent contractor. *IBEX Comments* at 15, (*citing Size Appeal of Rylex Consulting, LLC*, SBA No. SIZ-5401 (2012)).

The ODRA finds that incumbency, as a matter of law, is *one* indicator of affiliation, but special treatment is not called for by the regulation. SBA OHA precedent does not explain what it means by the phrase "heightened scrutiny" other than noting it is a factor expressly stated in the ostensible subcontractor regulation.²² Applying the regulation plainly, the use of the incumbent as a subcontractor is one indicator among many that can support finding a violation of the ostensible subcontractor rule.

(2) Proposal Preparation

Substantial contributions by the subcontractor during proposal preparation are "strong indicia" of undue reliance under the ostensible subcontractor rule. *ePerience, Inc.*, SBA No. SIZ-4668

²² The phrase "heightened scrutiny" appears for the first time in SBA decisions in the *Size Appeal of TCE Incorporated*, SBA No. SIZ-5003 (2008). That decision merely references the regulation, stating,

Further, HeiTech, the subcontractor, is not the incumbent (there is no incumbent) therefore the **heightened scrutiny** the regulation requires for an incumbent subcontractor is inapplicable here. There are simply not sufficient indicia of affiliation for the ostensible subcontractor rule to apply here.

Size Appeal of TCE Incorporated, SBA No. SIZ-5003 (2008) (boldface added). The regulatory text lists incumbency as one of the several examples of "all aspects of the relationship," but it does not expressly impose "heightened scrutiny" as the term is used in more familiar contexts. See 13 C.F.R. § 121.103(h)(4) (2013), *quoted supra*. The United States Supreme Court, for example, imposes a level of heightened scrutiny under the Commerce Clause that is described as a two-step review. Specifically, "once a state law is shown to discriminate against interstate commerce 'either on its face or in practical effect,' the burden falls on the State to demonstrate both that the statute 'serves a legitimate local purpose,' and that this purpose could not be served as well by available nondiscriminatory means." *Maine v. Taylor*, 477 U.S. 131, 138, 106 S.Ct. 2440, 2447 (1986). The ODRA reads nothing similar into the SBA OHA regulation, and notes that prior to the *TCE* decision, subcontracting with the incumbent contractor was described merely as "one factor this Office has found supports a finding of unusual reliance." *ePerience, Inc.* SBA Nos. SIZ-4668 (2004).

(2004).²³ The ODRA finds that the size determination irrationally did not account for this aspect of the relationship. Further, the ODRA also finds – based on overwhelming evidence – that CSR prepared substantial portions of the proposal.

The record before the ODRA filed for 13-ODRA-00641 includes significant portions of the proposals from both ATS and CJ Rogers. The documents establish that CSR is the proposed subcontractor for both offerors. *FF* 29 and 49. Comparison of the proposals reveal that they are beyond merely similar; in many instances they are word-for-word identical, containing the same font, organization, language, typographical mistakes, for language pertaining to both the CSR, *and the offeror as prime*.²⁴ The ODRA need-not discuss every similarity, as a few blatant examples suffice:

- **Example 1 – Volume I Cover.** Aside from the name, address, and other details regarding the offeror, the cover sheets are identical. They have the same relative placement on the page for the agency, the solicitation number, the title and volume number, and date. They use the same font, and have a similar decorative line slightly above the center of the page. *FF* 94.
- **Example 2 – Table of Contents.** These tables of contents are identical in every material aspect, differing only in the use of the phrase “CJR” or “ATS,” and the fact that the CJ Rogers table is double spaced. The section numbering is identical, even down to the minutest indexing level such as “C.6.4.3 Capabilities and Limitations Secondary Equipment.” Similarities continue to the last entry, a reference to “Figure 14 D5 – 1 ATS’ [or CJR’s] Proactive Risk Mitigation Approach Ensures an Effective Transition.” *FF* 95.
- **Example 3 – Declaration of Commitment.** Each prime offeror provided a gratis “Declaration of Commitment,” found at page 9 in their respective technical proposals. *FF* 96. Both commitments are set out in a text box,

²³ The SBA OHA explained in the context of the ostensible subcontractor rule:

Further, it is clear that MCB had substantial input into Appellant's proposal. The two firms collaborated in drafting the proposal, relying upon MCB's in-depth knowledge of the requirements in the solicitation. This is another strong indicia supporting a finding that the relationship between the firms is a joint venture.

ePerience, Inc., SBA No. SIZ-4668 (2004) (citing *InfoTech Enterprises, Inc.*, SBA No. SIZ-4346, at 12).

²⁴ Undoubtedly, use of the same subcontractor could explain some similarities in proposals to the extent they describe the subcontractor's role. Similarities would not be expected vis-à-vis language pertaining to the prime offerors unless those offerors were unduly reliant on their experienced subcontractor to prepare their winning proposal.

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with identical blue shadowing. *Id.* Whereas the CEO/President of ATS signed his statement, CJ Rogers' President did not. *Id.* In one sentence, CJR Rogers forgot to insert its own name in the appropriate text. The sentence reads, "We are fully committed to providing the support, guidance, and corporate resources needed by **Name** to successfully execute this effort." *Id.*

- **Example 4 – Labor Estimates and Bid Rates.** The ODRA's Findings of Fact include analyses of price exhibits contained in the record. They reveal remarkable similarity²⁵ in the pricing between ATS and CJ Rogers:

Bid Element	Percent Identical	Reference
Labor Estimates	[REDACTED]%	FF 102
G&A Est. Rate	[REDACTED]%	FF 103
Fee Rate	[REDACTED]%	FF 104
OH Est. Rate	[REDACTED]%	FF 105
Combined G&A, Fee, & OH per site, per yr.	[REDACTED]%	FF 106

Even if the ODRA were to assume that CSR was performing as a subcontractor for the sites analyzed in the referenced findings of fact, it does not explain why the rates for G&A, Fee, and OH for the prime contractors bear such similarity.

These few examples show that the proposals are identical in layout, organization, substantial amounts of textual content, and basic pricing figures. The similarities cannot be explained through compliance with a formatting instruction or form imposed by the Solicitation. *FF 15; see also AR* Tabs 1 to 5 (formatting is not dictated other than in provision L.16). The similarities are so striking that the ODRA finds that *figuratively*, the same hand guided the assembly of these competing proposals. Other evidence demonstrates that *literally*, the same hand guided the assembly of these competing proposals.

Competitors who respond to a solicitation submit a signed version of the appropriate standard-form offer, in this case an SF-33. *FF 26 and 46.* It would not ordinarily be expected, however, to have the same person's handwriting on competitor's forms. The ODRA finds, however, that the same scrivener completed block 14 on both proposals. *FF 97.* The similarity is so evident

²⁵ The ODRA notes the similarities of the bid elements in corroboration with the other substantial evidence of textual similarity. The statistical measures of deviation and significance were not calculated, and no party provided expert testimony on this point.

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that expert testimony is unnecessary.²⁶ The fine penmanship on both documents used clear strokes and even spacing that ensured legibility on such important documents. The mix of script-style capital “A” with block printing for the remaining letters in the word “Amendment” is the same in all six examples.²⁷ The left-justified spacing is consistent for “Amendment 1” and “Amendment 3” on both forms, with each acknowledged amendment and date consuming nearly equal space in the blanks provided. The placement of the acknowledgements in the columns and rows is identical: the scrivener proceeded across the rows of the table in Block 14 before going down to the next row, rather than using the first column for the three amendments.

Neither CJ Rogers nor ATS deny that the same person completed block 14, and both express a belief that it was a CSR employee. When IBEX called the similarity to the ODRA’s attention, the ODRA directed both CJ Rogers and ATS to provide a “declaration executed in accordance with 28 U.S.C. § 1746, from a competent and knowledgeable declarant” to explain who prepared the proposal, and specifically, “whose handwriting appears in Block 14 of the SF-33” submitted by the respective offeror. *FF* 122. ATS’s declarant responded, “I do not know the identity of the person whose handwriting appears in block 14 of the SF-33.” *FF* 123. Similarly, CJ Rogers’ declarant responded, “I do not know the identity of the person whose handwriting appears in block 14 of the SF-33 contained in AR Tab 23.” *FF* 124. Both declarants expressed a belief that it was a CSR employee during the final stages of review. *FFs* 123 and 124. Both declarants

²⁶ There is no general legal principle or requirement mandating the use of handwriting experts. As one court held,

Petitioner contends that the determination is not supported by substantial evidence because there was no forensic analysis of the handwriting samples to prove that he wrote the letter. Contrary to petitioner's contention, the evidence relied upon provided substantial evidence of petitioner's guilt. It is well established that “the trier of fact (here, the Hearing Officer) may make his or her own comparison of handwriting samples in the absence of expert testimony on the subject” (*Matter of Smith v. Coughlin*, 198 A.D.2d 726, 726, 604 N.Y.S.2d 630; see, *Matter of Maldonado v. Goord*, 270 A.D.2d 742, 704 N.Y.S.2d 383; *Matter of Thomas v. Coughlin*, 145 A.D.2d 695, 696, 535 N.Y.S.2d 235). “Thus, the handwriting samples alone ... can form the basis for a determination of guilt ... if there are sufficient similarities between the two to comprise substantial evidence that they were written by the same person” (*Matter of Smith v. Coughlin*, supra, at 726, 604 N.Y.S.2d 630). Petitioner's remaining claims, to the extent that they are properly before us, have been examined and found to be lacking in merit.

Johnson v. Coombe, 271 A.D.2d 780, 780-781, 707 N.Y.S.2d 251, 251 - 252 (N.Y.A.D. 3 Dept., 2000).

²⁷ Each of the two forms acknowledges three “Amendments.” *FF* 97.

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further acknowledged CSR's participation in the development of their proposals. *FFs* 123 and 124.

Given the acknowledged contribution of CSR in preparing the proposals, and further recognizing the blatant similarities between competing proposals relying on the same subcontractor, the ODRA finds that CSR prepared substantial portions of CJ Rogers' proposal. The ODRA further finds that it was irrational for the size determination to not consider proposal preparation as an indicator of undue reliance on CSR. *FF* 85; *AR* Tab 16.

(3) Past Performance

The size determination considered the degree of CJ Rogers' reliance on CSR to meet the past performance criterion of the Solicitation. *FF* 85; *AR* Tab 16 at 11. It noted the one example in the proposal of CJ Roger's own contract, as well as the remaining references from CSR. *FF* 85; *AR* Tab 16 at 11. The size determination also noted that the Solicitation "expressly allowed" reliance on the subcontractor's past performance references. *FF* 85; *AR* Tab 16 at 11 (*citing* Solicitation provision L.20.1.). As shown below, this analysis was legally flawed and not rationally based on the Solicitation's terms.

The Solicitation before the ODRA required "a minimum of three and no more than five contracts per offeror" to demonstrate past performance. *FF* 17. Such contracts had to involve a "similar size and scope (complexity and magnitude)" as the work addressed in Section C of the Solicitation. *Id.* Offerors failing to meet this were to be "assigned an unacceptable rating for this factor." *Id.*

The record shows that CJ Rogers submitted a single contract reflecting its own experience, and four contracts from CSR. *FF* 41.²⁸ The record shows that CJ Rogers received an acceptable past performance rating, but there is no textual discussion as to how this determination was made, or more specifically, how the evaluators treated CJ Rogers' own performance history embodied in

²⁸ CJ Roger's Past Performance volume also discusses experience as a single-airport subcontractor to CSR, but these contracts were not submitted for review as the part of the three to five examples using the appropriate forms from the Solicitation. See *AR* Tab 7.a.(i) at 5.

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the single contract. *FF 74.* Objectively, the CJ Rogers’ single example of experience does not meet the criterion of the Solicitation. The contract was to staff a single airport, for two 4-hour shifts a day. *FF 42.* Over the course of four years, the value of the contract was \$702,711. *Id.* In contrast, each of the potential contracts awarded under the current Solicitation involved multiple sites, sometimes in remote locations, and in many cases required services 24 hours per day, 7 days a week. *AR Tab 2 at § C.4; Tab 5 at Attachments J-1 and J-2.* All but three groups had recommended award amounts exceeding \$10 million. *AR Tab 37 at 46-47.* For the awards currently at issue, CJ Rogers will charge \$16.7 million for 11 airports under the group 3 award, and \$18.0 million for 10 airports under the Group 13 award, lasting four years and 10 months. *FF 78.*

The foregoing shows that CJ Rogers’ own experience, without augmentation, would have yielded an “unacceptable” rating under provision L.20.2 because its own experience was not of similar size and scope as the work under current Solicitation. CJ Rogers satisfied the requirement, however, by exclusively relying on CSR, whose experience was of “similar size and scope (complexity and magnitude)” as the current Solicitation. Each of the four examples from CSR involved multiple sites, coverage for 24 hours a day, 7 days a week, and were priced between \$8.4 million to \$16.2 million. *FF 43.* But satisfying the past performance criteria by relying exclusively on the subcontractor *is not the same* as satisfying the standards imposed by the ostensible subcontractor rule.

Regarding past performance criterion in a solicitation, the SBA OHA has explained:

Although such total or unusual reliance may be permitted by the RFP, it is not permitted under the 13 C.F.R. § 121.103(h)(4), which requires the contractor to perform or be capable of performing primary and vital requirements of a contract and not to be unusually reliant upon its subcontractors if the contractor is to avoid ostensible subcontractor affiliation. As stated earlier, a prime contractor must bring something to the table beyond its small business size status and under 13 C.F.R. § 121.103(h)(4) that something must be, at a minimum, the ability to perform primary and vital contract requirements.

*Size Appeal of Smart Data Solutions LLC T/A SDSE, LLC, SBA No. SIZ-5071 (2009).*²⁹ In that

²⁹ Notably, this case involved the acquisition of weather services by the United States Air Force, and involved matters concerning CSR.

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case, the Air Force's past performance criteria allowed using experience from "a Subcontractor if performance under such contract meets the definition of relevancy and recency identified above in accordance with the evaluation process in the solicitation." *Id.* Because none of the prime's own experience satisfied the Solicitation and regardless of successful reliance on its subcontractors during award, the SBA OHA found that Smart Data was unduly reliant on the subcontractor. The SBA OHA reasoned that "the prime could not qualify for award of a contract without unusual reliance upon the qualifications or other assistance from a subcontractor." *Id.*

Likewise, CJ Rogers could not have qualified for the award of its contracts without undue reliance on CSR. The ODRA finds that this is indicator of a violation of the ostensible subcontractor rule.

(4) Financial Resources

The Contracting Officer considered the adequacy of CJ Rogers' financial resources in relationship to the ostensible subcontractor rule. *FF* 85; *AR* Tab 16 at 10. In particular, she considered a letter from [REDACTED], as well as personal assets belonging to [REDACTED]. *Id.* Relying on these assets, she concluded that CJ Rogers' was financially independent of CSR for the purposes of the ostensible subcontractor rule. *Id.*

Presently, the question is whether CJ Rogers unduly relies on CSR for performance and qualification for contract award. The ODRA explains elsewhere why neither the putative line of credit for \$[REDACTED] from [REDACTED] nor the personal assets of the Rogers family support the finding of financial independence from CSR, much less satisfy the 90-day financial requirement found in provision L.10. *See infra* Part IV.A.2.c. Indeed, evidence to the contrary is contained in Volume I of CJ Rogers' proposal. That proposal did not rely on the Rogers' personal assets, but it did include CSR's own open-ended credit note from Coastal Bank & Trust Company.³⁰ *FF* 31. Inclusion of the note in the proposal is probative evidence of undue reliance

³⁰ The note is not complete inasmuch as signature pages are missing, and the copy is not entirely legible. Moreover, on its face it may actually be of little value to the FAA in performance of the contract. First, it appears to expire on "10/17/2012," which is several weeks before the "Contract Performance Start Date" of December 1, 2012 stated in Section L.1. *Compare AR* Tab 23 with Tab 4, Section L. at provision L.1. Second, a renewal stamp on the bottom of the note's first page indicates that the note has "an original principle amount of \$[REDACTED] of which

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in two ways. First, it cannot be overlooked that CJ Roger's own \$[REDACTED] attempt at financing is from the same bank as the one that granted CSR its open-ended credit. *FF 30 and 31*. This strongly suggests that CS Rogers relies on CSR to facilitate the acquisition of working capital. Second, by including the note in the package, CS Rogers relied on CSR to present an image of financial viability to win the award.

Accordingly, the record before the Contracting Officer and the ODRA regarding CJ Rogers' financial condition demonstrates that CJ Rogers had very little of its own assets, and relied on CSR to bolster its image and chance at award.

(5) The Teaming Agreement

The size determination gave considerable consideration to the teaming agreement, and focused on the stated split of work of 60% CJ Rogers and 40% CSR. *FF 85; AR Tab 16, at 6, 7, and 9*. It also noted with approval that CJ Rogers did not object to the Limitation of Subcontracting clause's requirement that the prime contractor employees perform at least 50% of the labor costs. *FF 85; AR Tab 16, at 9*.

While review of the teaming agreement is appropriate and specifically called out in the 13 C.F.R. § 121.103(h)(4), the agreement is not judged by the standards found in the Limitation on Subcontracting clause. As the SBA OHA has stated, "It is true 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).

Further, the teaming agreement itself is not the subcontract that the parties will ultimately execute nor is it the proposal prepared under its terms. Instead, it anticipates that the parties will enter into a firm fixed price subcontract, but those terms are not stated and they must be "mutually agreeable." *FF 83.f*. This has at least two implications. First, it means that the stated

\$[REDACTED] is currently outstanding." *AR Tab 23*. Elsewhere on the same page, the document makes clear that interest is paid on the "outstanding principal balance." *Id.* This demonstrates that the note is tapped out, and cannot contribute to continuity of FAA operations in the event of Government payments are in arrears, as referenced in provision L.10.

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60/40 split may not be set in stone, but could change upon further negotiation. Second, it gives a high degree of leverage to CSR in the negotiation given the extensive promises that CJ Rogers makes to the FAA regarding CSR's participation.

The foregoing establishes that while it was proper to consider the teaming agreement, the size determination's comparison of the 60/40 labor split to the Limitation on Subcontracting was not germane. Furthermore, given the stated need for negotiation and execution of a subcontract, it is the Teaming agreement is not an indicator – *or counter-indicator* – of affiliation. As such, it does not mitigate the effects of other indicators discussed herein.

(6) Use of Incumbent Managers

As detailed below, the record reveals that CJ Rogers will rely heavily on former and current employees of CSR to administer the contract.

CJ Rogers' proposal demonstrates that the Weather Program Manager and the Deputy Program Manager, were recent employees of CSR during the period it performed contract weather observations for the FAA. [REDACTED], the intended Weather Program Manager, has already been discussed. *See supra* Part IV.A.1.b. The proposed Deputy Program Manager was CSR's Weather Program Manager under the prior FAA contract. *FF* 40. While serving as the Deputy Program Manager under the CJ Rogers' contract, he will remain a CSR employee. *Id.*

Aside from these two positions, at the various airports there are site managers whose title is "Senior Weather Observer." Section A10.3.1 of CJ Rogers' proposal describes the Senior Weather Observer position, in part, 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 36 (*quoting AR Tab 7.b.i. at 21*). CJ Rogers also explained in the proposal,

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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 CJR management structure***. This will allow for the Senior Weather Observer to administer disciplinary actions.

FF 36 (quoting AR Tab 7.b.i. at 22) (emphasis added). That the Senior Weather Observer is a front-line management position also is confirmed in the proposal, which further 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.

FF 36 (quoting AR Tab 7.b.i. at 38) (emphasis added). Based on the foregoing statements, and without belaboring the matter with further quotations to the record, the ODRA finds that the position of Senior Weather Observer is a management position.

CJ Rogers’ states its intended method of filling the Senior Weather Observation positions:

The 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.

FF 37. The Qualifications Summary, found in Volume I of the CJ Rogers proposal states further:

CJ Rogers Aviation, Inc. (CJR) has contacted each incumbent Senior Weather Observer for the locations CJR is proposing and each Senior Weather Observer has verbally confirmed their intent to join the CJR 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.

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FF 37. The proposal also explains that “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.” *Id.*

The foregoing discussion shows that for two of its top management positions used to administer the Contract Weather Observer contract, CJ Rogers will depend on a former CSR management employee, and a current CSR employee. Further, incumbent Senior Weather Observers from CSR will migrate to either join CJ Rogers, or will continue as a CSR employees.³¹ Under these circumstances, the ODR finds that the proposed management structure in the proposal is an indicator of a violation of the ostensible subcontractor rule.

(7) Other Examples of Reliance on CSR

The Technical Proposal has several other examples of reliance by CJ Rogers on its ostensible subcontractor, CSR:

- “CJR will leverage CSR’s web based recruiting efforts to fill vacancies as well perform recruiting efforts as needed. CSR’s database can easily be screened for candidates based on experience, location, availability, security clearance, etc.” AR Tab 7.b.i. at 104.
- “CJR’s Quality Assurance and Training Programs are based on current QAMP practices under CSR’s FAA CWO 2007 Contracts as well as additional items to meet the requirements of this effort. CJR shall leverage CSR’s program which has consistently received high scores on NWS and FAA inspections.” *Id.* at 79.
- “CJ Rogers Aviation, Inc. (CJR) will utilize the Control Systems Research (CSR) proven Quality Assurance Management Plan (QAMP) that focuses on preventing discrepancies and non-conformance items upfront, identifying and reporting quality problems early, and mitigating them quickly.” *Id.* at 44.
- “CSR’s proven training concepts and structure will be used to perform on this contract.” *Id.* at 28.
- “If it is necessary to recruit and train individuals without any weather service background or experience, CJR will use CSR’s proven initial qualification-training program that has already been used with great

³¹ The ODR recognizes that CSR’s incumbency stated in the proposal applied to seventeen airports (AR Tab 7.a.i. at 6). It was unknown at the time of submission whether CJ Rogers would assume control of the same seventeen airports. Nevertheless, affiliation determinations are properly based on information available when the size representation was made, and the proposal in this regard demonstrates that CJ Rogers brings little to the transaction other than its size status. CSR, on the other hand, is the party with the cadre of existing Senior Weather Observers and proposal indicates that more will join CSR if needed. FF 37.

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- success.” *Id.* at 23.
- “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.
 - “The CSR Quality Assurance and Training Plans will continue to be the foundation from which we work.” *Id.* at 5.
 - 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.” *Id.*
 - “CJR/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.

FF 38. These quotes from the proposals demonstrate that extraordinary reliance by CJ Rogers on CSR in the areas of recruiting, quality assurance, training, contingency planning, IT infrastructure, and even the “methodology and approach” to fulfilling the contract requirements. *Id.* The Contracting Officer’s Size Determination addresses a few of these topics, concluding that regardless of the text, CJ Rogers will be performing the work. *FF* 85; *AR* Tab 16 at 9-10. This conclusion ignores the fact that it is CSR’s programs, systems, or approaches that are being used, and that the proposal repeatedly uses blurred references (“CJR/CSR”) as to who actually will perform the work.³² *FF* 54. This approach leaves no room for doubt that CJ Rogers brings little to the transaction other than its status as a small business.

(8) Conclusion Regarding Ostensible Subcontractor Rule

The discussion above presents set of indicators that overwhelmingly show undue reliance by CJ Rogers on its large-business subcontractor, CSR. These include CJ Rogers’ reliance in the areas of:

- Subcontracting with the incumbent;
- Proposal Preparation
- Past Performance,
- Financial resources,
- Use of incumbent managers,
- Recruiting,

³² Pervasively using blurred references such as these in a proposal is also an indicator of undue reliance on the subcontractor. See *Size Appeals of CWU Inc. and US Dept. of Homeland Security*, SBA No. SIZ-5118 (2010).

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- Quality assurance,
- Employee training,
- Contingency planning,
- IT infrastructure, and
- The “methodology and approach” to performing the contract.

The ODRA finds that CJ Rogers and CSR are affiliated under the ostensible subcontractor rule, and the size determination was in error as a matter of law in reaching the opposite conclusion and failed to adhere to the “small business” criteria embodied in the AMS Policy and Solicitation. The ODRA, therefore, recommends sustaining this ground of the Protest.

d. Totality of the Circumstances

“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) (2013). IBEX asserts the rule applies to CJ Rogers. *Initial Protest* at 20-21.

The ODRA finds that the facts supporting the application of the newly organized concern rule and the ostensible subcontractor rule apply equally to the analysis of the totality of these circumstances. Further, the additional facts discussed in relationship to the identity of interest rule may be considered under the totality of the circumstances. In that regard, the ODRA adds the fact that CJ Rogers had no revenue in 2009 and 2010, and further, that 71.4% of its income in 2011 came from two contracts with CSR. *FF* 84.b.. When considered collectively, the body of facts discussed at length in these many preceding pages, establishes that the totality of the circumstances demonstrate affiliation between CJ Rogers and CSR.

e. Affiliation Conclusion

Based to on the preceding discussion, the ODRA recommends that the Administrator sustain the protest on the ground that CJ Rogers is affiliated with CSR under the newly organized concern rule, the ostensible subcontractor rule, and the totality of the circumstances.

2. CJ Roger's Financial Resources as a Matter of Definitive Responsibility

Two provisions of Section L. required offerors to demonstrate that they had sufficient financial “resources” or “ability” to cover 90 days of uncompensated performance under the contract. *FFs* 13 (provision L.5) and 14 (provision L.10). The first provision, L.5, embeds the specific financial requirement in language relating to the necessary determination of whether an apparent awardee is “responsible,” as that term is used under the Acquisition Management System (“AMS”). *FF* 13. The second provision, “L.10 Minimum Qualifications,” mandated precisely defined financial resources be demonstrated with the proposal “to be eligible to compete for this procurement.” *FF* 14. IBEX protests that the facts do not support the Contracting Officer’s conclusion that CJ Rogers satisfied this requirement. *Initial Protest* at 22 – 24; *IBEX Comments* at 24 – 27.

As discussed in the following subsections, the issue cannot be treated simply under the rules applicable to routine, affirmative responsibility determinations. Instead, the ODRA must review the 90-day financing requirement as a definitive responsibility criterion, and review whether the Product Team acted in accordance with its own, unique Solicitation terms when it assessed CJ Rogers’ financial ability.

a. Characteristics of Routine Responsibility Determinations and Definitive Responsibility Criterion

While AMS Policy 3.2.2.7.2 states that “no award shall be made unless the CO makes an affirmative determination of responsibility,” the AMS anticipates that affirmative determinations of responsibility require no documentation beyond the physical act of signing the ultimate contract. *AMS Policy* 3.2.2.2 (Revised 7/2012). The AMS Policy also describes the key features of a responsibility determination, but it does not impose a requirement to include a specified description of how the responsibility determination will be made. *Id.* Aside from the representations required under mandatory *AMS Provision* 3.2.2.7-7, “Certification Regarding Responsibility Matters (January 2010),” or conditionally mandatory provisions like AMS

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Provision 3.2.5-7, “Independent Price Determination (October 1996),”³³ further information for the responsibility determination “**should** ordinarily be limited to information from those offerors most likely to be considered for award.” *AMS Guidance* T3.2.2.7 at c.(1) (Revised 7/2012) (boldface added). “Generally, the [contracting officer] **should** obtain information on prospective contractors promptly after receipt of offers.” *Id.* (boldface added).³⁴ By using the word “should,” the AMS Guidance expressly gives the acquisition personnel the discretion and authority to adopt different approaches consistent with applicable law and AMS policy.^{35, 36} As shown in the next subsection, the terms of the current Solicitation demonstrate that the Product Team exercised that authority to create a unique process for evaluating a definitive responsibility criterion.

b. The Financial Eligibility Requirements were not Routine, and Constitute a Definitive Responsibility Criterion with Unique Evaluation Procedures

The provisions in Section L relating to financial eligibility differ from the description of a routine responsibility determination under the AMS. Whereas the provision L.5 traces almost word-for-word the description of a responsibility determination found in *AMS Policy* 3.2.2.2 (Revised 7/2012), it expanded the policy’s standard financial resources language to state, “Have adequate financial resource to perform the contract for a period of 90 days without government

³³ The prescription for the provision states it “must be used in Solicitations for firm fixed price or firm fixed price with economic price adjustment if there is a possibility of price collusion among the offerors.”

³⁴ Similarly, the ODRA has noted that responsibility determinations are generally made after “a prospective contractor is selected for award.” *Protest of Mechanical Retrofit Solutions, Inc.*, 07-ODRA-00402.

³⁵ The AMS Statement regarding Policy vs. Guidance states:

Should. The term “should” indicates requirements or procedures that allow discretion to adopt different approaches consistent with applicable law and AMS policy. Acquisition personnel are expected to use principles of reasoned decision making and to document, to an appropriate extent, the rational basis for adopting a different approach.

AMS Statement regarding Policy vs. Guidance; see also, Protest of Adsystech, Inc., 09-ODRA-00508, at n.16.

³⁶ The comparable data collection procedures found in the Federal Acquisition Regulation (FAR) use the word “shall.” See FAR § 9.905-1. Under the FAR, “‘Shall’ means the imperative.” FAR § 2.101. As discussed in footnote 38, *infra*, when the AMS differs from the comparable FAR statement, GAO precedent may be unpersuasive before the ODRA.

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funding, or the ability to obtain financial resources.” *FF* 13.³⁷ The provisions of L.10 and L.11 confirm the departure from the routine AMS-responsibility criteria. The relevant portions of provision L.10 state:

L.10 MINIMUM QUALIFICATION

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. ...

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.

FF 14 (underline added; boldfaced and capitalized sentence in the original). The underlined language establishes procedures that differ from the usual AMS post-evaluation procedures for collecting and analyzing information about the financial responsibility of a would-be awardee. First, rather than limiting the related data-submission to offerors selected for possible award, this requirement was imposed on all offerors as a condition on their “eligibility to compete.” *Compare AMS Guidance* T3.2.2.7 at c.(1) (Revised 7/2012) *with* L.10 (quoted above). Second, rather than obtaining the financial information “after receipt of offers,” the Solicitation required

³⁷ For comparison, AMS Policy 3.2.2.2 has one of six bullets that reads, “Has or can obtain adequate financial resources to perform a contract.”

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the information to be provided “with the proposal submission.” *Id.* Third, all proposals - not just the apparent awardees – were to be evaluated against the requirements found in L.10, and provision L.11 specifically explained, “During the evaluation process, the FAA will evaluate each offeror’s proposal, using information submitted to the FAA, presented in written form by each offeror, to determine who meets the minimum qualifications as addressed in Paragraph L.10.” *FF* 16 (emphasis added). Thus, the Product Team elected to assess financial responsibility based on materials submitted with the proposal, during the evaluation, and measured against the specific 90-day standard. As discussed in the previous subsection, the use of “should” in the applicable AMS Guidance gives discretion to the Product Team to conduct its responsibility determination in this manner, and the ODRA finds no reason not to enforce the terms of the Solicitation.³⁸

The 90-day standard itself raises a further complication. Whereas the ODRA does not routinely review affirmative responsibility determinations, it recognizes that review is appropriate for allegations that “definitive responsibility criteria in the solicitation have not been met.” *Protest of Washington Consulting Group, Inc.*, 97-ODRA-00059, n.3. The ODRA has not described “definitive responsibility criterion” in its own decisions, but the Government Accountability Office has explained:

A definitive responsibility criterion is a specific and objective standard, qualitative or quantitative, that is established by a contracting agency in a solicitation to measure an offeror’s ability to perform a contract. *Supreme Foodservice GmbH*, B-405400, B-405400.2, Oct. 31, 2011, 2011 Comp. Gen. Proc. Dec. P 244 at 14. In order to be a definitive responsibility criterion, the solicitation provision must reasonably inform offerors that they must demonstrate compliance with the standard as a precondition to receiving the

³⁸ Well-established GAO case law allows bidders to avoid enforcement of similar language in Invitations for Bids (“IFB”). See *e.g.*, 42 Comp. Gen. 464, 466 (1963); 39 Comp. Gen. 247, 249 (1959). Under these cases and their progeny, an Agency may not find an offer “nonresponsive” for failure to provide information pertaining to responsibility regardless of IFB language requiring bidders to submit such information with their bid. *Id.*; see also, *Science Applications Inc.*, B-193479 (March 8, 1979); *To Lewis, Mitchell & Moore*, B-176206, 52 Comp. Gen. 389 (1972). These cases rely on regulatory distinctions between responsibility determinations (currently found in FAR Subpart 9.1) and responsiveness (currently found in FAR §14.301). As explained in 42 Comp. Gen. 464 (1963), enforcing such IFB language “contravenes applicable law and regulations.” 42 Comp. Gen. at 466. Nevertheless, as discussed in footnote 35, *supra*, the AMS uses discretionary language that diverges from the mandatory procedures found in the current FAR and older systems like the Federal Procurement Regulation and the Armed Services Procurement Regulation. Accordingly, the ODRA finds that application of GAO precedent on this point is not appropriate.

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award. *Public Facility Consortium I, LLC; JDL Castle Corp.*, B-295911, B-295911.2, May 4, 2005, 2005 Comp. Gen. Proc. Dec. P 170 at 3.

In re Pernix-Serka LP, B-407656, B-407656.2 at 8 (Jan. 18, 2013). “Where an allegation is made that definitive responsibility criteria have not been met, [the GAO] will review the record to ascertain whether evidence of compliance has been submitted from which the contracting officer reasonably could conclude that the definitive criteria have been met.” *Deployable Hospital Systems, Inc.* B-260778 (July 21, 1995). Moreover, despite the minimal documentation requirements for affirmative responsibility determinations,³⁹ the GAO expects the agency to “articulate the basis for its determination with greater specificity.” *Id.* In *Deployable Hospital Systems, Inc.*, “the record was silent as to whether the agency considered the matter in accordance with the language of the requirement,” and the GAO was “unable to determine whether the agency reasonably concluded that [the awardee] satisfied this criterion.” *Id.*

The foregoing analysis of the AMS Policy, AMS Guidance, Solicitation, and case law determines the standards by which the ODRA must measure the Product Team’s assessment of the 90-day financing standard found in provisions L.5 and L.10. Specifically, in these protests: (1) as required by the solicitation, the information that may support the determination had to be submitted with the proposal; (2) the timeframe for the determination was “during the evaluation” of the proposals, and (3) the record before the ODRA must show that the Product Team articulates a rational basis for their affirmative finding of this definitive responsibility criterion.

c. Evaluation of CJ Rogers’ Financial Resources

IBEX raises many issues regarding the evaluation of CJ Rogers’ financial resources. The issues relate to:

- (1) How the matter was documented (*IBEX Supplemental Comments* at 5);
- (2) Use of information obtained during the size determination (*IBEX Comments* at 25); and

³⁹ See FAR § 9.105-2(a), which provides that a contracting officer’s signature on the contract constitutes an affirmative determination of responsibility. The AMS Policy and Guidance establish the same rule. See *AMS Policy* 3.2.2.2 and *AMS Guidance* T3.2.2.7 1.d.

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- (3) Whether the financial information considered actually supports a rational affirmative finding for the 90-day financing, definitive responsibility criterion (*IBEX Comments* at 25-26).

Each issue is addressed in turn.

The ODRA finds no legal or factual problems with how the Product Team – at this stage of the acquisition – documented its findings. The *AMS Policy* 3.2.2.2 (Revised 7/2012), as discussed above, requires nothing more than the Contracting Officer’s signature on the executed contract as evidence of the finding. As to concerns about the Agency articulating its rationale in a manner sufficient for review, the Contracting Officer’s size determination – issued prior to execution of the contract – adequately explains her analysis of the 90-day financing requirement. *FF* 85; *AR* Tab 16 at 10. Further, the Product Team adopted this rational in response to the protest. *AR* at 31.

The ODRA finds more persuasive the challenge to the information used to determine responsibility. First, the Product Team takes the position that the letter from [REDACTED], which CJ Rogers submitted with its proposal, was a “line of credit” that could contribute to the pool of financial resources counted toward the 90-day financing requirement. *AR* at 31 (*citing AR* Tab 16 at 10). Second, it states that CJ Rogers “has also provided evidence that it has access to [REDACTED] belonging to [REDACTED].” *Id.* These assets were identified in response to the size protest rather than with the proposal. *FF* 83.a. As to this [REDACTED], the ODRA finds that provision L.10 did not permit considering these assets as part of the responsibility determination because they were not submitted with the proposal.⁴⁰ *See supra* Part IV.A.2.b. By considering these personal assets, the Product Team did not comport with the requirements of the Solicitation.

Finally, the ODRA agrees with the Protester that neither the putative [REDACTED] nor the personal assets of the [REDACTED] support the finding of ninety days of sufficient financial assets. As stated in L.10(1), the criterion required a showing of the “offeror’s ability to cover

⁴⁰ Lest this holding be cited too broadly by future litigants, the ODRA emphasizes that the conclusion is on the unique terms of this Solicitation, which in turn reflect a permissible departure from the usual responsibility procedures found in *AMS Guidance* T3.2.2.7 at c.(1) (Revised 7/2012), as previously discussed.

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payroll and other operation and administrative expenses ... for [a] period of ninety days.” *FF* 14. This language requires that the ability be contemporaneous with the submission, and that it is the “offeror’s” ability. *Id.* The [REDACTED] letter did not satisfy these requirements for several reasons. First, as the ODRA already explained, the letter was not a line of credit or any kind of similar asset. *See supra* Part 1V.A.1.a. (1). It was merely the bank’s expression of interest and required further instruments to put into effect. *Id.* Second, the terms under consideration and stated in the letter did not guarantee full access to all \$[REDACTED], but instead had limitations based on 75% of amounts approved for payment from the U.S. Government. *FF* 30. The bank’s condition is at odds with the purpose of the L.10, which as quoted above was to ensure continued performance if the Government was “in arrears” on payment, whether due to delayed approvals or otherwise. It therefore made little sense for the size determination to credit the entire amount of the unconsummated credit line under consideration.

The assets of the [REDACTED] also do not support the finding. First, that estate includes [REDACTED] with potential unrealized capital gains. *FF* 83.g. It was irrational in the size determination to attribute the gross amounts stated in [REDACTED’s] disclosure without accounting for the possible significant tax penalties and liabilities that likely would accrue if these assets were liquidated. Second, and more fundamentally [REDACTED] are not the offeror “CJ Rogers Aviation, Inc.” Nothing in the record demonstrates a personal guarantee or other instrument that grants the corporation’s unfettered and immediate access [REDACTED’s] personal estate.

Based on the foregoing, the ODRA recommends that the ground of protest directed at the assessment of financial ability under L.5 and L.10 be sustained.

3. Evaluation of Past Performance

IBEX protests that the Product Team permitted CJ Rogers to rely excessively on the past performance of CSR when it evaluated the proposal. *Initial Protest* at 23. IBEX tells the ODRA

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that “the GAO’s decision in *Accurate Automation Corp.*, B-292403, B-292403.2 (Sept. 10, 2003) is instructive.” *Id.* at 24. The ODRA disagrees.

The protester in *Accurate Automation*, a small business, challenged the Air Force’s neutral evaluation of the protester’s past performance for a specific subfactor for managing subcontractors. *Accurate Automation* at 2. The protester asserted that it should have been given credit because it engaged a large subcontractor that had significant experience in managing its own subcontractors. *Id.* at 6. The GAO disagreed, and concluded that it was appropriate for the Air Force to not give credit to the small-business, prime offeror because the purpose of the factor was to ensure that prime contractors had the ability “to keep the program on track.” *Id.* IBEX now relies on the *Accurate Automation* decision to say that it was improper for the FAA Product Team to allow CJ Rogers to rely on the past performance of its large subcontractor, CSR. *Initial Protest* at 24.

Accurate Automation is distinguishable. First, unlike the FAA’s small-business set-aside solicitation currently at issue (*FF* 10), the solicitation in *Accurate Automation* sought full-and-open competition. The GAO explained in detail that in a full-and-open competition, a small business like *Accurate Automation* is not entitled to special consideration due to its size. *Accurate Automation* at 3. Second, unlike the subfactor in *Accurate Automation*, the current Product Team’s pass/fail evaluation criterion was not so specific that awarding credit would be senseless. *See FF* 22. Third, Section L of the FAA Product Team’s Solicitation expressly contemplated proposals from “newly formed entities, without prior contracts,” but required that they “must enter into a subcontracting arrangement with a vendor that possesses the relevant past performance.” *FF* 17. When read in harmony with the evaluation criteria in Section M, this language conveyed in advance of proposals that the FAA would give offerors credit for their subcontractor’s past performance.⁴¹ Accordingly, the ODRA does not find *Accurate Automation* to be instructive, and recommends that this ground of protest be denied.

⁴¹ The Product Team correctly points out that IBEX has filed a post-award protest, and that to the extent this is a challenge to the solicitation, it is untimely. *Supplemental Agency Response*, at 3, (citing 14 C.F.R. § 17.15(a)(1)). IBEX, in turn, recharacterized the reliance on subcontractors for past performance as an issue under the ostensible subcontractor rule. *IBEX Supplemental Comments* at 6. That issue is addressed in Part IV.A.1.c.(3), *supra*, of these Findings and Recommendations.

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4. Alleged Failure to Question the Certifications of Independent Pricing

IBEX raised a Fourth Supplemental Protest charging that the Product Team failed to question CJ Rogers' certification under provision K.6, which incorporated AMS Provision 3.2.5-2, "Independent Price Determination (October 1996)." *IBEX Second Supplemental Comments* at 7. Under that provision, offerors must warrant three separate aspects of their pricing. Specifically, the provision states:

K.6 AMS 3.2.5-2 INDEPENDENT PRICE DETERMINATION (October 1996)

The offeror warrants that:

(1) The prices in this offer have been arrived at independently, without, for the purpose of restricting competition, any consultation, communication, or agreement with any other competitor relating to:

- (i) those prices,
- (ii) the intention to submit an offer, or
- (iii) the methods or factors used to calculate the prices offered;

(2) The prices in this offer have not been knowingly disclosed by the contractor, directly or indirectly, to any other competitor before receipt of offers unless otherwise required by law; and

(3) No attempt has been made by the contractor to induce any other concern to submit or not to submit an offer for the purpose of restricting competition.

(End of provision)

FF 11. According to IBEX, the "striking similarities" of the proposals from CJ Rogers and ATS, "together with the similar content and structure of each company's proposal and the identical handwriting found on each company's Standard Form 33 ("SF-33"), should have led the Product Team to question whether ATS and CJ Rogers had independently developed their pricing, as they certified." *IBEX Second Supplemental Comments* at 2.

The Product Team admits that it conducted no investigation, but argues that "the *raison d'être* of the clause is contained in both subsections 1 and 3, ensuring that there has been no actions

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that would restrict competition.” *Second Supplemental Agency Response* at 2. The Product Team uses group 3 (awarded to CJ Rogers) as an example, and posits that half of the 22 offerors who did not use CSR as a subcontractor provided the Government with a range of offers. *Id.* Therefore, according to the Product Team, “this pricing appeared truly competitive, with no suggestion of any restriction on competition.” *Id.* The Product Team also observes that pricing of offers depended on either collective bargaining agreements or Department of Labor Wage Determinations, which would dictate some degree of similarity between offers. *Id.* at 3. The Product Team closes by simply asserting that this ground should be denied for “want of proof.” *Id.*

The Product Team’s response is meritless. The prescription explains that the provision must be used “if there is a possibility of price collusion among the offerors.” *AMS Provision* 3.2.5-2, at proscription (emphasis added). Indeed, knowingly disclosing a price to a competitor, regardless of any intent to restrict competition, is forsworn by paragraph 2 of the provision. *Id.* at ¶ 2. The Product Team’s premise that AMS Provision 3.2.5-2 is aimed at restrictions on competition, based only on subparagraphs 1 and 3, therefore, is too narrow. Further, the Product Team makes an erroneous speculation by stating:

The only variation is in the overheads applied, such as G&A or fee. It is quite reasonable to conclude that those overhead variations can account for the variations in total contract pricing seen by the Contracting Officer. As such, there was no indication of any restriction on competition in the pricing submitted by the offerors.

Second Supplemental Agency Response at 2. The error lies in the fact that the Contracting Officer herself chaired the Price Evaluation Team that prepared the detailed spreadsheet found in Tab 31. That exhibit shows striking similarities in both the G&A rates and the fee rates of CJ Rogers and ATS. *See FFs* 103 and 104.

The ODRA has not previously addressed allegations of false certifications under the Independent Price Determination provision. The GAO, however, treats the issue as a matter relating to responsibility. *See World-Wide Movers, Inc.*, B- 261941, (Oct. 26, 1995), n.1.⁴² The GAO will

⁴² In *Worldwide Movers*, the GAO wrote:

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not review an affirmative responsibility determination unless, for example, the contracting officer unreasonably failed to consider available relevant information. 4 C.F.R. § 21.5(c). The rationale behind this approach is that ordinary responsibility determinations reflect the contracting officer's subjective business judgment, but such judgments are flawed if available information is ignored. *See International Roofing & Building Construction, Inc.*, B- 292833 (November 17, 2003); *see also* 67 Fed. Reg. 79832, -34 (Dec. 31, 2002). The ODRA's precedent on signed certifications is in accord, and similarly holds that "the ODRA considers a signed certification as establishing a rational basis for acceptance by a contracting officer, *unless* there is evidence to the contrary." *Protest of Alutiiq Pacific LLC*, 12-ODRA-00627.

The ODRA has already found "blatant similarities" in the proposals from ATS and CJ Rogers. *See supra* Part IV.A.3.c.(2). The similarities in the text, organization, layout, and formatting of the competing volumes are patent evidence of collusion, which is the unethical behavior that the Independent Price Determination provision remedies. The substantially identical figures found in the Price Evaluation Team's own price analysis spreadsheets in AR Tabs 30 and 31 are equally obvious, especially given the fact that these spreadsheets were personally drafted by, or under the direction of, the Contracting Officer as the Chairperson of the Price Evaluation Team. FFs 101 to 106. Nevertheless, the Product Team responds to this protest ground by narrowly referring to another spreadsheet, found in Tab 33, to state in a supplemental declaration:

1. AR Tab 40 is a Price Worksheet I prepared for the Second Supplemental Agency Response. It lists all offerors, including those who listed CSR as a subcontractor, and the bids they submitted for each group. This worksheet is similar to AR Tab 33, with corrections in some cells for key stroke errors in the Tab 33 worksheet. Those cells are noted with the approximate difference.
2. I saw nothing in the pricing of any offeror *from the original bid worksheet* that caused me to consider investigating the independent price certification provided by ATS Meteorology or CJ Rogers Aviation, and *I see nothing in this worksheet* that would cause me to consider such an investigation.

In general, the standard bid representations and certifications, such as the Certificate of Independent Price Determination, the Taxpayer Identification clause, and Certificate of Authority to sign corporate bid, concern bidder responsibility, not bid responsiveness. *Nomura Enters. Inc.—Recon.*, B-244993.2; B-245521.2, Oct. 9, 1991, 91-2 CPD ¶ 322. Since a bidder may supply such material after bid opening, they are not relevant to our decision.

World-Wide Movers, Inc., B- 261941, (Oct. 26, 1995), n.1.

AR Tab 44, *Contracting Officer's Third Supplemental Decl.* at ¶¶ 1 and 2 (emphasis added). When rendering a responsibility determination, narrow consideration of one summary document is not sufficient. The declaration ignores the other blatant warning signs that were present. The ODRA finds that there was a failure to consider plainly available and relevant information that called into question CJ Rogers' certification of independent pricing, and by extension, CJ Rogers' responsibility as a firm with "integrity and proper business ethics." *AMS Policy* 3.2.2.2.

The ODRA, therefore, recommends sustaining the Fourth Supplement Protest ground against the award to CJ Rogers to the extent that the responsibility determination failed to consider plainly available, contrary evidence that calls the warranties of Independent Price Determination into question.

5. CBA Issue

IBEX challenges the proposal process by alleging that CJ Rogers was given outdated Collective Bargaining Agreements ("CBAs") that showed lower hourly rates for weather observers than the updated CBAs given to IBEX. This disparate treatment, according to IBEX, allowed CJ Rogers to provide lower prices than IBEX. *Supplemental Protest* at 2.

The ODRA need-not reach this issue. Having found that CJ Rogers and ATS are not small under SBA regulations, questions regarding the hourly rates used in their proposals and for evaluation are moot. The ODRA, therefore, recommends dismissing this allegation as unnecessary for these Findings and Recommendations. *See Protest of Adsystech*, 09-ODRA-00508.

B. 13-ODRA-00664 (ATS)

ATS Meteorology USA Inc. is a newly incorporated firm with acknowledged affiliates in Canada. New to the market in the United States, ATS submitted a proposal that relied heavily on an incumbent subcontractor, CSR. IBEX challenges ATS's eligibility to compete for the award based on ostensible subcontractor rule found in 13 C.F.R. §121.103(h)(4) (2012). IBEX also challenges the Product Team's assessment of ATS's financial ability, its past performance, and

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the acceptance without investigation of its warranty under AMS Provision 33.2.5-2, “Independent Price Determination (October 1996).” The ODRA recommends sustaining most of these grounds.

1. CBA Issue

After reviewing the Agency Response, IBEX withdrew the CBA Issue as a ground of protest against the award to ATS. *IBEX Comments*, at 11, n.5.

2. Affiliation with other ATS Companies and CSR

ATS acknowledges its affiliation with “sister ATS companies” doing business in Canada as Canadian firms. *ATS Comments* at 1. This leaves for the ODRA two fundamental questions: (1) was the Contracting Officer’s determination as to the aggregate size of the ATS family of companies rational and supported by the record; and (2) are ATS and CSR affiliated under the ostensible subcontractor rule, as alleged by IBEX?

a. The Aggregate Gross Revenue of the ATS Family of Companies

The size determination for ATS states in part:

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, [REDACTED]. [REDACTED] owns 100% of ATS. [REDACTED] Therefore, for size determination purposes, I considered the annual average gross revenues over the last three fiscal years for [REDACTED]. The total of the annual average gross revenues over the last three fiscal years for ATS, ATS Services, Ltd., ATS Technology Systems, Inc. and [REDACTED] 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 with ATS Services, Ltd., ATS Technology Systems, Inc. and [REDACTED].

FF 88; AR Tab 15 at 4. Remarkably, the size determination does not explain the figures used for the conclusion that these affiliated companies are “below the \$14.0 million size standard set forth in the SIR.” *FF 89.* Further, the basis of the conclusion was not readily divined from the record originally presented in the Agency Response. The ODRA, therefore, directed the Product Team

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to file either the contemporaneous calculations, or provide a declaration that explained the basis for the conclusions.⁴³ *FF* 127.

The subsequent declaration and supporting materials explain the calculations and the source of the data. *FF* 128. The subsequent filing demonstrates that the Contracting Officer conducted a rational analysis to arrive at a figure below the size standard, supported Canadian tax returns, financial statements, and published exchange rates. Further, IBEX, the party with the burden of persuasion, does not challenge the calculations, the source materials, or the explanation. See *IBEX's Second Supplemental Comments, passim*. The ODRA therefore recommends that this ground of protest, to the extent it rests solely on affiliation within the ATS family of companies, be denied.

b. Affiliation with CSR

IBEX limits its ATS-CSR affiliation argument solely to application of the ostensible subcontractor rule. *IBEX Comments* at 28, n.9. The ostensible subcontractor rule has been discussed earlier in this decision. See *supra* Part IV.A.1.c. IBEX cites to several indicators of a violation, including: (1) CSR's incumbency status, (2) evidence that CSR wrote the proposal, (3) CSR's role in managing the prime contract, and (4) sixteen other examples of "deep reliance" on CSR for key areas of contract performance for "IT infrastructure, recruiting, training, DCAA compliance," and more. *Id.* at 28-30.

In reviewing the record, the ODRA has taken care to mindfully distinguish the analysis of CJ Rogers and ATS vis-à-vis their separate proposals despite the use of the same incumbent subcontractor, CSR. In so doing, the ODRA also considered that the Contracting Officer's size determination regarding ATS was separate and distinct from the size determination for CJ Rogers. But the legal principles do not vary, and the ODRA refrains from repeating the legal

⁴³ The Product Team in this matter has not been sufficiently forthcoming in complying with its obligations to provide "all relevant" documents in its Agency Responses. See 14 C.F.R. 17.21(c) (2012). On numerous occasions, the ODRA needed to direct the Product Team to produce records that are obviously relevant and expected to be in the Agency Response. See *FFs* 116, 125, 126, and 127. Failures of this sort serve only to delay the adjudication process, and cause protesters like IBEX to file repeated Supplemental Protests once withheld information is produced. Further, product teams that fail to comply with the regulation run the risk that the incomplete record actually filed will not support finding facts in its favor.

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analysis addressed earlier in these Findings and Recommendations. The ODRA, after examining all aspects of the relationship, finds that ATS and CSR are affiliated under the ostensible subcontractor rule, and recommends that the Protest be sustained on this ground.

(1) Incumbency

Incumbency is expressly identified by 13 C.F.R. § 121.103(h) as an indicator of affiliation under the ostensible subcontractor rule. *See supra* Part IV.A.1.c.(1). The ATS proposal and the size determination recognize that CSR is an incumbent contractor. *FF* 88; *AR* Tab 15 at 6 (ATS size determination). *See also FFs* 49 and 53. Nevertheless, the size determination does not state whether incumbency was considered a factor in the determination. *FF* 88; *AR* Tab 15 at 6. The ODRA does not accord heightened scrutiny to incumbency, but considers it as an indicator of a violation of the ostensible subcontractor rule.

(2) Proposal Preparation

The SBA OHA considers a subcontractor's substantial assistance in preparing the proposal to be an indicator of affiliation under the ostensible subcontractor rule. *See supra* Part IV.A.1.c.(2). The ODRA has previously discussed in detail the similarities between the ATS and CJ Rogers proposals. *Id.* In summary, the similarities include identical layout, organization, substantial portions of text, and hundreds of identical pricing figures. *Id.* The similarities notably include substantial information referring to ATS itself, rather than simply CSR as a subcontractor. *Id.* Further, the same CSR employee reviewed both proposals and completed by hand block 14 of the SF-33. *Id.* ATS acknowledged CSR's participation in developing the proposal. *FF* 123. The common factor between the two prime offerors is CSR as the proposed subcontractor. The ODRA finds substantial evidence that CSR assisted to a very substantial degree in the preparation of the ATS proposal.

The Contracting Officer's size determination did not consider the degree of assistance rendered by CSR in the preparation of the proposal. *FF* 88; *AR* Tab 15, *passim*. Given the blatant similarities between competing proposals relying on the same subcontractor, the ODRA finds

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that it was irrational for the Contracting Officer, when conducting the size determination, not to consider proposal preparation as an indicator of undue reliance on CSR.

(3) Past Performance

Regardless of the evaluation criteria found in the past performance provisions of a solicitation, overreliance on the ostensible subcontractor to satisfy those provisions is an indicator of affiliation. *See supra* Part IV.A.1.c.(3). As previously discussed, the Solicitation required “a minimum of three and no more than five contracts per offeror” to demonstrate past performance. *FF* 17. Such contracts had to involve a “similar size and scope (complexity and magnitude)” as the work addressed in Section C of the Solicitation. *Id.* The contracts were to “demonstrate the offeror’s past experience,” and offerors failing to meet this were to be “assigned an unacceptable rating for this factor.” *Id.* (emphasis added). The Solicitation provided that newly formed entities without prior contracts “must enter into a subcontracting arrangement with a vendor that possesses the relevant past performance.” *Id.* Provision M.5.5 served notice that the evaluation team would evaluate a “subcontractor’s” past performance if subcontractor experience was included in the proposal. *FF* 22.

The proposal from ATS included five contracts as examples of past performance. *FF* 68. Two examples were from “ATS,” and three were from “Control Systems Research, Inc.” *Id.* Given that the offeror, “ATS Meteorology USA, Inc.,” was incorporated on December 14, 2011 (*FF* 87.c), and further given that the start dates listed under the “Periods of Performance” on the two ATS forms precede this incorporation (*FFs* 69 and 70), the ODRA finds that an ATS “sister company” held these contracts, not the offeror. This is corroborated by the text of the proposal, which discusses the referenced work as being performed by “ATS Services Ltd.” *FF* 68. Regardless of which ATS firm was the actual contractor, the ATS contracts are not of the same magnitude. Whereas the first example is for seventeen remote locations, 7 days a week, 24 hours a day, and valued at over \$[REDACTED] over five years (*FF* 69), the second example is only for three years at a single airport, [REDACTED], reputed to be “Canada’s busiest airport.” *FF* 70.

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The Product Team's past performance evaluation report does not provide any explanation as to why ATS's Past Performance was "acceptable." *FF* 75. It is unknown whether the Product Team accepted the two examples of "ATS" past performance as contributing to this rating. Objectively, neither contract satisfied the Solicitation requirements. First, the Solicitation sought past performance examples from either the "offeror" or a "subcontractor." *FF* 17. ATS Services Ltd. is not listed as a subcontractor in the proposal, and its experience does not satisfy the plain terms of the Solicitation.⁴⁴ Second, while the first example objectively meets the Solicitation's standard of "similar size and scope," the second example for a single airport does not. As a result, ATS satisfied the Solicitation requirements with the three remaining examples of past performance, all from CSR.

Regardless of the fact that only CSR experience satisfied the terms of the Solicitation, the Contracting Officer's size determination erroneously counted the experience of ATS Services Ltd. as meeting the terms of the Solicitation. *FF* 88; *AR* Tab 15 at 8. The Contracting Officer also erred by using the Solicitation language to discount reliance on CSR's past performance as a factor under the ostensible subcontractor analysis. *FF* 88; *AR* Tab 15 at 8. As previously explained, when evaluating questions of undue reliance under the ostensible subcontractor rule, the question presented pertains to the degree of reliance, not whether it is permitted by the Solicitation. *See supra* Part IV.A.1.c.(3). The ODRA finds, therefore, that ATS's reliance on CSR's experience is an indicator of affiliation under the ostensible subcontractor rule.

(4) Financial Resources

Volume I of the ATS proposal does not demonstrate undue reliance on CSR to satisfy the financial requirements of Solicitation. The record demonstrates that ATS submitted a letter [REDACTED]. *FF* 50. The Contracting Officer found in her size determination that these assets "precluded any notion that it was unusually dependent on its subcontractor in terms of financing." *FF* 88; *AR* Tab 15 at 9.

⁴⁴ Unambiguous language in a Solicitation requiring that an "offeror" possess certain minimum experience is interpreted to mean the offeror itself, not a subcontractor or affiliate, unless otherwise provided by the plain language of the Solicitation. *Protest of Alutiiq Pacific LLC*, 12-ODRA-00627.

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The ODRA finds that the Contracting Officer correctly assessed these facts as they pertain to the ostensible subcontractor rule. While these facts may show reliance on ATS Services and [REDACTED], they do not show reliance on CSR. Accordingly, the ODRA does not find the financing arrangements to be an indicator of affiliation.

(5) Agreements between ATS and CSR

The Contracting Officer's size determination considered a teaming agreement and the non-disclosure statement executed by ATS and CSR. *FF 88; AR Tab 15, at 6 (referring to documents found in Tab 11.c.i.)*. The size determination quoted paragraph 12 of the teaming agreement, which indicated that it is not intended to "create a joint venture, limited liability company, pooling arrangement, partnership, or other formal business organization of anything, other than a teaming arrangement" *FF 88; AR Tab 15 at 6 (citing Tab 11.c.i., Teaming Agreement at ¶ 12)*. Citing both documents, the Contracting Officer ambiguously states that "nothing ... leads me to conclude that ATS is affiliated or unusually reliant on its subcontractor for performance of this contract." *FF 88; AR Tab 15 at 6*. The ambiguity lies in whether she relied on these documents as affirmative evidence to conclude that affiliation did not exist.

These documents, standing alone, do not demonstrate undue reliance. The purpose of the teaming agreement was to develop a mentor-protégé relationship to submit a proposal "in response to solicitation DTFAWA-12-R-08591," i.e., the Solicitation at issue in the present Protests. *FF 87.e*. Notably, the mentor-protégé approach was not used. Further, the teaming agreement states that if ATS is awarded a contract under the Solicitation, then the parties would use "good faith commercial efforts to complete a definitive subcontract." *Id.* The allocation of work that the parties anticipate under that subcontract is stated in the proposal, which is addressed in other parts of the Findings and Recommendations. Thus, the teaming agreement and the non-disclosure statement are not indicators – *or counter-indicators* – of affiliation.⁴⁵

⁴⁵ This conclusion is particularly important in relationship to paragraph 12, cited in the size determination. The analysis at bar is under the "ostensible subcontractor rule," with the key word being "ostensible." "Ostensible" in this context means "1. Outwardly appearing as such; professed, pretended: *an ostensible cheerfulness concealing sadness*." *Random House Webster's Unabridged Dictionary*, 1370 (2d ed. 1998). The analysis of "all aspects of the relationship" (13 C.F.R. § 121.103(h)(4)), by its nature, tests the veracity of representations of legal relationships like those stated in paragraph 12.

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They do not, therefore, mitigate the effects of other indicators discussed herein.

(6) Use of CSR Management

ATS Meteorology USA, Inc. was less than seven months old when it dated its proposal. *Compare FF 44* (Vol. I dated June 5th, 2012) *with FF 87.c.* (Certificate of Incorporation dated December 14, 2011). As a new firm, it apparently lacked any sufficient past performance experience of its own to reference in its proposal. *FF 68.* Further, as a new firm, ATS's business declaration indicated that it had [REDACTED] employees. *FF 48.*

Volume III of the ATS Proposal contains the resumes of the key management personnel and shows that the [REDACTED] employees serve the "ATS Group," rather than simply ATS Meteorology USA, Inc. The first is for the [REDACTED], identified as the CEO / President of all three ATS companies. *FF 65.* The [REDACTED] are [REDACTED], who [REDACTED] work for the "ATS Group." *FF 66.* Added to these names is [REDACTED], identified as the CSR's Deputy Program Manager. *FF 67.* It is not clear from the exhibit, however, what roles these individuals will perform.

The Technical Proposal in Volume II gives insight as to specific roles. Figure 1 at page 24 is an organizational chart showing the ATS President at the top. *FF 60.* Below the President is the "ATS Program Manager," who in turn oversees the Senior Weather Observers. *Id.* Branching off of this line of supervision is the "QA/Training Manager." *Id.* Nevertheless, in describing the "ATS President" as part of the quality control process, the Technical Proposal assigns the function to the "ATS / CSR Presidents ([REDACTED] / [REDACTED])," who "[REDACTED]." *FF 56.* Page 86 gives this same duo the responsibility "[REDACTED]" during the transition period. *FF 61.* Similar teaming during transition is found with [REDACTED] (ATS Group) and [REDACTED] (CSR), who operate in the area of "QA/Training/Qualifications/Certifying," and they "provide instructions to Senior Weather Observer[s], implement programs, SOPs, guidance, train[ing], etc." *FF 62.* Notably, this same exhibit identifies [REDACTED] as responsible for "Security," which involves security paperwork, background checks, security training, and ensuring employees follow procedures.

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FF 63. [REDACTED], as the record shows, is identified as one of four “owners” of CSR and serves as CSR’s “Chief Administrative Officer / Facility Security Officer.” FF 92. The proposal further explains “personnel comprising the Transition organization will still support those activities and functions performed during the Transition Phase **that will continue as part of ongoing operations.**” FF 64 (emphasis added). Thus, the ODRA finds that significant players in CSR’s management will continue to manage the services while ATS holds the contract.

As stated above, ATS’s managerial chart also included the Senior Weather Observers. FF 60. The ODRA has previously explained that the Senior Weather Observer position is a managerial position. *See supra* Part IV.A.1.c.(6). Because the ATS proposal and the CJ Rogers proposals are so similar, the language supporting the ODRA’s conclusion for CJ Rogers Senior Weather Observers also appears in the ATS proposal. *Compare FF 36 with FF 57, respectively.* It is clear from ATS’ Technical Proposal, ATS planned to hire the incumbent Senior Weather Observers:

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.

FF 58. Further, as stated in language nearly identical to the CJ Rogers proposal, ATS explained that any newly hired Senior Weather Observers will, at least in part, be employed by CSR, i.e., “They will leave their incumbent positions at the close of business on the last day of September 2012 and report to work the following day as employees of ATS or its subcontractor CSR.” *Id.*

The foregoing analysis demonstrates that ATS plans to bring few of its own staff to the contract, but will rely on many of the incumbent managers or on CSR directly. As a result, the ODRA finds that proposed management structure is an indicator of affiliation.

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(7) Other Aspects of the Relationship

ATS's Technical Proposal has several other examples of reliance on its ostensible subcontractor, CSR:

- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]

FF 55. These quotes from the proposals demonstrate that across-the-board reliance on CSR in the areas of information technology ("IT"), DCAA compliance, quality control, emergency planning, training, and even the "methodology and approach" to fulfilling the contract requirements. Each of these is an indicator of undue reliance, and they pervade many areas of contract administration. The Contracting Officer's Size Determination addresses IT, training, and quality assurance by concluding that regardless of the text, ATS will be performing the work. *FF 88; AR Tab 15 at 8-9.* The ODRA already has rejected such reasoning in these Findings and Recommendations because it ignores the fact that it is CSR's programs, systems, or approaches that are being used. *See supra* Part IV.A.1.c.(7).

(8) Conclusion Regarding Affiliation

The forgoing discussion demonstrates that the size determination includes several legal errors regarding the application of the ostensible subcontractor rule. Such errors include the comparison to the Limitation on Subcontracting clause, misapplication of past performance evaluation criteria in the analysis, and failure to consider CSR's role in proposal preparation. The record presents set of indicators that show undue reliance by ATS on its large-business subcontractor, CSR. These include ATS's reliance in the areas of:

- Subcontracting with the incumbent;
- Proposal Preparation

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- Past Performance,
- Use of incumbent managers,
- Quality assurance,
- Employee training,
- Contingency planning,
- DCAA compliance,
- IT infrastructure, and
- The “methodology and approach” to performing the contract.

The ODRA finds that ATS Meteorology USA, Inc. and CSR are affiliated under the ostensible subcontractor rule, and that the size determination was in error as a matter of law in reaching the opposite conclusion. By extension, the size determination failed to adhere to the “small business” criteria embodied in the AMS Policy and Solicitation. The ODRA, therefore, recommends sustaining this ground of the Protest.

3. Responsibility Determination

IBEX’S Initial Protest charged that the Product Team irrationally deemed ATS to be responsible under the 90-day financing requirement found in provision L.5 and L.10. *Initial Protest* at 22-23. As previously discussed in these Findings and Recommendations, the 90-day financing provision in L.10 is a definitive responsibility criterion, and “(1) as required by the solicitation, the information that may support the determination had to be submitted with the proposal; (2) the timeframe for the determination was ‘during the evaluation’ of the proposals, and (3) the record before the ODRA must show that the Product Team articulates a rational basis for their affirmative finding of this definitive responsibility criterion.” *See supra* Part IV.A.2.b.

The record shows that the Contracting Officer found ATS responsible, as articulated in the size determination, based on data provided with the proposal. *FF* 88; *AR* Tab 15 at 9. Specifically, the Contracting Officer relied on a [REDACTED]. *Id.* The ODRA finds that reliance on these assets lacks a rational basis since neither were assets of the offeror, ATS Meteorology USA, Inc. Specifically, [DELETED]. Similarly, [REDACTED]. *Id.* The Contracting Officer does not identify (and the ODRA has not seen) [REDACTED]. Without such support, the ODRA finds that the determination under this definitive responsibility criterion was irrational, and the ODRA recommends that the protest on this ground be sustained.

4. Evaluation of Past Performance

As with its allegations against the evaluation of CJ Rogers, IBEX argues that the Product Team permitted ATS to rely excessively on the past performance of CSR when it evaluated the proposal. *Initial Protest* at 23. The ODRA has already distinguished IBEX’s argument under *Accurate Automation Corp.*, B-292403, B-292403.2 (Sept. 10, 2003).” *See supra* Part IV.A.3. IBEX does not assert further arguments regarding the evaluation of past performance. Accordingly, the ODRA recommends that this ground of protest be denied.

5. Responsibility under Independent Price Determination Warranty

As discussed above, IBEX argues that the “striking similarities” of the proposals from CJ Rogers and ATS, “together with the similar content and structure of each company’s proposal and the identical handwriting found on each company’s Standard Form 33 (‘SF-33’), should have lead the Product Team to question whether ATS and CJ Rogers had independently developed their pricing, as they certified” under AMS Provision 33.2.5-2, “Independent Price Determination (October 1996).” *See supra* Part IV.A.4. (*quoting IBEX Second Supplemental Comments* at 2.) The prior discussion in these Findings and Recommendations applies equally to ATS and to CJ Rogers because the analysis turns on the blatant similarities in their proposals. The ODRA, therefore, recommends sustaining the Fourth Supplement Protest ground against the award to ATS to the extent that the responsibility determination failed to consider plainly available, contrary evidence that calls the warranties of Independent Price Determination into question.

C. Prejudice

“The ODRA will not sustain, or recommend sustaining, a protest unless the protester can demonstrate that but for the agency’s inappropriate action or inaction, the protester would have had a substantial chance of receiving the award.” *See e.g. Protest of Optical Scientific, Inc.*, 06-ODRA-00365; *Protest of Enroute Computer Solutions*, 02-ODRA-00220. Although the Solicitation states the competition the award will be made to the technically acceptable, low price offeror (*FF 18*), the familiar rule⁴⁶ that only the next in line can show prejudice has no place in this unique, multiple-award Solicitation. The Solicitation provided that each offeror

⁴⁶ *See e.g., Protest of Metro Monitoring Services, Inc.*, 97-ODRA-00047.

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could receive no more than two contracts arising under the Solicitation, and there were 17 separate contracts that could be awarded. *FFs* 4 and 20. Elimination of three awards – one for ATS and two for CJ Rogers – will affect the standing of many offerors over many possible contracts, as shown in the Product Team’s complex price matrix. *FF* 77. Further, the Solicitation gives the Product Team discretion in allocating awards in the event an offeror is lowest for more than two groups. *FF* 18. In these circumstances – multiple awards, a complex matrix of offered prices, and vested discretion – simple next-in-line reasoning fails. Instead, sustaining these protests “could reposition the protester such that it would stand a reasonable chance for award,” and is sufficient to demonstrate prejudice. *Protest of Carasoft Technologies Corp. and Avue Technologies Corp.*, 08-TSA-034, at n.2.

V. CONCLUSION AND REMEDY

For the reasons discussed herein, the ODRA recommends that the Protest be sustained in part and denied in part. Specifically, as to the issues raised in 13-ODRA-00641 against the award to CJ Rogers, the ODRA recommends sustaining on the grounds of affiliation under the newly organized concern rule, the ostensible subcontractor rule, and the totality of the circumstances. The issues of responsibility, under L.10 and the Independent Price Determination provision, should also be sustained. The challenge of disparate impact regarding the CBAs and the challenge to the past performance evaluation should be denied.

Regarding the issues raised against ATS in 13-ODRA-00644, the ODRA recommends sustaining the affiliation ground under the ostensible subcontractor rule. It also recommends sustaining the grounds relating to the issues of responsibility under L.10 and the Independent Price Determination provision. The ground relating to the evaluation of past performance should be denied.

The ODRA further recommends that the Product Team be directed as follows: (1) terminate the contracts awarded to ATS and CJ Rogers under this Solicitation; (2) disqualify them from further awards under the Solicitation, and (3) make a new source selection decision in accordance with the continuing needs of the Agency. The corrective actions should be completed promptly in a manner consistent with ensuring that there is no gap in CWO services at the airports involved.

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In addition to the foregoing remedies, the ODRA recommends that the best interests of the FAA and the integrity of the AMS may require further proceedings in a forum other than the ODRA. The record as a whole demonstrates that the FAA spent significant (though non-quantified) labor and expense to evaluate ATS and CJ Rogers based in part on the signed business declarations and affiliation representations. Under AMS Policy 3.2.2.7.4, the FAA “may suspend or debar contractors for cause.” As elaborated in AMS Guidance T3.2.2.7 A.3.b.(1)(d), debarment is appropriate for “any other cause of so serious or compelling a nature that it affects the present responsibility of a Government contractor or subcontractor.” “Responsibility,” in turn, depends on several corporate characteristics, but most importantly in this context, responsibility requires that the firm has a “satisfactory record of integrity and proper business ethics.” *AMS Policy* 3.2.2.2 (delineating the elements of a responsibility determination). Given the ODRA’s findings regarding the warranties of Independent Price Determination, and further given the findings of affiliation contrary to the signed business declarations, “cause for debarment or suspension may exist” in regard to one or more of the companies involved. See *AMS Guidance* T3.2.2.7 A.3.a.(7) (emphasis added). The ODRA itself does not determine suspension or debarment matters, but it recommends that the Administrator direct that “AGC-500 [] appoint a debarment/suspension officer to investigate whether cause for debarment or suspension exists,” and to take such further action as is warranted based on the results of that investigation.^{47, 48} *Id.*

⁴⁷ The ODRA has broad discretion to recommend a “remedy consistent with the AMS that is appropriate under the circumstances.” 14 C.F.R. § 17.23(a)(8) (2012). This recommended remedy is founded upon the AMS Policy and Guidance, and the ODRA notes the similarity with remedies that can be imposed under the Small Business Act. In particular, misrepresentations relating to affiliation “shall -”

(C) be subject to suspension and debarment ... on the basis that such misrepresentation indicates a lack of business integrity that seriously and directly affects the present responsibility to perform any contract awarded by the Federal Government or subcontract under such a contract [.]

15 U.S.C. 645(d)(2)(C) (2012); see also *Small Business Size and Status Integrity*, 78 Fed. Reg. 38,811, 38,816 (June 28, 2013) (revising 13 C.F.R. § 121.108). The ODRA leaves for the appropriate Agency officials to determine whether to initiate further action in other fora under the Program Fraud Civil Remedies Act of 1986 (31 U.S.C. 3801-3812) or the False Statements Act (18 U.S.C. § 1001).

⁴⁸ *AMS Guidance* T3.2.2.7 A.3.a. (1) states, “Contractors debarred, suspended, or proposed for debarment are excluded from receiving contracts. FAA will not solicit offers from, award contracts to, consent to subcontracts, or conduct business with contractors that are debarred, suspended, or proposed for debarment[.]”

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Finally, the Product Team should be directed to report to the Administrator through the ODRA every 45 business days on the status of corrective action being taken in these matters.

-S-

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APPROVED:

-S-

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