

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

**PUBLIC VERSION OF
FINDINGS AND RECOMMENDATIONS**

Matter: Consolidated Protests of Consecutive Weather, Eye Weather
Windsor Enterprises and IBEX Group, Inc.
Under Solicitation Nos. DTFA01-02-R-03113 and
DTFA01-02-R-031130

Docket Nos.: 02-ODRA-00250, 02-ODRA-00251, 02-ODRA-00252 and
02-ODRA-00254 (Consolidated)

Appearances:

For the Protesters: Consecutive Weather and Eye Weather: Daniel F. Lalli, Esq., Attorney at Law; Windsor Enterprises: Mr. Fred J. Wilmers; IBEX Group, Inc.: Eric J. Marcotte, Esq., Winston & Strawn

For the FAA Headquarters Product Team: Maureen Cummings-Spickler, Esq.
and William R. Sheehan, Esq.

For the Intervenors: Pacific Weather: Richard Carlson; SERCO Management Services: Inc., Ross Dembling, Esq., Holland and Knight, LLP; Midwest Weather: Sam Gdanski, Esq., Attorney at Law; and MacAulay Brown, Inc.: Kevin P. Connelly, Esq., Seyfarth Shaw.

I. Introduction

These Findings and Recommendations involve four separate consolidated bid protests (“Consolidated Protests”) filed, respectively, by Consecutive Weather (“Consecutive”), 02-ODRA-00250; Eye Weather (“Eye”), 02-ODRA-00251; Windsor Enterprises (“Windsor”), 02-ODRA-00252; and IBEX Group, Inc. (“IBEX”), 02-ODRA-00254. The Consolidated Protests involve the procurement of contract weather observer (“CWO”) services at designated groupings of airports located in the United States and Puerto Rico (“Procurement”). The Procurement was conducted by the FAA Headquarters Air Traffic Planning and Procedures, CWO Program Office

Product Team (“Product Team”). The Procurement involves two Solicitations (or “SIRs”), namely, Solicitation DTAF01-02-R-03113, which was a small business set-aside (“Restricted Solicitation”); and Solicitation DTFA01-02-R-031130, which was not restricted to small businesses (“the Unrestricted Solicitation”). The Restricted Solicitation and the Unrestricted Solicitation both called for awards of fixed-price contracts, with base performance periods of one year and four one-year renewal options. Award was to be made based on the determination of the best overall value to the Agency. The Restricted Solicitation contemplated possible awards of twelve groupings of weather observations sites (Site Groups 1-12). The Unrestricted Solicitation contemplated the possible awards of four groups of sites (Site Groups 13 -16).

Contracts were awarded for all of the Site Groups under the Unrestricted Solicitation. For the Restricted Solicitation, contracts were awarded for all but Site Groups 2, 6, 8 and 11. The Consecutive Protest challenges the awards of contracts for Site Groups 9 and 10 as well as the non-award of a contract for Site Group 8 under the Restricted Solicitation and further protests the award of a contract for Site Group 16 under the Unrestricted Solicitation. The Eye Protest also challenges the awards of contracts for Site Groups 9 and 10. The Windsor Protest challenges the award of a contract for Site Group 3 and the non-award of a contract for Site Group 11 under the Restricted Solicitation. The IBEX Protest challenges the awards of contracts for all the Site Groups under the Unrestricted Solicitation, *i.e.*, Site Groups 13, 14, 15, and 16. The Awardee/Intervenors are: Midwest Weather (“Midwest”) for Site Groups 3 and 9; Pacific Weather (“Pacific”) for Site Group 10; MacAulay Brown, Inc. (“MAB”) for Site Groups 13 and 15; and SERCO Management Services, Inc. (“SERCO”) for Site Groups 14 and 16. No bid protests were filed with respect to the awards of contracts for Site Groups 1, 4, 5, 7 and 12 or the non-award of contracts for Site Groups 2 and 6 under the Restricted Solicitation.

Each of the Consolidated Protests challenges various individual findings and ratings by the Product Team’s evaluators and aspects of the conduct of the procurement process. In addition, one of the Consolidated Protests, *i.e.*, the Consecutive Protest, challenges the validity of the SIR.¹

¹ In his January 31, 2003, Comments regarding the Agency Response to the Consecutive Protest, counsel for Consecutive states: “Consecutive Weather accepts the premise that challenging the validity of the SIR is untimely.”

Additionally, the Eye Protest and subsequent Eye filings are replete with references to bias, bad faith and retaliation on part of the evaluators.

The parties entered into alternative dispute resolution (“ADR”) agreements, pursuant to which an ODRA neutral provided early neutral evaluation and facilitated exchanges of documents and discussions between the parties. The ADR process was conducted concurrently with the adjudication of the Consolidated Protests under the ODRA’s Default Adjudicative Process.

The Product Team filed its Agency Response (“AR”) to the Consolidated Protests on January 23, 2003, and comments on the Agency Response were filed by each of the protesters and intervenors, addressing those portions of the Agency Response relating to the individual protests in which they were interested parties.²

For the reasons discussed below, the ODRA recommends that: (1) the Consecutive and Windsor Protests be denied in their entirety; (2) the Eye Protest be sustained in part; (3) the IBEX Protest be dismissed for lack of standing, to the extent it pertains to the award to SERCO of Site Group 16; and (4) the IBEX Protest be sustained in part in conjunction with its challenge to the award of Site Group 14 to SERCO and the awards of Site Groups 13 and 15 to MAB. Further, the ODRA recommends that the Eye and IBEX proposals be re-evaluated consonant with the following discussion and that the Product Team report to the Administrator through the ODRA on the results of that re-evaluation within 30 days of the Administrator’s Order.

The ODRA construes counsel’s statement and the balance of his Comments as constituting a withdrawal of what was in fact an untimely attempt to protest the terms of the Solicitation of the SIR after award. *See* ODRA Procedural Regulations, 14 C.F.R. §17.15(a)(1).

² A supplementary Agency Response to the Consecutive Protest was filed on February 6, 2003, after it was determined that a supplementary Protest filed by Consecutive on December 26, 2002 had not been served on counsel for the Product Team.

II. Findings of Fact³

A. General Findings

Procurement Background and Issuance of Screening Information Requests (SIRs)

1. The Procurement at issue in the Consolidated Protests is for Contract Weather Observer (“CWO”) services at designated airports throughout the United States and Puerto Rico. The basic responsibility of a CWO is to augment, or back up, Automated Surface Observing System (ASOS) equipment. CWO contracts may require the performance of manual surface weather observations during equipment outages. This requires the observer to take, document, and disseminate accurate and timely hourly weather observations at designated locations in accordance with FAA Orders. CWO contracts have a critical impact on the efficient operation, safety, viability and capacity of the National Airspace System (NAS). CWO services are needed on a continuous basis, 24 hours per day, at major airports throughout the country. AR Vol. I, Tab 3.
2. Prior to fiscal year 2002, CWO contracts were funded by the Air Traffic Planning and Procedures (ATP) Program Directorate at FAA Headquarters, but regionally administered by the staffs in the nine regions where the contracts were located. The ATP program office made a decision to restructure the CWO program by assuming complete program management responsibility of CWO contracts at FAA Headquarters. Thus, an investment decision was made to procure CWO support service contracts to replace the existing regionally managed contracts in calendar year 2002 and beyond from FAA Headquarters. This decision was made to achieve operational and administrative uniformity in meeting program demands. AR Vol. I, Tab 3.
3. Historically, CWO contracts were awarded by the Regional offices on a low-cost basis. Typically, only one or two geographically related sites were competed at one time. The

³ These Findings of Fact are divided into: (1) general findings applicable to all of the Consolidated Protests; and (2) subsections comprised of the Findings pertaining, respectively, to the Consecutive, Eye, Windsor, and IBEX Protests.

Regional offices administered the contracts they awarded. The instant procurement represents the first attempt by the Agency to bring a large number of sites together for award and administration by FAA Headquarters. AR Vol. I, Tab 3.

4. As part of the restructuring of the CWO program, the program office decided to divide the 105 sites into 16 groups. Each group would contain multiple sites. The groups were determined based on geographical locations, distances between sites, airport capacity and airport complexity within the groupings, and the number of airports contained in each group. One of the objectives in determining the groupings was to make the groups more manageable with respect to the level of service a single vendor was capable of performing. The 16 groups would result in the award of 16 firm-fixed-price contracts, with a base period of performance of one year and four (4) one-year renewal option periods. Twelve contracts, for Site Groups 1 through 12, would be awarded exclusively to small businesses, and four contracts, for Site Groups 13 through 16, would be awarded on an unrestricted basis. The awards of CWO contracts would be made to Offerors whose offers represented the best value to the FAA. AR Vol. I, Tabs 3, 4, 15 and 17.
5. The FAA issued Solicitation DTFA01-02-R-03113 and Solicitation DTFA01-02-R-031130 on April 11, 2002. These two Solicitations were virtually identical with a single major exception: Solicitation DTFA01-02-R-03113 (the Restricted Solicitation) was set-aside for small business, while Solicitation DTFA01-02-R-031130 (the Unrestricted Solicitation) was not. AR, Vol. I, Tab 4.
6. The Agency issued four amendments to the SIRs. Amendments Number 1, 2, and 4 applied to both SIRs. Amendment Number 1 postponed the due date set for the receipt of proposals. Amendment Number 2 included a number of items, but the principal changes involved the regrouping of sites within designated groups in Section B of the SIR; the requirement to have adequate financial resources to perform the contract for a period of three months before receiving any payments from the Government; and the FAA's characterization of the risk that would be involved in making an award to a particular Offeror. Amendment Number 3 applied only to the Unrestricted Solicitation, DTFA01-

02-R-031130, and removed one site from Site Group 13 in the base year of the contracts. Amendment Number 4 revised the minimum offer acceptance period. AR Vol. I, Tab 4.

General Proposal Instructions

7. SIR Section L.5 advises Offerors that, in terms of the numbers of possible site groups to be awarded, “no more than two (2) contracts [*i.e.*, two site groups] will be awarded to an individual Offeror.”⁴ AR, Vol. I, Tab 4, p. L-3.
8. SIR Section L.10.2 advises Offerors that the FAA may hold one-on-one communications with Offerors that may continue throughout the procurement process, as required, at the FAA’s discretion. The FAA expressly reserved “the right to conduct discussions with specific Offerors only, or with all Offerors, as circumstances warrant.” AR, Vol. I, Tab 4, p. L-4.
9. The General SIR Instructions, at L.12, provides that “[r]eplies to this SIR must follow the outlines and/or instructions concerning format given in ... Section L.” Specifically, SIR section L.12.2 states:

Offerors must submit factual and concise written information as requested in the SIR, as well as substantiated price data to provide a basis for sound evaluation by the FAA. Proposals should be specific enough to provide the FAA evaluators with enough information to be able to judge the technical and financial ability of the Offeror to conduct this requirement. Proposals that merely offer to conduct a program in accordance with the FAA’s requirements as described under the SOW, will be considered unacceptable, as will those proposals that merely paraphrase Section C. of the SIR, or which use nonspecific phrases such as “in accordance with standard procedures” or “well known techniques.”

AR, Vol. I, Tab 4, page L-5.

⁴ Likewise, SIR Section M.1.1.5, entitled “Number of Potential Contract Awards,” advised Offerors that no more than two contracts would be awarded to any prime Offeror under each SIR. AR Vol. I, Tab 4, p. M-1.

10. SIR Section L.12.3 also provides: “Omission of or a sketchy response to the requirements of this solicitation may render a proposal incomplete as it relates to the requirements of the solicitation, and therefore may cause it to be found unacceptable for further consideration.” AR, Vol. I, Tab 4, p. L-5.
11. SIR Section L.13 instructs Offerors to prepare the following proposal volumes in response to the SIR: (1) Volume I – Offer and Other Documents; (2) Volume II – Technical Proposal; (3) Volume III – Business and Management Proposal; and (4) Volume IV – Price Proposal. Section L.13 further describes exactly what information Offerors were required to include in each particular volume, how the information was to be organized, and the number of copies that were to be provided. AR, Vol. I, Tab 4, pages L-6-7.

Technical Proposal Instructions

12. SIR Section L.16 specifically instructed Offerors as to what information to include in Volume II, Technical Proposal. In pertinent part, L.16.1, Staffing Plans and Sample Schedules and Leave Coverage, states: “The Offeror shall provide site-specific staffing plans for each site in each group that the Offeror proposes to contract.” Offerors are further instructed:

to provide staffing numbers for both supervisory and non-supervisor personnel in the form of full time equivalents. The Offeror shall provide sample facility shift schedule based on the hours of operation specified in Section C, Appendix A. The sample schedules shall specify shift start and end times and number of employees on each shift. The use of charts is encouraged. The Offeror shall discuss periods where the facility is expected to be staffed with only one employee.

AR Vol. I, Tab 4, pages L-7-8. Additionally, proposals are required to contain a detailed plan to accommodate coverage for periods of personal, vacation, sick and other types of leave. *Id.*

13. SIR Section L.16.2, Technical Implementation Plans, instructs Offerors to provide a detailed Facility Training Plan that would address all of the requirements in SIR Section C. It requires that the training plan address how the Offeror will approach training employees with different qualifications. The SIR further requires the submission of a “detailed” Quality Assurance Plan that addresses “strategies for accident/incident prevention and education, including the process for correcting actions as required.” Section L.16.2 also instructs Offerors to provide a “detailed” Phase-In/Phase Out Plan, which addresses “the methodology for ensuring the assumption of weather observation services at a site with 2 days of assumption or relinquishment of responsibilities for weather observation services.” In this regard, Offerors were specifically advised that “[a]ttention should be given to simultaneous startup at multiple sites” and that “the methodology for ensuring orderly phase-out” was to be addressed. AR, Vol. I, Tab 4, page L-8.

14. SIR Section L.16.3, Technical Methodology and Approach, identifies five points that an Offeror was to address in its proposal:

1. The Offeror’s understanding, level of knowledge and experience in the operational and functional aspects of weather observation services as required by the SOW.
2. The Offeror shall describe in their contingency plan their [sic] approach to responding to emergency situations such as power outages, communication disruptions, etc.
3. Description of the organization method to measure, improve and report performance to the customer.
4. A description of the Offeror’s approach to establishing and maintaining effective communications between all relevant parties under the CWO program. The Offeror shall identify the parties deemed relevant from the Offeror’s viewpoint.
5. Offeror’s understanding of and approach to minimizing the risks involved with the management of multiple, geographically separated, operating facilities as well as possible means by which to minimize disruptions associated with the identified risk most likely to occur.

AR Vol. I, Tab 4, pages L-8-9.

15. In SIR Section L.16.5, Transition Management, Offerors were specifically instructed to address the following four points in their proposals:

1. The methodology by which the Offeror proposes to obtain needed labor categories and skill levels and place them in the proper locations in a timely manner during the transition process.
2. The approach to effectively coordinate between key players, such as FAA personnel, subcontractor, current CWO contract, etc. during the transition period.
3. The approach to transitioning functions and work efforts with minimal disruptions, minimal impact of FAA operations and productivity, minimal duplication of efforts and minimal additional costs to the FAA.
4. Identification of any risks envisioned in transitioning from one contractor to another and proposed solutions as to how these risks may be mitigated, and the identification of any assistance and the source in which assistance may be required.

AR Vol. I, Tab 4, p. L-9-10.

Business/Management Proposal Instructions

16. SIR Section L.17 addresses the contents of Volume III, Business/Management Proposal, which was required to contain information relative to the Offeror's Management Plan, Contract Administration, Subcontracting Plan (if applicable) and Past Performance and Relevant Experience. With respect to the Management Plan, SIR Section L.17.1 states generally:

The Business Management plan shall demonstrate the soundness of the methodology the Offeror proposes to employ to meet the program requirements as well as the degree to which the Offeror displays a comprehensive understanding of the details and resources required to implement, support and complete the program.... the proposal shall address the degree to which the Offeror can provide controls to reduce cost risks and the delineation of the proposed lines of responsibility and communication within the proposed organization in relation to the present organization.

AR Vol. I, Tab 4, p. L-10.

17. SIR Section L.17.1 instructs Offerors to describe their understanding, approach and ability to manage prescribed tasks under the contract by addressing the following evaluated categories:

L.17.1.1 The Offeror shall include a resume (limited to 2 pages per management team) of the proposed team (prime and subcontractor).

L.17.1.2 The Offeror shall provide a management plan which describes the extent of management involvement in daily operations at CWO sites. The management plan needs to address the methodology for interfacing with FAA management to successfully accomplish contract requirements. In addition, the plan needs to address how the Offeror plans to manage any proposed subcontract operations so as to achieve a completely integrated concept.

L.17.1.3 The Offeror shall discuss management's approach to enforcing all applicable FAA rules and regulations while providing CWO services at CWO sites. In addition, the Offeror shall identify the management level and discuss the methodology with the management team will utilize in situations requiring decision-making.

L.17.1.4 A description of any other management tools contemplated for use on the CWO program.

L.17.1.4.1 The Offeror shall discuss its labor relationship skills relative to dealing with union(s), its philosophy and how it plans to control costs in view of union demands.

L.17.1.4.1.2 The Offeror shall provide a description of the offeror's policies, procedures, methods and other measures utilized to incentivize employees to achieve optimal performance under the contract. Examples of incentives include, but are not limited to, employee bonuses and suggestion award programs.

L.17.1.4.1.3 The Offeror shall describe guidelines and procedures for the handling of any disciplinary actions involving contractor personnel. The offeror shall describe procedures to be utilized to rectify deficiencies among contractor personnel who failed to meet FAA or contractor standards and requirements.

AR, Vol I, Tab 4, pages L-10-11.

18. As for information pertaining to Contract Administration, the SIR provides that Volume II of the proposal must address the methodology proposed for compliance with

Department of Labor (DOL) rules and regulations, as well as the Offeror's ability and management approach to be used in administering a complex requirement with multiple sites, geographical area and contracts. AR Vol. I, Tab 4, p. L-11.

*Price Proposal Instructions and
Minimum Qualification Requirements*

19. SIR Section L.18 instructs Offerors as to the preparation of their price proposals, which were to contain information relative to labor and overhead rates, and profit, as well as financial information, including balance sheets and statements of income, cash flow and retained earnings. AR Vol. I, Tab 4, pages L-12-15.
20. SIR Section L.20 sets forth minimum qualification requirements, which, in pertinent part, include the following requirements: "In order to be eligible to compete, a potential offeror must have the ability to cover payroll and other operating and administrative expenses to accommodate Government 'in arrears' payments for work performed for periods up to ninety days. The amount of money required to cover expenses needs to be sufficient enough to cover 3 months of the base year sites (one quarter of the firm fixed price) for the two highest dollar value groups being awarded." The Section indicates that financial documentation, certified by the lending institution, can be used to validate this requirement. Another minimum qualification requirement states: "An on-site employee, who is a certified weather observer and who is the designated supervisor for each site shall have a minimum of one (1) year's experience in performing weather observations." AR Vol. I, Tab 4, p. L-16.

Method of Award

21. Section M.1.1 of the SIR states:

Award will be made to the technically acceptable offeror(s) who is determined to be responsible and whose proposal conforms to all requirements of the SIR and is the best value to the FAA. Best Value is defined as the proposal that presents the most advantageous solution [to] the FAA, based on the evaluation of technical, price and other factors

specified in the SIR. The best value approach provides the opportunity for a technical cost/price tradeoff and does not require that award be made to either the offeror submitting the highest rated proposal or the Offeror submitting the lowest cost/price, although the ultimate award may be to either one of those offerors.

AR, Vol. I, Tab 4, p. M-1.

22. SIR Section M.1.1 provided that, in the event an individual Offeror proposed on more than two groups, the FAA would assign the groups among the winning Offeror and the second best Offeror, based upon the combination of offers that represented the best value to the government. Also, in Section M.1.1 of the SIR, the FAA reserved the right not to make an award if such action was in the best interest of the FAA. AR, Vol. I, Tab 4, p. M-1.

23. Section M.1.1 further provided that the FAA was free to conduct discussions or otherwise communicate with Offerors to discuss aspects of their proposals:

In evaluating the proposals, the Government may conduct written or oral communications with any and/or all Offerors, and may reduce the Offerors participating in the competition to only those Offerors most likely to receive award. Additionally, the FAA reserves the right to conduct discussions and negotiations with any individual competing Offeror, or all competing Offerors, as the situation warrants. Discussions with one or more Offerors does not require discussions with all Offerors.

AR, Vol. I, Tab 4, p. M-1.

24. Also, Section M.1.2 of the SIR, Order of Importance, stated that Technical was the most important factor, followed by Business and Management Approach, followed by Price, and followed by Past Performance/Relevant Experience. Additionally, the SIRs stated that the award would be made using the evaluation factors contained in Section M and the FAA's characterization of the risk involved in making an award to an Offeror. AR, Vol. I, Tab 4, p. M-1-2.

25. SIR Section M.1.2 cautions Offerors not to minimize the importance of a detailed, adequate response in any group because of its order of importance. The FAA also reserves the right in Section M.1.4 to award a contract immediately following the

conclusion of all of the evaluations without discussions or negotiations with any Offeror. Offerors were notified further that it was critical that each offer be fully responsive to the SIRs and that each proposal contains the "best terms from a technical and price standpoint." AR, Vol. I, Tab 4, p. M-1-2.

26. Section M.2.5 provides that risk was an integral part of the evaluation, and evaluators would assess the overall risk of each Offeror for each group proposed. It was noted that, in evaluating risk, the Government would assess the Offeror's ability based only on the evaluation of the Offeror's proposal. AR, Vol. I, Tab 4, p. M-2.

27. Section M.3 of the SIR also established the following Factors, Sub-factors, and Sub-elements, in descending order of importance, for evaluating each proposal:

Factor I --Technical Proposal (60% of total score)

Subfactor A -- Staffing Plans and Sample Schedules
Staffing Plans and Sample Schedules
Leave Coverage

Subfactor B -- Technical Implementation Plans
Facility Training Plan
Quality Assurance Plan
Phase In/Phase Out Plan

Subfactor C -- Technical Methodology and Approach
Technical Methodology and Approach
Personnel and Financial Resources and
Recruitment Management
Transition Management

Factor II -- Business and Management Proposal (40% of total score)

Subfactor A -- Management Plan
Subfactor B -- Contract Administration
Subfactor C -- Subcontracting Plan

Factor III -- Price Proposal

Factor IV -- Past Performance/Relevant Experience

AR, Vol. I, Tab 4, page M-3.

28. Section M.9 of the SIR explained how the FAA intended to assess the risks associated with each offeror's proposal:

The primary criteri[on] to be used in the assessment of risk will be the degree to which the Offeror substantiates the ability to meet schedule, cost and performance components of the SIR. The evaluation of risk will also focus on whether each proposal volume supports and is logically consistent with information supplied in other volumes.

AR, Vol. I, Tab 4, p. M-7.

29. According to this Section, the FAA would assign each offeror one of the following overall risk ratings:

High -- Likely to cause serious disruptions of schedule, increase in cost, or degradation of performance even with special emphasis and close monitoring.

Moderate -- Likely to cause some disruption of schedule, increase in cost, or degradation of performance, but with special emphasis and close monitoring of the Contractor, will probably be able to overcome difficulties.

Low -- Has little potential to cause disruption of schedule, increases in cost, or degradation of performance. With normal effort/monitoring will probably avert/overcome difficulties.

AR, Vol. I, Tab 4, pages M-7-8.

30. The SIR did not identify any weight to be assigned to the evaluation of risk in connection with the best value analysis.

Proposal Evaluation

31. The FAA received 22 proposals on June 13, 2002, the date set for the receipt of proposals. The FAA received 12 proposals from vendors in response to the Restricted

Solicitation and 10 proposals from the vendors in response to the Unrestricted Solicitation. AR Vol. I, Tab 15.

32. Included among the 12 vendors responding to the Restricted Solicitation were: Consecutive, Eye, Midwest, Pacific and Windsor. Among the 10 vendors that responded to the Unrestricted Solicitation were: Consecutive, IBEX, MAB, Midwest, and SERCO. AR Vol. I, Tabs 7 - 14.
33. On June 13, 2002, the Product Team received all accompanying proposal documentation, including past performance surveys. The prospective vendors had previously given these past performance surveys to customers they had worked with on similar contracts within the last five years. The survey respondents mailed the survey results directly to the Product Team. AR Vol. I, Tab 15.
34. On June 17, 2002, an Evaluation Plan was approved, and on June 18, 2002, the Product Team's evaluators received evaluation training. Proposal evaluations began on June 19, 2002. AR Vol. I, Tabs 5 and 6.
35. Evaluation teams were tasked to support the Product Team's Source Selection Official ("SSO") and the Contracting Officer ("CO") by assessing the suitability of proposals through review and analysis of each proposal. Three separate evaluation teams evaluated proposals. There was a Technical Team, a Business and Management Team and a Price Team. Each team was given only the proposal section relevant to its particular review. Thus, the Price Team only saw and reviewed Price Proposals; the Technical and Business and Management Teams, in turn, were given only the Technical and Business and Management portions of the proposals, respectively. In terms of Factor IV (Past Performance/Relevant Experience), the previously described past performance surveys were given to the Business and Management Team for evaluation. AR Vol. I, Tab 5.
36. The evaluation process under the Evaluation Plan was to consist of an evaluation of each Offeror's Technical Proposal, Business and Management Proposal, past performance and

relevant experience submission and its Price Proposal. The overall degree of risk to the FAA inherent in each Offeror's proposal was also to be evaluated. The three separate evaluation teams were to evaluate risk within their respective areas of responsibility. Overall Risk was then to be evaluated by the Integrated Service Team ("IST"). AR, Vol. I, Tab 7, page 12.

37. The Evaluation Plan explained that each Sub-factor under the evaluation factors identified in Section M would be weighted as follows:

Factor I --Technical Proposals

Subfactor A -- Staffing Plans and Sample Schedules = [Deleted]

Subfactor B -- Technical Implementation Plan = [Deleted]

Subfactor C -- Phase In/Phase Out Plan = [Deleted]

Factor II --Business and Management Proposal⁵

Subfactor A -- Management Plans = [Deleted]

Subfactor B -- Contract Administration = [Deleted]

Subfactor C -- Subcontracting Plan = [Deleted]

AR, Vol. I, Tab 5, Attachment 2.

38. In addition, the Evaluation Plan provided that evaluators could only assign one of [Deleted] possible adjectival ratings and related point scores for each Subfactor, and provided the following guide regarding the ratings and numerical point scores:

[Deleted]

AR, Vol. I, Tab 5, p. 16.

39. The Evaluation Plan stated that the point scores assigned by each individual evaluator would be [Deleted] in order to arrive at a total combined point score for each offeror under Factors I and II. *Id.* at pp. 25-26.

⁵ Section M of the Restricted Solicitation (which did not require a subcontracting plan) stated that the weights under Factor II were to be as follows: Subfactor A -- Management Plans = 60%; Subfactor B -- Contract Administration = 40%; Subfactor C -- Subcontracting Plan = 0%.

40. For purposes of the CWO evaluation, the Evaluation Plan defined certain definitions to be used by the evaluators. The Evaluation Plan defined the term [Deleted] as follows:

[Deleted]

AR, Vol. I, Tab 5, p. 13. The Evaluation Plan defined the term [Deleted] as:

[Deleted]

AR, Vol. I, Tab 5, p. 13.

41. The Evaluation Plan defined the term [Deleted] as follows:

[Deleted]

AR, Vol. I, Tab 5, p. 13.

42. The Evaluation Plan defined the term [Deleted] as:

[Deleted]

AR, Vol. I, Tab 5, p. 13.

43. The Evaluation Plan defined the term [Deleted] as follows:

[Deleted]

AR, Vol. I, Tab 5, p. 14.

44. The Evaluation Plan defined the term [Deleted] as follows:

[Deleted]

AR, Vol. I, Tab 5, p. 14.

45. The Evaluation Plan defined a [Deleted] as being:

[Deleted]

AR, Vol. I, Tab 5, p. 14.

46. All the evaluations, Technical, Business and Management, and Price, proceeded in accordance with the Evaluation Plan and were completed by November 5, 2002, and the reports of the various evaluation teams were forwarded to the

Integrated Service Team (IST) for review and consolidation into an IST report to the SSO. AR Vol. I, Tab15.

47. To assure anonymity and an impartial source selection decision by the SSO, the IST Report and accompanying evaluation team reports utilized letters in lieu of vendor names when reporting evaluation results. In terms of the Restricted Solicitation, the letter designations for those involved in the instant Consolidated Protests were: D – Consecutive; F- Midwest; G – Pacific; K – Windsor; and L – Eye. For the Unrestricted Solicitation, the letter designations for those involved in the instant Consolidated Protests were: B – Consecutive; D – IBEX; E – MAB.; F- Midwest; and G – SERCO. The scores resulting from the evaluation of Technical Proposals under the Restricted Solicitation are summarized below.

Technical Evaluation Summary Weighted Scores – Small Business Set Aside										
	Subfactor A		Subfactor B			Subfactor C			Technical Score Total	
Vendor	Staff	Leave	Trng	QA	Phase	Meth	Pers	Trans	Unwtd	Wtg
A	[Deleted]									
B										
C										
D										
E										
F										
G										
H										
I										
J										
K										
L ⁶										

AR, Vol. I, Tabs 15 and 16.

48. The scores resulting from the evaluation of Technical Proposals under the Unrestricted Solicitation are summarized below.

⁶ In these Findings, all scores for Offeror L are the revised scores contained in the Addendum to the IST Report. AR, Vol. I, Tab 16.

Technical Evaluation Summary Weighted Scores – Unrestricted Groups										
	Subfactor A		Subfactor B			Subfactor C			Technical Score Total	
Vendor	Staff	Leave	Trng	QA	Phase	Meth	Pers	Trans	Unwtd	Wtg
A	[Deleted]									
B										
C										
D										
E										
F										
G										
H										
I										
J										
K										

AR, Vol. I, Tabs 15 and 16.

49. The IST Report (as modified by an IST Report Addendum, discussed further in connection with the Eye Protest) contains an Overall Evaluation Summary setting forth the weighted Technical score, the weighted Business and Management (B/M) score, the Price submitted for each Offeror within each Site Group, and the Offer's Overall Risk adjectival rating. AR, Vol. I, Tab 15, pages 17-23; and AR, Vol. I, Tab 16, IST Report Addendum, page 2. The scores and prices for the Site Groups that are the subject of the instant Consolidated Protests are set forth below:

Group 3					
Offeror	Tech. Score	B/M Score	Total Score	Price	Overall Risk
G	[Deleted]		[Deleted]		
F			6.43	\$8,425,620	Moderate
C			[Deleted]		
K					

Group 8					
Offeror	Tech. Score	B/M Score	Total Score	Price	Overall Risk
F	[Deleted]				
D					

Group 9					
Offeror	Tech. Score	B/M Score	Total Score	Price	Overall Risk
G	[Deleted]				
F	[Deleted]		6.43	\$5,566,800	Moderate
E			[Deleted]		
D					
L					

Group 10					
Offeror	Tech. Score	B/M Score	Total Score	Price	Overall Risk
G	[Deleted]		8.32	\$7,783,941	Low
D					
L					
H					

Group 11					
Offeror	Tech. Score	B/M Score	Total Score	Price	Overall Risk
C	[Deleted]				
K					

Group 13					
Offeror	Tech. Score	B/M Score	Total Score	Price	Overall Risk
E	[Deleted]		7.85	\$6,312,330	Low
C			[Deleted]		
G					
F					
I					
D					
J					
K					
A					

Group 14					
Offeror	Tech. Score	B/M Score	Total Score	Price	Overall Risk
E	[Deleted]				
C					
G	[Deleted]		7.63	\$8,870,904	Low
F			[Deleted]		
I					
D					
J					

Group 15					
Offeror	Tech. Score	B/M Score	Total Score	Price	Overall Risk
E	[Deleted]		7.85	\$8,041,280	Low
C			[Deleted]		
G					
F					
D					
J					
K					

Group 16					
Offeror	Tech. Score	B/M Score	Total Score	Price	Overall Risk
C	[Deleted]		[Deleted]		
G			7.63	\$3,330,156	Low
I			[Deleted]		
D					
J					
A					
B					

AR, Vol. I, Tabs 15 and 16.

50. On November 5, 2002, the IST briefed the SSO and gave him the IST Report and individual evaluation team reports. In accordance with the CWO Evaluation Plan, the briefing was conducted "in the blind" and, as indicated previously, all the reports given to the SSO were coded with letter designations for each vendor to ensure that the SSO made his decision without knowing the identity of any of the Offerors. AR Vol. I, Tab 17.
51. The IST Report indicates that the IST established as a "condition" for award under both of the Solicitations that an Offeror's total weighted point score (the total of the weighted Technical and Business/Management scores) be at least 4.0 in order to be considered "acceptable" "in accordance with the CWO evaluation plan." AR, Volume I, Tab 15, pages 24 and 33. The Solicitations called for awards to "technically acceptable offerors." AR, Volume I, Tab 4, SIR, page M-1, ¶M.1.1. The Evaluation Plan, as previously noted, assigned to the adjectival rating of "[Deleted]" a corresponding numeric point score of

4.0. *See* Finding of Fact (“FF”) 38. It appears that, on this basis, the IST equated the term “technically acceptable” with a total weighted point score of 4.0 or above. The IST, in its report and briefing to the SSO, recommended that four groups (Site Groups 2, 6, 8, and 11) of the 12 site group contracts that were set aside for small business under the Restricted Solicitation not be awarded. In the four groups for which the IST recommended no awards, either (a) no Offerors received an overall acceptable/satisfactory score “in accordance with the CWO evaluation plan” (*i.e.*, total weighted point scores at or above 4.0); or (b) the only Offerors that did receive acceptable/satisfactory scores were already recommended for awards of contracts for two other site groups, and thus were ineligible for further awards. AR Vol. I, Tabs 15, 16 and 17.

52. For the Unrestricted Solicitation, the IST, in its report and briefing to the SSO, made recommendations for awards of contracts for each of Site Groups 13 through 16. AR Vol. I, Tabs 15, 16 and 17.

53. The IST also recommended to the SSO that a follow-on competitive acquisition for CWO services being contemplated for the next fiscal year include Site Groups 2, 6, 8, and 11. The IST suggested extending the current contracts for those four groups through September 30, 2003. AR Vol. I, Tabs 15 and 17.

54. On November 14, 2002, the SSO issued the Source Selection Decision Memorandum (“SSDM”). AR Vol. I, Tab 18. The SSDM expressly adopts the rationale, justification and validations set forth in the reports of the evaluation teams for both the unrestricted and restricted procurements as well as the IST Report. AR Vol. I, Tabs 15-16.

55. With respect to the contracts set aside for small business under the Restricted Solicitation, the SSO approved the following determinations and award rationale:

Group	Awardee	Rationale
1	J	“Offeror J satisfied the requirements of the SIR and represented the best value to the Government. Offeror J had an acceptable overall

		Technical and Business/Management score, an overall moderate risk rating, and an acceptable Past Performance/Relevant Experience rating. Offeror J's price was determined to be fair and reasonable. ATP-1 considers that a moderate risk is mitigable and does not carry enough sufficiency to cause an impact on contract performance."
2	No award	"The requirement in section M.1.5 of the SIR states that a maximum of two contracts (groups) can only be awarded to an individual vendor. Offerors G, F, and J were eligible to receive awards for these groups because they were determined to be technically acceptable. However ... they have already received the maximum of two awards."
3	F	"Offeror F satisfied the requirements of the SIR and represented the best value to the Government. Offeror F had the second highest overall total Technical and Business/Management Score, an overall moderate risk rating, and an acceptable Past Performance/Relevant Experience rating. Offeror F's price was the lowest price proposed for these two groups. ATP-1 considers that a moderate risk is mitigable and does not carry enough sufficiency to cause an impact on contract performance."
4	I	"Offeror I satisfied the requirements of the SIR and represented the best value to the Government. Offeror I had an overall total Technical and Business/Management Score slightly lower than a competing Offeror (Offeror A) but offered a lower price. Offeror I received an overall moderate risk rating and an acceptable Past Performance/Relevant Experience rating. The .07 difference in the overall Technical and Business/Management score between the two offerors for Group 5 does not warrant payment of an additional \$686,000.00 to Offeror A. ATP-1 considers that a moderate risk is mitigable and does not carry enough sufficiency to cause an impact on contract performance."
5	I	Same as for Group 4 rationale above.
6	No award	Same as for Group 2 rationale above.
7	J	Same as for Group 1 rationale above.
8	No award	Same as for Group 2 rationale above.
9	F	Same as for Group 3 rationale above.
10	G	"Offeror G satisfied the requirements of the SIR and represented the best value to the Government. The offeror had the highest overall total Technical and Business/Management score, a low overall risk rating, and an acceptable Past Performance/Relevant Experience rating. Offeror G's price was determined to be fair and reasonable."
11	No award	"The two offerors who proposed on this group were determined to be technically unacceptable in accordance with the CWO evaluation plan. They did not achieve an overall technical and business/management score of 4 and above. Therefore, the offerors

		were ineligible to receive awards”
12	G	Same as for Group 10 rational above.

AR, Vol. I, Tab 18.

56. With respect to the contracts to be awarded under the Unrestricted Solicitation, the SSO noted that “[o]nly [Deleted] of the 10 offerors presented acceptable Technical and Business/Management proposals. . . . However, I find clear differentiation among the [Deleted] offerors that do not make them all eligible to receive awards.” The SSO identified two of these [Deleted] offerors to receive awards based on the following rationale:

Group	Awardee	Rationale
13	E MacAulay Brown, Inc.	“Offeror E satisfied the requirements of the SIR and represented the best value to the Government. Offeror E had the highest overall total Technical and Business/Management score, an overall low risk rating, and an acceptable Past Performance/Relevant Experience rating. Offeror E’s price [\$6,312,330] was determined to be fair and reasonable.”
14	G Serco Management Services	“Offeror G satisfied the requirements of the SIR and represented the best value to the Government. Offeror G had the second highest overall total Technical and Business/Management score, an overall low risk rating, and an acceptable Past Performance/Relevant Experience rating. Offeror E’s price [\$8,870,904] was determined to be fair and reasonable.
15	E MacAulay Brown, Inc.	<i>See</i> Group 13 rationale above [price was \$8,041,280].
16	G Serco Management Services	<i>See</i> Group 14 rationale above [price was \$3,330,156].

AR, Vol. I, Tab 18.

57. On November 19, 2002, the CO awarded 12 of the 16 Site Groups under the two Solicitations – for 8 of the 12 Site Groups under the Restricted Solicitation and all four Site Groups under the Unrestricted Solicitation. She also notified the unsuccessful

offerors of the award decisions on that same day by telephone, and followed with written notification to all of the Offerors. AR Vol. II, Tabs 19-22.

B. Findings of Fact Pertaining to the Protest of Consecutive Weather -- Docket No. 02-ODRA-00250

58. Set forth below are the Technical evaluation comments pertaining to Consecutive (designated as Vendor D for evaluation of its proposal for Site Groups 8, 9 and 10 under the Restricted Solicitation, and as Vendor B for evaluation of its proposal for Site Group 16 under the Unrestricted Solicitation):

Staffing Plans And Sample Schedules	[Deleted]
Leave Coverage	
Facility Training	
Quality Assurance	
Phase In/Phase Out	
Technical Methodology And Approach	
Personnel and Financial Resources and Recruitment Management	
Transition Management	
Overall Risk	

AR, Vol. I, Tab 15, pp. A-23-26 (emphasis in original).

59. On November 30, 2002, Consecutive submitted its Protest of the award of Site Groups 9, 10, and 16 and the non-award of Site Group 8. *See* Consecutive Protest.

60. Consecutive's Protest, which was submitted prior to its receipt of a debriefing from the Product Team, consisted of a one page Memorandum addressed to the ODRA from Consecutive's principal, Mr. Dean Haney. The entire text of the Protest Memorandum reads as follows:

I submitted a bid for groups 8, 9, 10 and 16 of the aforementioned SIR and was informed “there is a high risk that” I “would not perform the contract successfully.” I have been a Weather Observer Contractor for over five years and have successfully operated five contract sites. I am presently successfully operating two sites. The FAA regional contracting officers submitted reference information to the Washington screening office confirming my satisfactory performance. This was a best value to the government award and the FAA awarded one contract grouping for over one million dollars more than Consecutive Weather’s offer. As a government funding contributor I cannot comprehend how this is a best value to the government.

I contend that the FAA’s SIR is invalid and does not accurately measure a contractor’s ability to successfully operate one or more weather sites. Instead it is an exercise in paperwork that was conducted by individuals that were not familiar with the weather observation business. This is evidenced by the letter I received from the FAA informing of the site awards.”

Consecutive Protest.

61. The Consecutive Protest challenges the Product Team’s “High” Overall Risk rating and its failure adequately to consider the price savings of over one million dollars offered by Consecutive on one of the Site Groups in its proposal. The second paragraph of the Protest challenges the validity of the Solicitation itself and the competence of the individuals that conducted the evaluation.
62. On December 17, 2002, the Product Team conducted a debriefing for Consecutive. *See* AR, Vol. III, p. 1. On the following day, the Product Team supplied Consecutive by Federal Express with: a redacted IST Report to the SSO; the SSO’s Selection Memorandum; and redacted copies of the Technical Evaluation and Business/Management Reports. *Id.*
63. On December 26, 2002, the ODRA received by facsimile a Memorandum from Consecutive dated December 21, 2002. The Memorandum had been telecopied to the ODRA Offices on December 24, 2002 at 11:04 p.m., *i.e.*, after close of business on that day and just prior to the Federal holiday. The Memorandum (referred to hereinafter as Consecutive’s “Supplemental Protest”) describes as its purpose “to expound the previous

Protest submitted by Consecutive Weather (CW)". This expansion, Consecutive explained, was prompted by "the debriefing and subsequent information received."

64. In its Supplemental Protest, Consecutive makes the following statement:

CW contends that the FAA's evaluation is unfounded, arbitrary and capricious for the following reasons:

1. The Proposal was not lacking in detail or vague in various areas as stated.
2. The FAA evaluation contains identified weaknesses that address multi site start up and are not pertinent to a single site take over such as San Juan.
3. CW was found acceptable in the past performance area. The SIR itself identifies an acceptable finding as "the offerors' product or service satisfies the Government's minimum requirements as specified in the SIR. Few weaknesses exist which are likely to affect overall program schedule, product quality or performance. To have an acceptable past performance and then be found unacceptable in the technical area and the business/management area is in itself contradictory.

See Consecutive Supplemental Protest at 1.

65. The Supplemental Protest goes on to respond to the Evaluation Team's findings with respect to and in the areas of: (1) staffing and scheduling; (2) leave coverage; (3) facility training; (4) quality assurance; (5) phase in/phase out; (6) technical methodology and approach; (7) personnel financial resources and recruitment; and (8) transition management.

66. The "rebuttal" set forth in Consecutive's Supplemental Protest, for the most part, consists of disagreements with the conclusions reached by the evaluators in their scoring of Consecutive's Proposal, particularly with respect to the level of detail provided in Consecutive's Proposal. *See* Consecutive Supplemental Protest at pages 2 – 4.

67. Consecutive further alleges that the evaluators acted inconsistently in giving Consecutive an acceptable rating for past performance and finding Consecutive's Proposal with respect to technical abilities and management plan to be unacceptable. *See* Consecutive Supplemental Protest at 4.

68. Consecutive's Supplemental Protest further requests:

that a neutral party review its Proposal in light of adequate detail and relevance to determine contractor's risk based on the award grouping involved. Inquire further with the Southwest and Southern Region concerning CW past performance in the area of technical abilities and business management.

Id.

69. In its Supplemental Protest, Consecutive goes on to request a re-evaluation of its proposal. After such a re-evaluation, if the Team still is not satisfied with Consecutive's abilities, Consecutive urges, the Team should conduct additional discussions. Consecutive's Supplemental Protest concludes with a request that the Team "award a minimum of one bid grouping to CW." *Id.*

70. Consecutive's Supplemental Protest, although filed with the ODRA on December 26, 2002, was not served on any opposing parties at the time it was filed. The Agency Response to Consecutive's Original Protest filed on January 23, 2003, therefore addressed only Consecutive's Original Protest. AR, Vol. III.

71. The initial Agency Response pointed out that:

The letter from the Protester does not identify any specific action on the part of the FAA which violated the AMS or other applicable law.

See AR, Vol. III, p. 2.

72. The initial Agency Response to the Consecutive Protest goes on to note that Consecutive's challenge to the terms of the Solicitation is untimely. *See* AR, Vol. III, p. 3.⁷

73. The Agency Response for the Consolidated Protests included, among other things, the Evaluation Plan for both Procurements, affidavits by the Technical Evaluation Chair and the Contracting Officer, as well as the IST Report to the SSO. AR, Vol. I, Tabs 1, 2, 5 and 15. As noted above, the IST Report indicated that offerors' proposals were to receive, as a minimum, a total weighted point score of "4" in order to be considered "acceptable" and eligible for a contract award. *See* FF 38 and 51. Consecutive's proposal received a total combined weighted score of [Deleted] and thus was found to be "unacceptable." *See* AR, Vol. III, p. 2.

74. With respect to Site Group 8, only two offerors, *i.e.*, Midwest and Pacific, were determined to be "acceptable" and thus eligible to receive an award. *See* AR, Vol. III, p. 2. However, because of limitations on the number of groups that any awardee could receive – *see* AR, Tab 4, SIR Section M.1.5 – and, inasmuch as both Midwest and Pacific were eligible to receive awards in other groups, the IST determined that there would be no award for Site Group 8, which was considered of a lower priority. Accordingly, Site Group 8 was made the subject of a future acquisition. *See* AR, Vol. I, Tab 16, pages 5, 13, and 17 – 33; AR, Vol. III, p. 3.

75. The initial Agency Response goes on to note that the challenged award, which was based on a considerably higher priced offer than that of Consecutive, was consistent with the "best value" provisions of the Solicitation. Consecutive's initial Protest did not specifically challenge the findings of the evaluators. Nonetheless, the initial Agency Response notes:

[T]he Technical Team found [Deleted] strengths in Consecutive's Proposal and, instead, [Deleted] weaknesses. Most of the weaknesses had

⁷ As is noted above, Consecutive conceded the untimeliness of this portion of its Protest in a subsequent filing.

a common theme, which was Consecutive's consistent failure to provide a detailed response.

See AR, Vol. III, pp. 4 - 5.

76. The Agency Response specifically points to the failure by Consecutive to provide clear, articulate responses to specific SIR requirements. *See* AR, Vol. III, p. 5; AR, Vol. I, Tab 15, Business/Management Evaluation Report, page C-6. In this regard, the Technical Evaluation Report notes: "[T]here were at least [Deleted] occurrences where [Consecutive's] Proposal failed or marginally met the SIR requirements due to no discussions or lack of a discussion of a required item." *See* AR, Vol. I, Tab 15, Technical Evaluation Report at A-26.
77. On the basis of the Technical and Business/Management scores reported to the IPT – a total weighted score of [Deleted] and an overall risk rating of "High" – Consecutive was eliminated from further consideration. *See* AR, Vol. I, Tab 15, IST Report, p. 27. The initial Agency Response goes on to note that "the Agency was willing to pay a somewhat higher price to the technically superior offerors to avoid high employee turnover and disruptive performance." *See* AR, Vol. III, p. 5.
78. On January 31, 2003, counsel for Consecutive filed Comments on the Agency Report (Consecutive's "Initial Comments"). In those Initial Comments, among other things, Consecutive noted that the initial Agency Response appeared not to have addressed Consecutive's Supplemental Protest. It requested that the Agency be required to do so. Consecutive's Initial Comments also: (1) take issue with "the exclusion of the six vendors"; (2) assert that "Consecutive also has successfully completed several contracts without incident"; and (3) argue that "the screening request should be presented in such a manner that you don't need to hire a writer." *See* Consecutive Initial Comments at 1.
79. On February 3, 2003, the ODRA, after determining that Consecutive had failed to serve copies of its Supplemental Protest on the other parties, forwarded a letter enclosing copies of the Supplemental Protest to all parties. Thereafter, on February 6, 2003, the

Product Team filed a Supplemental Agency Response (“Supplemental Agency Response”) addressing Consecutive’s Supplemental Protest. The awardee/intervenors, Pacific Weather and SERCO, thereafter filed brief comments supporting the Agency’s positions in its initial Agency Response and Supplemental Agency Response, whereupon the record in Docket No. 02-ODRA-00250 closed.

80. The Supplemental Agency Response addresses the additional allegations set forth in Consecutive’s Supplemental Protest by, among other things, pointing out that “past performance/relevant experience only gives a limited insight into how well the offeror has performed on past contracts. Performing at one to two observation sites is far different from performing on between nine and thirteen weather observation sites. Under the current SIRS, offerors are required to perform and manage many more weather observation sites than offerors such as Consecutive have ever managed in the past.” Supplemental Agency Response at 3. The Supplemental Agency Response further states that:

The protester not only misses the point, but also displays a serious lack of understanding regarding what it was required to do. It was not the Southwest or the Southern Region’s assessment of the offeror’s Technical and Business/ Management abilities that the evaluation teams were concerned about. The evaluation teams were required to evaluate under Technical and Business/Management factors the offerors’ written responses to the SIRs’ requirements. It was Consecutive’s own understanding, skills and abilities as demonstrated in the proposals that the teams were required to evaluate.

Supplemental Agency Response at 3.

81. The Product Team further points out that the SIR’s evaluation criteria called for the Technical and Business/Management Proposals to be significantly more important in the evaluation than past performance/relevant experience. The Team also notes that “the offeror’s job was to provide comprehensive responses to the SIR’s requirements. This Consecutive failed to do.” *Id.*.

82. With respect to the specific challenges to the Technical Team’s findings included in the Supplemental Protest, the Supplemental Agency Response notes that in several cases the

Supplemental Protest merely references portions of the evaluation and then disagrees with them. *Id.*.

83. The Supplemental Agency Response further points out, with respect to the holding of discussions, that offerors were put on notice by Sections M.1.1 and M.1.4, that the Integrated Product Team reserves the right to not hold discussions and to make award based on initial offers. *See* Supplemental Agency Response at 4. More specifically, the Supplemental Response states:

The CO's decision not to send Consecutive discussion questions in the Technical and Business/Management areas during the course of the evaluation was rational. Because of the large number of weaknesses noted in Consecutive's Technical and Business/Management proposals, it was doubtful that Consecutive could have improved its score significantly without a major revision of its proposals. Moreover, even if Consecutive could have somehow brought its score up in the Technical and Business/Management areas, it was also very doubtful that it could have raised to the level of being *Satisfactory*, let alone competitive with the other, Technically superior, offerors. *See* Volume I, Tab 2."

Supplemental Agency Response at 5.

84. In that regard, as noted above, the weighted score of Consecutive was [Deleted] and it was given an overall risk rating of "High." This scoring and rating was significantly below those of the successful awardees. *See* FF 49.

85. The Supplemental Agency Response further notes that:

The Protester provides no explanation for its disagreement with the Technical team's finding beyond a simple declaration that Protester's response was detailed, or that its plan "meets the SIR requirements." A cursory glance at Consecutive's proposal (*See* Volume I, Tab 7, pp. 2A-3, 2B-1 through 2B-2, 2C-1, 2D-1, and 2E-1), in the above identified areas demonstrates that the scores given by the Technical team were rational, fully substantiated and well deserved.

See Supplemental Agency Response at 4.

86. The Supplemental Agency Response further identifies specific sections of the Solicitation that contradict the Protester's contentions that: the sites are required to be operated on less than a 24-hour basis; and that its supervisors were not required to have a minimum of one-year experience in performing weather observations.

**C. Findings of Fact Pertaining to the Protest of Eye Weather --
Docket No. 02-ODRA-00251**

87. Set forth below are the Technical evaluation comments for Eye (designated as Vendor L for the evaluation of its proposals for Site Groups 9 and 10 under the Restricted Solicitation):

Staffing Plans And Sample Schedules	[Deleted]
Leave Coverage	
Facility Training	
Quality Assurance	
Phase In/Phase Out	
Technical Methodology And Approach	
Personnel and Financial Resources and Recruitment Management	
Transition Management	
Overall Risk	

AR, Vol. I, Tab 16, pp. A-31-33 (emphasis in original).

88. On December 2, 2002, Eye filed a Protest with the ODRA, challenging awards of Site Groups 9 and 10 under the Restricted Solicitation to Midwest and Pacific. The Eye Protest alleged a myriad of improprieties surrounding the evaluation of its proposal, contesting every "weakness" that had been assigned to it for the various sub-elements of its Technical Proposal as well as the Overall Risk rating, repeatedly urging that the findings of weakness were "arbitrary and capricious," complaining about unreasonableness in expecting the same information to be included repeatedly in numerous sections of the proposal, and asserting fraud and bad faith on the part of the Product Team in steering the awards of the two Site Groups to competitors with proposals having significantly higher prices. In this latter regard, the Eye Protest

includes numerous accusations of Agency wrongdoing, including the following statement made in response to Product Team contentions concerning information purportedly missing from the Eye proposal:

[The Contracting Officer] is trying to make it appear that Eye Weather did not even bid this contract in an effort to erase information that she received. Throwing Eye Weather's proposal away appears to be the only way that the FAA could attempt to justify awarding these contracts at such outrageous prices over cost (over \$1,500,000 for Group 10 and over \$362,000 for Group 9). This is a ridiculous waste of Government funds. It is contract fraud to sabotage bid proposals in an effort to skew the contract award.

Eye Protest at 15.

89. The Product Team conducted a post-award telephonic debriefing for Eye on December 17, 2002. By facsimile letter to the ODRA filed on December 24, 2002, Eye provided supplementation of its Protest based on the debriefing, attacking each of the areas of weakness found in the Eye Technical Proposal by the Product Team evaluators, arguing that it received disparate treatment and again asserting bad faith on the part of the Product Team. *See Eye Protest Supplement of December 24, 2002.*

90. The Agency Response to the Eye Protest (AR, Vol. IV), in turn, responds to each assertion regarding the Product Team evaluation and rejects Eye's accusations of wrongdoing as utterly unsupported:

ODRA has adopted the long-standing burden of proof for such allegations: The protester carries the burden of producing "well nigh irrefragable proof" of actual bias on the part of government officials, *Protest of Camber Corporation*, 98-ODRA-0079, *Protest of Information Systems and Networks*, 99-ODRA-0116, *Protest of NanTom Services Inc*, 97-ODRA-00030. Here, Eye has not even begun to meet this burden. It has offered no evidence whatsoever of agency bias; rather, it has proffered only its mere disagreement with the agency's findings, unfounded allegations and a general lack of understanding of processes and events. **See *Protest of AeroTech***, 97-ODRA-0029. Any argument claiming bias or bad faith should be summarily dismissed, especially since the SSO never even knew the identities of the companies he was selecting. Eye has not demonstrated whatsoever that the Technical team exhibited actual bad

AR, Vol. IV, p. 27.

Eye included its: (1) Technical Methodology and Approach, (2) Personnel and Financial Resources, and (3) Recruitment Management and Transition Management in Volume III (the Business/Management Proposal volume) rather than Volume II, the Technical Proposal volume. All of the areas referenced above should have been evaluated by the Technical Evaluation team but were not. Because of the way the Evaluation teams were structured (the Technical Evaluation team had subteams, as did the Business/Management Evaluation team), the Technical team had no way of knowing that some of the areas it was required to review were included in the Business/Management volume. Similarly, the Business/Management team had no way of knowing that the three areas listed above were not included in the Technical proposal volume. The Technical Evaluation team was provided with the Technical proposal volume and the Business/Management team was provided with the Business/Management proposal volume. This was explained to Eye during its debriefing on December 17, 2002.

TECHNICAL EVALUATION SUMMARY WEIGHTED SCORES – SMALL BUSINESS SET ASIDE										
	SUBFACTOR A		SUBFACTOR B			SUBFACTOR C			TECH. SCORE TOTAL	
VENDOR	Staff	Leave	Trng	QA	Phase	Meth	Pers	Trans	Unwtd	Wtd
L	[Deleted]									
Addendum										

L	
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AR, Tab 16, Addendum A, Table A-3, page A-2.

92. Comments on the Agency Response were provided both by Eye and Pacific, which had intervened in the Eye Protest on January 31, 2003. Pacific's Comments were submitted as to both the Eye Protest and the Consecutive Protest. As to the Eye Protest, Pacific, in addition to taking issue with certain of Eye's specific contentions, provides the following with respect to Eye's assertion that it was unreasonable for the Product Team to expect Eye to repeat the same information in many places throughout its proposal:

Although it may have been burdensome to provide the same information in multiple places in both the technical and business proposal[s] this non-the-less [sic] does not excuse Eye Weather from providing the information as required. Pacific Weather did provide the same information in various places in our proposal which was done according to the instructions given in the solicitation. It was not for an offeror to judge if the information sought was redundant, as the offeror had no way to know the manner in which the offer would be evaluated. Different personnel are often used when evaluating different aspects of a technical and business proposal. Therefore, these personnel may lack critical information if the portions of the technical or business plan which they evaluate are omitted. Finally, the failure to follow instructions when providing an offer is reason for the FAA to suspect that the offeror will not follow instructions when performing work on the awarded contract. This is clearly indicated in ODRA decision docket #99-ODRA-00112, Protest of Consecutive Weather.

Pacific Comments at 2.

93. The Eye Comments were provided in the form of two submissions, the first from Eye's principal, in a lengthy document (consisting of 62 pages, including the facsimile cover sheet) that indicated that it was an attachment to another Comments document being submitted by Eye's counsel, Mr. Lalli, and the second, a two-page letter dated January 30, 2003, from Mr. Lalli to the ODRA. The first document expands further on each of Eye's Protest grounds, takes issue with statements contained in the Agency Response and again repeatedly asserts "fraud," "bad faith," "conspiracy," and "subterfuge" on the part of the Product Team. For his part, in his Comments letter, Mr. Lalli notes

“inconsistencies” in the Product Team’s evaluations, citing as an example the assignment of strengths to other offerors for “discussing and providing for ‘overtime’ in their bid proposals” while assigning a weakness to Eye relating to its provision for “overtime.” Mr. Lalli observes that, in his view, the Product Team “apparently” was looking for “a voluminous amount of information” and criticizes the Team for scoring risk “based on how well you complete the paperwork” He further notes that Eye, a small company, “feels that they have been discriminated against for past acts in publicly denouncing the ASOS System and this Agency Report is a way to get . . . Eye Weather out of the weather observation business.” Lalli Letter dated January 30, 2003 at 2.

94. Midwest, which had intervened in both the Consecutive and Eye Protests, chose to provide no submission in either protest. Instead, in a handwritten response to an ODRA letter dated February 11, 2003, Midwest’s counsel advised: “We rest with Agency comments.”
95. The Product Team filed with the ODRA on February 3, 2003 a Motion to Strike and Motion to Dismiss. In it, the Product Team sought to strike the 62-page attachment of Eye’s principal to the Lalli Comments letter as “redundant and superfluous.” It also requests that the allegation by Mr. Lalli concerning retaliation for Eye’s purported denouncement of the ASOS System be dismissed as an untimely filed ground of protest.
96. The ODRA, by letter to the parties dated February 4, 2003 denied the motion to strike, noting that the motion’s grounds – that the attachment was “redundant and superfluous” – would go to the document’s weight, as opposed to its admissibility into the record. As to the motion to dismiss, the ODRA requested that Mr. Lalli respond, “addressing only the timeliness of the retaliation allegation.” ODRA February 4, 2003 letter at 2 (emphasis in original).
97. Mr. Lalli responded to the ODRA’s letter, but made no mention of the challenge to timeliness, provided only a “general” objection to “dismissal of the protest” and

requested “that the record remain intact so it may be available for any further action Eye Weather may wish to take.” Letter of Daniel F. Lalli dated February 6, 2003.

98. By letter dated February 12, 2003 to Product Team counsel (with copies to all parties and counsel), the ODRA requested that the Product Team provide a “complete listing of the offerors’ respective letter designations used by the Team in the evaluations.” Such a listing was furnished by the Product Team to the ODRA along with a letter dated February 13, 2003.

99. The ODRA, during the course of its review of the record, noted a disagreement between Eye and the Product Team concerning the order and format in which Eye’s proposal had actually been submitted. In particular, the Product Team, as part of its Agency Response, had asserted that Eye had misplaced segments of its Technical Proposal and had included them as part of its Business/Management package, and that it was because of Eye’s failure to follow bidding instructions that a re-evaluation of those segments had been necessary. Eye, in the Attachment to its Comments on the Agency Response objected to this assertion and made reference to a document that it had previously provided the ODRA’s Ms. Collins as part of the ADR process, a document Eye contended represented precisely the order and format of the Technical Proposal as it had been submitted to the Product Team. In order to resolve this disagreement and establish just how the Eye Technical Proposal had been submitted, the ODRA, by letter to Product Team counsel dated March 7, 2003, provided the Product Team with a copy of the document referenced by Eye and sought additional input from the Product Team:

Appended hereto is a copy of what Ms. Collins received from Eye, a document that appears to include an Eye Weather Table of Contents along with the contents of Eye’s Volume II, Technical Proposal, and Volume III, Business/Management Proposal. The document omits both Volume I, Eye’s Offer and Other Documents, and Volume IV, Eye’s Price Proposal. Although materials provided to ADR Neutrals are not ordinarily part of a record of adjudication, this document has been made part of the record in this case, by virtue of its having been referenced in an adjudicative filing by the party who created and submitted it. The Product Team is asked either to confirm the accuracy of Eye’s assertions regarding that document or to provide the ODRA with the following information:

1. Was the original Eye Proposal for Site Groups 9 and 10 maintained in the Product Team's files in the same format that Proposal was initially submitted?
2. If so, does the Product Team assert that what it included as a binder along with its Agency Report as the Eye Proposal is an accurate copy of what has been maintained in its files – other than the handwritten page numbers, which it has advised were added by Product Team personnel – and is in the same order and format as it was when submitted by Eye?
3. If not, describe precisely what was done to the original Eye Proposal after its submission to the Product Team and how it came to be in the order and format as it currently appears within the Agency Response binder?

ODRA Letter to Product Team Counsel dated March 7, 2003.

100. By letter dated March 11, 2003, the Product Team provided the following responses to the ODRA's questions:

1. **Question:** Was the original Eye Proposal for Site Groups 9 and 10 maintained in the Product Team's files in the same format that Proposal was initially submitted?

Response: The material that currently resides in the Product Team's files is in the same format and the content is the same as when the proposal was initially submitted by Eye Weather on June 13, 2002. However, it is not in the same order as submitted. This is explained in the response to question 3 below.

2. **Question:** If so, does the Product Team assert that what it included as a binder along with its Agency Report as the Eye Proposal is an accurate copy of what has been maintained in its files – other than the handwritten page numbers, which it has advised were added by Product Team personnel – and is in the same order and format as it was when submitted by Eye?

Response: See response to question 3 below.

3. **Question:** If not, describe precisely what was done to the original Eye Proposal after its submission to the Product Team and how it came to be in the order and format as it currently appears within the Agency Response binder?

Response: According to Section L.13, Proposal Organization of the SIR, offerors were required to submit their proposals in the following manner: Volume I should contain [an] original and two copies of the Offer and Other Documents, Volume II should contain an original and seven copies of the Technical proposal, Volume III should contain an original and four copies of the Business and Management Proposal, and Volume IV should contain [an] original and three copies of the Price Proposal. On June 13, 2002, Eye submitted in one binder one copy of its Technical proposal and in another binder, one copy of the Business and Management proposal. There was no indication on the part of the offeror as to whether the single proposal submitted for the Technical and the Business and Management Proposal was an original or a copy. The Product Team found that the material contained copied material. However, the Product Team viewed the single submittal as the original. Because Eye submitted only one copy of both the Technical and the Business and Management proposals, copies had to be made. Copies were made (by one individual) from the single submittal and distributed in order to be evaluated. Upon conclusion of the evaluations, the original and agency-made copies were placed in a locked file under the control of the Contracting Officer (CO).

Once Eye Weather filed its protest, the proposal was again copied and the copies were distributed to the parties, e.g., Technical Chair, Business and Management, CO, in order to review and respond to the allegations in the protest. This was done in order to expedite the process.

The order and format of Eye's proposal as it currently appears within the Agency Report binder is the way it is for the following reasons. The copy received by ODRA on January 23, 2003 reflects the entire proposal in content and format but not in the order of the initial submission. The initial submission had certain parts of what should have been in Volume II Technical Proposal, in Volume III, Business and Management Proposal instead (see p. 5 of

Agency Report binder). As was explained in the Agency Report of January 23, 2003, Eye's proposal as submitted was not numbered, but for ease of reference the proposal was numbered by the FAA (see p. 1 of the Agency Report). The rationale is the same for the order in which the proposal appears in the Agency Report. For ease of reference, the Technical and Business and Management Proposals were placed in the order that it appears in the Agency Report, in order to reflect the order in which the Product Team addressed the Technical and Business and Management allegations raised by the protester as well as the organization required in the SIR.

With respect to Eye's contention that its Technical Proposal was submitted in accordance with the SIR's requirements and that the Technical Proposal submission was the same as what was presented to ODRA ADR Neutral, Marie A. Collins, Esq. (copy attached to ODRA's letter of March 7, 2003), the following observation is made. Eye's submittal of its Technical Proposal as well as its Business and Management proposal to the FAA were submitted in separate packages/binders (Volume II Technical proposal and Volume III Business and Management proposal) as required by Section L.13 of the SIR – Proposal Organization. However, when the Technical and Business and Management proposals were submitted to Ms. Collins, they were not submitted in separate packages/binders. Rather, they were one continuous document. This in part accounts for the difference in the order and format.

101. The Product Team says that only two binders were submitted by Eye on June 13, 2002. It does not make clear where, in those two proposal binders, the materials from Volumes I (Offer and Other Documents) and IV (Price Proposal) -- materials that do appear in the binder the Product Team presented as General Volume I, Tab 12 of the Agency Response -- had been located. The Product Team on one hand contends that segments of the Technical Proposal were improperly included in the second binder, where Eye purportedly had submitted its Business and Management Proposal, and on the other hand says that Eye's submittal was "in separate packages/binders (Volume II Technical proposal and Volume III Business and Management proposal) **as required by Section L.13 of the SIR – Proposal Organization.**" Furthermore, the Product Team's handwritten numbering system for the Volume II and Volume III materials it included

within the version of the Eye proposal contained in the Agency Response (*i.e.*, General Volume I, Tab 12) is not consistent with Eye's numbering of the sections within the document. What was submitted to the ODRA has, as pages 1 through 3, Eye's Business and Management Proposal Volume III, Section **B**, Past Performance and Relevant Experience. Pages 4 through 10 contains Eye's Volume III, Business and Management Proposal, Section **A**, Parts 1, Management Plan, 2, Contract Administration, and 3, Subcontracting Plan. Page 11 is Eye's Volume II, Technical Proposal, Part 1, Section D.4, pertaining to Personnel and Financial Resources and Recruitment Management. The ODRA fails to see any connection between the order and sequence of the Product Team's numbering within the Agency Response General Volume I, Tab 12 binder and how protest issues were addressed in the body of the Agency Response. Curiously, omitted from Agency Response General Volume I, Tab 12 (the Product Team's submission to the ODRA) is a copy of the Index that accompanied the version of Eye's proposal as given to the ODRA's ADR Neutral, Marie Collins, and that is consistent with the requirements and order of SIR Section L.13. In any event, because the Product Team concedes that Volume I, Technical Proposal, and Volume II, Business and Management Proposal, was submitted to the Product Team in the same format and order in which it was received by Ms. Collins, albeit in separate binders, the ODRA accepts that version of the two proposal volumes as being in the correct order and sequence as initially submitted by Eye.

102. With the ODRA's receipt of the Product Team's March 11, 2003 letter, the record in Docket No. 02-ODRA-00251 closed.

**D. Findings of Fact Pertaining to the Protest of Windsor Enterprises --
Docket No. 02-ODRA-00252**

103. Set forth below are the Technical evaluation comments pertaining to Windsor (designated as Vendor K for evaluation of its proposal for Site Groups 3 and 11 under the Restricted Solicitation):

Staffing Plans And Sample Schedules	[Deleted]
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Leave Coverage	[Deleted]
Facility Training	[Deleted]
Quality Assurance	[Deleted]
Phase In/Phase Out	[Deleted]
Technical Methodology And Approach	[Deleted]
Personnel and Financial Resources and Recruitment Management	[Deleted]
Transition Management	[Deleted]
Overall Risk	[Deleted]

AR, Vol. I, Tab 15, pp. A-72-75 (emphasis in original).

104. On November 21, 2002, the Contracting Officer informed Windsor by letter that its proposal to provide CWO services for Site Groups 3 and 11 would not result in an award to Windsor. *See* AR, Vol. V., Tab 17. The letter went on to identify “some of the most significant weaknesses” in the Windsor proposal in the areas of: staffing and scheduling; leave coverage; facility training; quality assurance; phase in/phase out; technical methodology and approach; personal and financial resources and recruitment management; transition management; and overall risks.

105. In the category of “Overall Risk,” the November 21, 2002 Product Team letter states:

Based on the evaluation this proposal was determined to present a **high risk**. There were at least [Deleted] occurrences where the offerors proposal failed or marginally met SIR requirements due to no discussion or lack of a discussion of a required item. In at least [Deleted] of these occurrences the offeror did not discuss a required item. ...accordingly, we have determined that another offeror submitting a proposal represented the best-value in the proposal evaluation.

Id. (emphasis in original).

106. The Windsor Protest letter dated December 8, 2002, was received in the ODRA offices on December 9, 2002. The Protest consisted of a two-page letter from Windsor's principal, Mr. Fred J. Wilmers. The Windsor Protest notes that:

Windsor Enterprises submitted proposals for two of the twelve groups included in the Solicitation. One of the groups (Group 3) was awarded to Midwest Weather and the other (Group 11) was not awarded.

Windsor Protest at 1. The Windsor Protest further states that "Windsor Enterprises is submitting this protest prior to the requested debriefing." *Id.* The basis for the Windsor Protest was described within the Protest as follows:

There are two basic positions the contracting agency has taken that are suspect: (a) Windsor Enterprises was rated as high-risk based upon a number of evaluations that were subjective in nature and in some cases wrong. Windsor Enterprises is currently operating 7 weather observing sites successfully for the FAA. It may be that Windsor Enterprises was considered a high financial risk to simultaneously operate both groups that were proposed. Group 3 consists of nine sites and Group 11 consists of 6 sites. However, since all of Windsor's current sites will phase out on 30 September 2003, when most of the new sites phase in, it would actually be business as usual financially for Windsor to operate one of the two groups at that time. (b) it appears that the contracting agency was determined to award two groups to each successful bidder. A single group was not awarded to a single bidder on this Solicitation or on a companion Solicitation that was unrestricted. In reality a large number of groups were structured and offered by the FAA in order to allow small businesses an opportunity to qualify for contract award of a single group. Each bidder was limited to winning only two groups to further this objective. Perhaps bidders were incorrectly evaluated based upon their financial ability to handle two groups rather than a single group. It is hard to believe that Windsor Enterprises did not qualify for Group 11. The annual contract value for Group 11 is projected to be approximately \$1.2M. Windsor Enterprises current FAA contracts are of that same magnitude.

Windsor Protest at 1-2. In terms of relief, the Windsor Protest simply requests: "Windsor Enterprises should be awarded a contract for Group 11." *Id.* at 2.

107. Windsor was provided its requested debriefing on December 13, 2002. *See* Letter from Contracting Officer dated December 13, 2002, enclosing Source Selection Decision Memorandum, redacted version of the Integrated Service Team Report, the Technical Evaluation Report, and the Business Evaluation Team Report, AR, Vol. V, Tab 9.

Unlike Consecutive and Eye, Windsor made no supplemental submission in conjunction with the debriefing.

108. In its Agency Response to the Windsor Protest, the Product Team notes that Windsor received a rating of high financial risk. *See* AR, Vol. V, p. 1. The Agency Response specifically references the fact that, while other offerors complied with the SIR requirement of demonstrating sufficient resources to finance contract performance for a 90-day period through submission of certified letters of credit from financial institutions, pursuant to SIR Section L.20, Windsor attempted to satisfy this requirement by identifying [Deleted]. In this regard, counsel for Product Team notes that:

The two Groups at issue, 3 and 11, cover fifteen sites spread throughout the Great Lakes and Southwest Regions, including such major airports as Chicago-O'Hare, Indianapolis, Los Angeles, San Diego, and Phoenix. These locations cannot tolerate even the smallest interruption in 24-hour coverage, and a company proposing to finance the entire payroll for up to 3 months, using [Deleted] obviously poses a serious risk.

AR, Vol. V, p. 2.

109. In addition, the Agency Response notes that, although the Windsor Protest had focused solely on the high risk rating, "Windsor scored [Deleted] in the combined Technical and Business/Management areas, and since this was a 'best-value' procurement, it would not be eligible for award under any 'price' or 'risk' scenario." AR, Vol. V, p. 2.⁸ On this basis, the Product Team urges that the Protest be summarily dismissed. *See* AR, Vol. V, p. 3.
110. Windsor filed its Comments to the Agency Response on January 31, 2003. ("Windsor Comments"), and restated Windsor's challenge to the evaluation of high risk by the Team. *See* Windsor Comments at 1.

⁸ In fact, Windsor did not score [Deleted] for Technical and Business/Management for all of the site groups involved in this Procurement. It did, however, have the [Deleted] score for the two site groups for which it bid, *i.e.*, Site Groups 3 and 11. *See* AR, Vol. I, Tab 15.

111. The Windsor Comments make the following assertion:

As in the initial Protest, it is still believed that the evaluation of the Proposals was defective in at least two areas; correctness of the technical/management evaluation and the risk assessment.

Windsor Comments at 1. Windsor's Comments also challenge the Product Team's allegedly arbitrary elimination of qualified proposals such as Windsor's from consideration; and disagree with the technical evaluation of its proposal. *See* Windsor Comments at 3 and 4. In so doing, Windsor admits that:

Windsor's Protest, submitted before a debriefing was obtained, focused on the financial risk rating. It was inconceivable to me, at that time, that there were significant problems with the technical or business management Proposals. I knew my Proposal would not be the best received. However, since the Proposal described an approach that had been employed successfully for several years, I believed it would be adequate.

Windsor Comments at 4.

112. Finally, Windsor's Comments state:

The Agency did not address the business/management proposal in the debriefing. However, it is conceivable that similar misinterpretations of Windsor's Proposal and abuse of discretion in scoring occurred.

Windsor Comments at 4. With the submission of these Comments, the record in the Windsor Protest closed.

**E. Findings of Fact Pertaining to the Protest of IBEX Group, Inc. –
Docket No. 02-ODRA-00254**

113. Set forth below are the Technical evaluation comments for IBEX (designated as Vendor D for evaluation of its proposals for Site Groups 13, 14, 15 and 16 under the Unrestricted Solicitation):

Staffing Plans And Sample Schedules	[Deleted]
Leave Coverage	

Facility Training	
Quality Assurance	
Phase In/Phase Out	
Technical Methodology And Approach	
Personnel and Financial Resources and Recruitment Management	
Transition Management	
Overall Risk	

AR, Vol. I, Tab 15, pp. A-34-37 (emphasis in original).

114. As noted above in the Introduction, awards relating to Site Groups 13 through 16 had been made to MAB (Groups 13 and 15) and SERCO (Groups 14 and 16) under the Unrestricted Solicitation. IBEX had submitted price proposals that were lower than those of the awardees in all instances:

Site Group	IBEX Proposal	Award Amount
13	[Deleted]	\$6,312,330
14		\$8,870,904
15		\$8,041,280
16		\$3,330,156

See Protest at 7. IBEX sought a post-award debriefing from the Product Team, and one was conducted on December 11, 2002. *Id.*

115. By letter dated December 18, 2002, IBEX, by its counsel, submitted to the ODRA a Protest regarding the awards for all four Site Groups. The IBEX Protest raised four protest grounds:

1. allegedly improper technical evaluation;
2. allegedly improper risk evaluation;
3. allegedly improper failure to conduct discussions with IBEX; and
4. allegedly improper best value determination

116. IBEX described these grounds in more detail as follows:

First, as discussed herein, the agency's award decision was based on an inappropriate and unequal evaluation of the relative technical merits of the

proposals submitted by IBEX and the other offerors. In connection with its evaluation of IBEX's technical proposal, the FAA repeatedly downgraded IBEX's proposal on the basis of alleged "conflicting information" and "inconsistencies" which simply do not exist. Similarly, the procurement record reveals that IBEX's proposal was significantly downgraded on the basis that IBEX allegedly omitted various information requested by the SIR. However, an examination of IBEX's proposal reveals that the allegedly omitted material was actually provided. Moreover, on information and belief, the FAA awarded higher scores to competing firms even though those proposals offered no material advantage over IBEX's proposal. Had the FAA conducted a reasonable and equal evaluation of the technical proposals submitted, as required by the Solicitation, IBEX's proposal surely would have been among the highest-scored.

Second, the FAA compounded the errors contained in its technical evaluation when it relied on a portion of this defective and improper evaluation as a basis to assign IBEX an Overall Risk rating of "Moderate." The sole basis contained in the procurement record for the FAA's assignment of a "moderate" risk rating to IBEX's proposal is the unsupported finding that IBEX's proposal contained "conflicting" or "inconsistent" information. Therefore, correction of the FAA's erroneous technical evaluation also requires that IBEX's risk rating be revised to "Low" risk -- an assessment consistent with IBEX's incumbent status at 15 of the 22 sites covered by its proposal. In addition, the FAA used the risk rating assigned the offerors as a significant discriminator during its best value evaluation. The FAA's failure to disclose the relative importance of the risk factor vis-à-vis the specified evaluation factors prejudiced IBEX who would have structured its proposal differently had it known of the significant importance attached to any perceived risk.

Third, the FAA failed to engage in meaningful discussions with IBEX and thereby denied IBEX any opportunity to address various alleged weaknesses in its proposal and dispel the evaluators' confusion. Had IBEX been afforded such an opportunity, it could have clearly substantially enhanced its evaluated scores and its chances for contract award by addressing alleged deficiencies and errors that could have been easily explained. The FAA improperly denied IBEX any such opportunity.

Fourth, the FAA clearly failed to conduct a proper best value analysis. Instead of properly weighing the qualitative benefits associated with IBEX's proposal and those of the other offerors, the FAA applied a rigid and mechanistic "point-per-dollar" scheme that was based on its erroneous technical scores. Because this process failed to consider the qualitative analysis and tradeoffs contemplated by the SIR, this analysis was flawed

and cannot sustain the awards made. Moreover, instead of exercising independent business judgment in evaluating the proposals as contemplated by the FAA's guiding regulations, the Source Selection Officer simply adopted the evaluation team's findings with no discernable analysis. Thus, the selection decision is utterly devoid of any reasoned analysis explaining why the substantial price premiums associated with the winning offers will be justified by objective gains in performance.

IBEX Protest, pages 1-2.

117. According to IBEX, "had the FAA conducted a proper procurement, IBEX's proposal clearly would have been among the highest-scored and IBEX would have received a risk rating of Low." Further, IBEX asserts: "under any reasonable best value analysis, the significant price advantage offered by IBEX, along with its technical superiority, would have required the award of contracts to IBEX." *Id.* at 2. IBEX concludes its Protest with a request that the MAB and SERCO contracts be terminated for the FAA's convenience, that the Administrator direct an immediate award to IBEX of at least two of the four Site Groups at issue or, in the alternative, that the Administrator require a re-competition in accordance with the terms of the Solicitation and all applicable laws and regulations, and that IBEX be awarded attorney's fees and "such other relief as may be appropriate." IBEX Protest at 25.

118. As part of its Protest, IBEX sought a suspension of contract performance under the MAB and SERCO contracts, pending completion of Protest adjudication. By decision dated December 30, 2002, the ODRA denied that request, finding "no compelling reason to overcome the AMS presumption of continuation of contract performance" during the pendency of protests.

119. As stated in the IBEX Protest, IBEX had been assigned a Past Performance/Relevant Experience rating of "Acceptable." IBEX Protest at 7. Its Technical Proposal and Business/Management Proposal received an overall combined weighted point score of [Deleted] and IBEX was assigned an Overall Risk rating of "Moderate." Although IBEX did not challenge the Past Performance/Relevant

Experience Rating, it did contest both its overall weighted point score as well as the Overall Risk rating as lacking a rational basis.

120. The Product Team, as part of its Agency Response and in accordance with the ODRA's instructions, furnished a specific response aimed at the IBEX Protest. *See* AR, Vol. VI. In it, the Product Team stressed that the IBEX proposal was found [Deleted] from a technical standpoint, albeit not [Deleted] or [Deleted] and that its weighted score had placed it "[Deleted]." The Agency Response for ODRA Docket No. 02-ODRA-00254 proceeds to enumerate the technical evaluation areas challenged in the IBEX Protest and to address each of those areas, taking issue with the arguments raised by IBEX regarding the technical scoring. It also defends the evaluators' assignment of a "Moderate" overall risk rating, the Product Team's actions relating to the conduct of discussions with IBEX and others, and the propriety of the Product Team's price/technical tradeoff and ultimate best value decision. The response concludes that the Contracting Officer, when presented with other competitively priced offers having [Deleted] of the IBEX proposal, acted rationally in awarding the contracts at issue to MAB and SERCO. *Id.*

121. By letter dated January 31, 2003, IBEX, through its counsel, provided Comments with respect to the Agency Response. In those Comments, IBEX restates its major grounds of protest and offers additional arguments in support of the positions it espouses. *See* IBEX Comments. Both SERCO and MAB likewise filed Comments on the Agency Response by their own letters of January 31, 2003. In SERCO's Comments, SERCO asserts that the Protest represents "mere disagreement" with the Product Team's technical evaluation, which SERCO maintains adhered to the Solicitation's evaluation criteria, had a rational basis and ought not to be overturned. SERCO Comments. MAB's Comments similarly voiced agreement with the Product Team's actions. In addition, MAB argued that, because the IBEX Protest did not challenge the great majority of weaknesses identified in its proposal, IBEX lacks standing to raise a protest. In this regard, MAB posits, even if the ODRA were to sustain all of IBEX's assertions regarding specific elements of alleged impropriety as set forth in the IBEX Protest, IBEX could not

be said to stand a “reasonable chance to receive an award.” More particularly, MAB urges:

[E]ven assuming that IBEX’s evaluation was improper as alleged, raising its score under the disputed evaluation factor would still leave IBEX as only the third or fourth ranked proposal at best. Midwest for certain will retain both its higher technical rating and its lower cost, and IBEX could not displace this proposal and become next in line for the award under any set of circumstances.

MAB Comments at 10.

122. By letter of its counsel dated February 7, 2003, citing the ODRA Procedural Rules, 14 C.F.R. §17.19(e), IBEX submitted to the ODRA a response to MAB’s challenge to its standing to lodge the Protest. In it, IBEX maintains that its Protest alleges “pervasive and manifest errors in the FAA’s technical evaluation,” that “[d]etermining with precision the scores IBEX would have earned absent these errors is simply not possible,” and that “what is clear” is “that IBEX would have improved its chances for award had the FAA conducted a reasonable and consistent evaluation.” IBEX Letter of February 7, 2003 at 3. In this regard, IBEX argues, “a proper evaluation of IBEX’s proposal would likely require numerous changes in the numbers of the evaluated ‘strengths’ and ‘weaknesses’ associated with IBEX’s proposal.” *Id.* at 5. In response to MAB’s contention that IBEX could not, “under any set of circumstances,” be in line for award, IBEX states:

IBEX has specifically challenged the FAA’s evaluation of the following aspects of its technical proposal: (1) Subfactor A – Staffing Plans and Sample Schedules/Leave Coverage; and (2) Subfactor B – Facility Training Plan/Quality Assurance Plan/Phase In/Phase Out Plan. Had IBEX received, as its proposal warranted, the highest scores available under these factors, its total unweighted technical score would have been [Deleted] – as compared to MAB’s unweighted score of [Deleted]; SERCO’s unweighted score of [Deleted]; and Weather’s unweighted scored of [Deleted]. Moreover, as noted in IBEX’s Comments, because of the significant price advantages offered by IBEX’s proposal, under a proper best value analysis there is simply no need to establish that IBEX’s technical scores would have exceeded or even equaled those of the higher-priced proposals mentioned above.

Id. at 3-4.

123. With the submission of the IBEX February 7, 2003 letter, the record in Docket No. 02-ODRA-00254 closed. Subsequently, counsel for MAB, by letter to the ODRA dated February 11, 2003, questioned the propriety of IBEX's February 7, 2003 submission, observing that it was submitted without the ODRA's leave and arguing that, in it, IBEX had gone beyond the issue of standing, taking the opportunity to bolster its Protest and focus on the issue of prejudice with respect to the individual grounds of protest (technical evaluation, risk, lack of discussions, and the best value determination), which issue MAB maintained related to the merits of the Protest and not to IBEX's standing to file a protest. In this regard, MAB requested that, to the extent the ODRA considered the February 7, 2003 IBEX filing, it only consider that filing in connection with the "lack of standing argument" and not "with respect to IBEX's prejudice, discussion and best value arguments raised therein."

124. The ODRA, by letter dated February 11, 2003, in response to this request, advised MAB and the other parties that, although, technically, IBEX should have sought leave to file its response regarding standing, the IBEX February 7 letter would be treated as a response to a motion to dismiss for lack of standing, and the MAB February 11 letter would be treated as MAB's reply. Rather than attempting to parse out portions of the IBEX filing that pertained solely to the standing issue, the ODRA offered to strike both documents from the record, if MAB, in turn, would choose to have the ODRA strike that portion of the MAB Comments that dealt with the standing issue. The ODRA allowed MAB until close of business February 12, 2003 to make that choice. MAB did not accept the ODRA's offer. Accordingly, both documents were included in the record in this case, and the record closed at that juncture.

125. On February 20, 2003, the ODRA received from the Product Team a letter taking issue with an assertion set forth in the IBEX Comments. More particularly, in those January 31, 2003 Comments, IBEX contended for the first time, not only that the Product Team improperly failed to conduct discussions with it, but also that it had received

disparate treatment with regard to discussions, since purportedly the Product Team had conducted discussions with IBEX competitors relating to issues similar to those for which IBEX had been assigned weaknesses. By letter to the parties dated February 20, 2003, the ODRA acknowledged that the Product Team letter had been submitted after the record had closed, but noted that the IBEX contention regarding disparate treatment was, in effect, a supplemental protest and advised that the ODRA would consider it as such and would further consider the Product Team February 20, 2003 letter as an Agency Response to that supplemental protest. The ODRA permitted IBEX and the intervenors by close of business Thursday, February 27, 2003, to submit comments regarding the February 20, 2003 Product Team letter/Agency Response. The ODRA required that IBEX, as part of its Comments, comply with the ODRA Procedural Rules for protests (14 C.F.R. §§17.15(c)(5) and (7)) and provide a detailed statement of the factual and legal basis for its contention, including whatever documentary or other support IBEX might have, as well as a statement as to protest timeliness, *i.e.*, indicating when and under what circumstances IBEX first became aware of the alleged disparate treatment.

126. The ODRA, by its February 20, 2003 letter, afforded IBEX an opportunity, in the alternative, by close of business February 21, 2003, to advise the ODRA and the parties that it was withdrawing its Supplemental Protest regarding disparate treatment. IBEX did not avail itself of that opportunity. Instead, IBEX and SERCO provided Comments on the Supplemental Protest by letters of February 27, 2003. MAB chose not to submit additional comments in this regard. In its brief Comments, SERCO urged that the Product Team had “performed in full accord with the policies outlined in the AMS and SIR” and indicated that IBEX’s argument relating to discussions misapprehended the purpose of AMS §3.2.2.3.1.2.2 and the “policy” underlying the provision and the AMS in general – *i.e.*, to “streamline the overall acquisition process.” SERCO Comments on Supplemental Agency Response. IBEX, for its part, disagreed with the ODRA’s characterization of its contentions regarding disparate treatment as constituting a Supplemental Protest. IBEX argued that those contentions were timely, given that its knowledge regarding discussions between the Product Team and SERCO and MAB had emanated from the Agency Response, which it had received only five business days prior

to its filing of the Comments that contained such contentions. IBEX further took issue with the Product Team's assertion that no discussions had been conducted and pointed out that its "discussions" argument was not limited to oral exchanges of information but would include all "communications," which was the term utilized by the AMS in AMS § 3.2.2.3.1.2.2, the provision upon which its protest ground was based. In that regard, IBEX explained, the record was clear that the Product Team had engaged in "communications" with Offerors and that its treatment of IBEX's proposal was not the same as its treatment of the proposals of IBEX's competitors with respect to the same or similar items:

A review of the portions of the procurement record referenced in the quote above leaves no doubt that the FAA engaged in technical "discussions" with at least two other offerors. For example, Tab 11 to the Agency Report (received by IBEX on January 24, 2003) is entitled "Communications between FAA and SERCO." Page 5 of Tab 11 contains an August 5, 2002 letter from the contracting officer to Serco entitled "Discussion Item and Clarification". *See* AR, Tab 11 ("Communications between FAA and SERCO"), p. 5. This letter specifically states, *inter alia*:

In connection with your proposal in response to the referenced document, the following has been noted:

[Deleted]

Id. Similarly, Tab 12 to the Agency Report (received by IBEX on January 24, 2003) is entitled "Communications between FAA and McAulay Brown." Page 3 of Tab 12 contains an August 5, 2002 letter from the contracting officer to MB entitled "Discussion Item and Clarification". *See* AR, Tab 12 ("Communications between FAA and MacAulay Brown"), p. 3. This letter specifically states, *inter alia*:

In connection with your proposal in response to the referenced document, the following has been noted:

[Deleted]

Id. As explained in IBEX's Initial Comments, MB responded to the FAA's August 5, 2002 "Discussion Item" letter by actually altering its proposal to

[Deleted]. AR, Tab 12 ("Communications between FAA and MacAulay Brown"), p. 9.⁹

Based on the foregoing, IBEX finds the FAA's current claim that it did not hold technical discussions with any offeror to be simply shocking.¹⁰ There can be no question that the FAA actually engaged in discussions with other offerors regarding the same or very similar issues that the FAA ultimately identified as the bases for significantly downgrading IBEX's technical proposal. As explained in IBEX's Initial Comments, this disparate use of communications was unreasonable, unfair, and in direct violation of the requirements of AMS § 3.2.2.3.1.2.2.

IBEX February 27, 2003 Comments on Supplemental Agency Response at 4-5. With the submission of such Comments, the record in 02-ODRA-00254 closed.

III. Discussion

A. General

Where the ODRA finds that the Product Team's award decision has a rational basis and is neither arbitrary, capricious, nor an abuse of discretion, and is supported by substantial evidence, the ODRA will not recommend that the Administrator overturn such a decision. 14 C.F.R. Part 17; *Protest of Computer Associates, Inc.*, 00-ODRA-00173, citing *Protest of Information Systems and Networks Corporation*, 98-ODRA-00095 and 99-ODRA-00116, *affirmed* 203 F.3d

⁹ **IBEX Footnote:** "As also detailed in IBEX's Initial Comments, Serco was afforded an opportunity to respond to the FAA's "discussion items" regarding Serco's proposed FTEs. In response, Serco provided a more detailed explanation of the way [Deleted]. See AR, Tab 11 ("Communications between FAA and SERCO"), p. 28."

¹⁰ **IBEX Footnote:** "Equally shocking is the FAA's apparent attempt to rely on the FAR distinction between "discussions" and "clarifications" in defense of its unreasonable and unfair use of communications. In its February 20, 2003 letter, the FAA contends that it only engaged in "cost clarifications" with offerors but "did not conduct technical discussions." This explanation is wholly unavailing for at least three reasons. First, as explained *supra*, the AMS does not distinguish between "clarifications" and "discussions" as those terms are defined and used in the FAR. Instead, the AMS treats all exchanges with offerors as "communications" under Section 3.2.2.3.1.2.2. Accordingly, the FAA's reliance on this FAR distinction is misplaced. Second, even if the AMS did recognize the FAR distinction between "discussions" and "clarifications," the letters referenced above clearly constituted "discussions" because they resulted in substantive changes to the awardees' proposals. The acid test of whether discussions have been held is whether it can be said that an offeror was provided the opportunity to revise or modify its proposal. If the communications provide an offeror with an opportunity to make a substantive change in its proposal, the communications are discussions, not clarifications. *New Hampshire-Vermont Health Serv.*, 57 Comp. Gen. 347, 78-1 CPD ¶ 202 (1978); *The Human Resources Co.*, B-187153, Nov. 30, 1976, 76-2 CPD ¶ 459. As detailed above, in this case the awardees were both allowed to make substantive changes to their proposals. Finally, the portions of the "discussion item" letters quoted above were clearly related to the technical aspects of the awardees' proposals and not merely "cost clarifications" as the FAA now alleges. Indeed, the same issues addressed in these letters were identified by the FAA as bases for downgrading IBEX's technical score. See IBEX Initial Comments, pp. 17-23."

52 (DC Cir. 1999). Moreover, the ODRA will not substitute its judgment for that of a FAA Product Team in best value procurements, where the Team's source selection decision is rationally based and consistent with the FAA's Acquisition Management System ("AMS"), as well as the specified Solicitation evaluation and award criteria. *See Protest of Information Systems and Networks Corporation*, 99-ODRA-00116. Finally, it is well established in FAA ODRA case law that "an offeror's mere disagreement with the Agency's judgment concerning the adequacy of its proposal is not sufficient to establish that the Agency acted irrationally." *Protest of Raytheon Technical Services Company*, 02-ODRA-00210, quoting *Protest of Universal Systems and Technology, Inc.*, 01-ODRA-00179.

B. Protest of Consecutive Weather – Docket No. 02-ODRA-00250

As was noted in the findings of fact, Consecutive filed an initial Protest and a Supplemental Protest. The Initial Protest challenged the validity of the SIR, the evaluation rating of "high risk" given to Consecutive by the Evaluation Team and the award of the contract for one of the four site groups at a price of "over one million dollars more than Consecutive Weather's offer." *See* Consecutive Protest at 1. Consecutive in its Comments on the Initial Protest subsequently recognized that its challenge to the terms of the Solicitation was untimely. As noted above, the ODRA therefore deems that ground of protest as having been withdrawn. *See* Footnote 1 above.

Consecutive's Protest was filed prior to its receiving a debriefing on December 17, 2002. Thereafter, on December 26, 2002, Consecutive filed a Supplemental Protest stating three grounds for its contention that the Product Team's evaluation was arbitrary, capricious and incorrect. Consecutive alleged that: (1) its Proposal was not lacking in detail or vague; (2) the Product Team's evaluation included weaknesses that were not relevant; and (3) Consecutive had a strong past performance record and thus could not have been found "unacceptable" in the Technical and Business/Management areas. *See* FF 67, Consecutive Supplemental Protest at 1. Consecutive's Supplemental Protest also challenges findings of the evaluation of the Evaluation Team in the Technical and Business/Management areas. *See* FF 65.

As noted above, inasmuch as Consecutive failed to serve a copy of its Supplemental Protest on counsel for the Product Team, the initial Agency Response did not specifically address all the

issues identified in Consecutive's Supplemental Protest. The Product Team filed an initial Agency Response on January 23, 2003, and a supplemental Agency Response on February 6, 2002, following its receipt of Consecutive's Supplemental Protest.

The ODRA has reviewed both Consecutive's initial and supplemental Protests as well as the initial and supplemental Agency Responses, which included evaluation reports, the Consecutive Proposal, and other documentation. Based on its review, the ODRA concludes that Consecutive has failed to meet its burden of establishing that the Product Team acted without a rational basis or in an arbitrary and capricious manner, or that it abused its discretion in the conduct of the evaluation and determination concerning the ratings of Consecutive, the awards of the contract in question, and the non-award of one of the site groups.

In this regard, it must be noted that Consecutive received a combined weighted score of [Deleted] and thus was found to have been [Deleted]. *See* FF 49. In this case, the Product Team's IST, based on the evaluation plan's "satisfactory" definition, established that offerors' proposals receive a minimum combined weighted score of "4" to be considered "acceptable". *See* FF 51 and 73. In this case, the Evaluation Team found [Deleted] strengths in Consecutive's Proposal and a total of [Deleted] weaknesses. *See* AR. Vol. III, p. 5; Vol. I, Tab 15, Business/Management Report, p. C-6 and Technical Evaluation Report, p. A-26. It was specifically found that Consecutive's "Proposal failed or marginally met the SIR requirements due to no discussions or lack of discussion of a required item." FF 76.

The ODRA finds no support for Consecutive's allegation that the evaluators lacked competency (*see* Consecutive Protest, paragraph 2). Moreover, a review of Consecutive's Proposal provides substantial evidence in support of the Team's conclusion regarding the Proposal's deficiencies. The Product Team properly points out that it was the "offeror's job to provide comprehensive responses to the SIR's requirements." Supplemental Agency Response at 3. The stated evaluation criteria called for Technical and Business/Management Proposals to be significantly more important in the evaluation process than the past performance/relevant experience component. *See* FF 27. Unfortunately, Consecutive's Proposal relies heavily on its experience

and either ignores or fails to specifically provide required information responsive to the Technical and Business/Management requirements of the Solicitation.

Under the AMS, as in traditional federal acquisition practices, technical evaluators have broad discretion. The ODRA previously has recognized that:

[t]he Comptroller General has held that the evaluation of technical proposals is a matter within the contracting Agency's discretion, since the Agency is responsible for defining its needs and the best method of accommodating them. *Protest of Universal Systems and Technology, Inc.*, 01-ODRA-00179, citing *Digital Systems Group, Inc.*, B-286931, March 7, 2001, 2001 U.S. COMP. GEN. Lexis 46. Technical Evaluators have considerable latitude in assigning ratings, which reflect their suggestive judgments of a proposal's relative merits. *Protest of Universal Systems and Technology, Inc.*, 01-ODRA-00179 citing *Digital Systems Group, supra*.

Protest of Raytheon Technical Services Company, 02-ODRA-00210, n.17.

Consecutive's complaints about the evaluation for the most part were general in nature and only focused on a limited number of specific findings by the evaluators. Its challenges to those findings amounted to mere disagreements with the Product Team's conclusions, or unsupported statements to the effect that Consecutive's Proposal in fact met the Solicitation requirements. Consecutive failed to demonstrate that the evaluators' findings were irrational.

Moreover, Consecutive provides no basis in fact or law for challenging the Product Team's use of a minimum total weighted score of "4" to qualify Offerors as "acceptable/satisfactory" for purposes of consideration for a contract award. It is well established under the AMS that down-selections to those contractors most likely to receive award of a contract are not only permissible, but encouraged. AMS Section 3.2.2.3.1.2.5.

In its proposal, Consecutive chose to take issue with, ignore, or respond in an inappropriate or uninformative way to the specific requirements of this best value Solicitation. As a result, its

Proposal received a less than satisfactory rating and thus was not among those finally considered for an award. The ODRA finds no basis on which to conclude that the Product Team acted without a rational basis, or in an arbitrary or capricious manner, or abused its discretion in the rating of Consecutive's Proposal. The ODRA further finds substantial evidence in support of the Product's Team decision not to make award of Site Group 8, based on the lack of availability of a satisfactory offeror. *See* FF 74. For the forgoing reasons, the ODRA recommends that Consecutive's Protest be denied.

C. Protest of Eye Weather – Docket No. 02-ODRA-00251

As noted above, Eye has protested the Product Team evaluators' assignment of every "weakness" within the Eye Technical Proposal as well as the Overall Risk rating. The ODRA's evaluation herein addresses *seriatim* each of the challenged Technical "weaknesses" on a subfactor-by-subfactor and sub-element-by-sub-element basis as well as the Product Team's assessment of Overall Risk.

1. Technical Proposal

a. Staffing Plans, Sample Schedules, and Leave Coverage

(1) Staffing Plans and Sample Schedules

The Product Team evaluators assigned [Deleted] to the "Staffing Plans and Sample Schedules" sub-element of Eye's proposal. The weakness related to an obvious and apparently acknowledged failure by Eye to provide its staffing plan "in the form of full-time equivalents." AR, Tab 15, IST Report, page 31. In this regard, Eye's sole complaint is that the Contracting Officer (Ms. Scott) had not come back to Eye with a request to reformulate its proposal so as to include the required FTE information:

If [what was contained in Eye's proposal] did not reflect what Ms. Scott desired, why did Ms. Scott fail to mention any questions concerning full time equivalent information when she asked Eye Weather for additional information concerning four other matters she questioned in her 8/5/02 letter? Eye Weather would have been agreeable to answer this FTE point in any format Ms. Scott desired

Eye Protest at 3. The Solicitation clearly called for information on staffing numbers to be "in the form of full time equivalents," *see* AR, Tab 4, Section L.16.1, and the Product Team clearly had a rational basis in finding a "weakness" in the Eye proposal in its not conforming to the

Solicitation's explicit instructions. Notwithstanding the AMS provision suggesting that Product Teams engage in "communications" throughout the course of a procurement, *see* AMS §3.2.2.3.1.2.2, there is nothing in either the Solicitation or the AMS that would mandate discussions aimed at permitting an offeror to correct an obvious omission in its proposal. As the ODRA has observed previously, an FAA Product Team "might consider an offeror's failure to follow written proposal instructions as part of its evaluation of the services that might be expected of an offeror under an awarded contract." *See Protest of OPTIMUS Corporation*, 98-ODRA-00096. This is true, regardless of whether a Solicitation expressly states as much. Eye's argument regarding this "weakness" fails.

(2) Leave Coverage

[Deleted] strengths were noted for the "Leave Coverage" sub-element, and the following [Deleted] "weaknesses" were identified by the Product Team evaluators:

[Deleted]

[Deleted]

AR, Tab 15, page A-31.

Eye, in its Protest, takes issue with the first finding of "weakness" under the "Leave Coverage" sub-element, urging that its inclusion of overtime for only "3.3 hours per site per month" was appropriate for the "unplanned events" that are "just a fact of life." *See* Eye Protest, pages 3-4. The Product Team, in its Agency Response, focuses on its perception of inconsistency in Eye's statements regarding the use of overtime:

Here the team raised a concern because in the Leave Coverage Plan, Eye allocated [Deleted] hours of overtime pay per site per year (see p. 20, third paragraph of Eye's proposal), which contradicted the statement in Eye's Sample Schedule that leave could be accommodated without resorting to overtime. See p. 20, fourth paragraph, of the offeror's proposal. To state it quite simply, there was an inconsistency between what the offeror stated in its Staffing Plan and what it stated in its Leave Coverage Plan. There was nothing "irrational" about what the evaluation team concluded.

The issue was not whether or not overtime was prohibited by the SIR. The issue is whether the statements in the Leave Coverage Plan and Sample Schedules are consistent. In the instant case they were not. Consistency between these two areas is not an unreasonable expectation. As noted in the TER, p. A-31, and as

the Technical Chair points out, “in the proposal’s leave plan, [Deleted]-hours of overtime per site per year was allocated.” However, in the proposed Staffing Plan it specifically states, “No over-time should be incurred with [Deleted] observers to cover a schedule of [Deleted] shifts per week.” See Tech. Chair declaration p. 4. These two statements were in direct conflict with each other.

AR, Vol. IV, page 9. The ODRA cannot conclude that the Product Team’s perception of inconsistency within the Eye proposal was without rational basis or that, by reason of an apparent conflict in Eye’s statements about overtime, the Product Team’s confidence in Eye’s ability to manage and schedule its part-time employees to avoid overtime use could not have been compromised. Under such circumstances, the ODRA cannot conclude that the Product Team’s assignment of a weakness for this sub-element was improper.

In terms of the second “Leave Coverage” weakness, Eye has the following to say:

The contention that Eye Weather staffing schedules did not match the staffing numbers provided for the sites is a false accusation. “Eye Weather’s staffing numbers as reported earlier were: one full-time (40 hours per week) on site supervisor.” The supervisor is labeled on the schedule as #1 and the key at the bottom of the schedule explains all labeling. The two additional full-time observers described in Eye Weather’s staffing plan are labeled #2 and #3. It is evident from the sample schedule that Employee #1, #2 and #3 each work five eight hour shifts Monday through Friday. This is also confirmed in the staffing plan (see Staffing Plan, first paragraph, last sentence), “The supervisor’s normal tour of duty will be Monday through Friday, 8:00 AM to 4:00 PM.” The second paragraph of the same page addresses the additional full-time employees. Focusing on the second sentence one can discern: “The normal tour of duty for the additional two full-time observers will be Monday through Friday covering the 12:00 AM to 8:00 AM shift and the 4:00 PM to 12:00 AM shift.” The part-time observers are addressed in the next sentence. “The weekend shifts will be staffed with the four part-time observers on a rotating basis.” This information matches Eye Weather’s sample schedule perfectly. The part-time employees are labeled #4, #5, #6 and #7 on the schedule and the key at the bottom reflects this fact. This simple method of labeling the schedule described in Eye Weather’s Staffing Plan is not difficult to understand. It does not appear Ms. Scott bothered to look at Eye Weather’s Staffing Plan or Eye Weather’s sample schedule; otherwise she would not debate their correlation. If Ms. Scott did not understand Eye Weather’s Staffing Schedule and believed a discrepancy existed with the Staffing Plan, she should have asked about this point in her letter of additional questions dated 8/5/02.

Eye Protest, pages 4-5. For its part, the Product Team, with respect to this alleged “inconsistency” “weakness,” provided no rebuttal whatsoever in its Agency Response. The ODRA, having reviewed the record on this point, including the Eye proposal, cannot discern a rational basis for concluding that the sample schedules were inconsistent with the Staffing Plan. Accordingly, the ODRA finds that assignment of a “weakness” in this instance was inappropriate.

b. Technical Implementation Plans

(1) Facility Training Plan

The Product Team identified [Deleted] strengths and [Deleted] weaknesses in connection with its evaluation of Eye’s Facility Training Plan:

Strengths:

[Deleted]

Weaknesses:

[Deleted]

AR, Tab 15, pages A-31 to A-32.

In its Protest, Eye asserts that its proposal explains that it intends to retain current contractor personnel who are already trained, certified and in position. In this light, Eye maintains, the training schedule, frequency and duration is a “moot point.” Eye Protest at 6.

Eye also disagrees with the evaluators’ conclusion that Eye did not provide site specific information for Group 10 and a portion of Group 9. Rather, Eye indicates, it included site specific information for all sites in both Groups 9 and 10. This information, it says, was labeled by SIR number DTFA01-02-R-03113 and each individual site was referenced for both groups. Therefore, Eye argues, the Product Team’s conclusion is “false.” Eye Protest at 6.

Eye asserts that it did answer the evaluator’s concern as to how the employees would be trained, pointing the following language of its proposal set forth at page 2 of Eye Protest Exhibit I:

[Deleted]

Eye Protest at 6-7.

In addition to challenging these “weakness” findings, interestingly, Eye, in its Protest Supplement of December 24, 2002, takes issue with one finding of “strength,” *i.e.*, the one that related to the [Deleted]. In this regard, Eye points out that its requirement would only apply to supervisors and not to “all employees.” What Eye indicates as its intent for such criticism is to establish that the evaluators’ review of the Eye proposal had been superficial, even when addressing what had been perceived as strengths. *See* Eye Protest Supplement of December 24, 2002 at page 6.

The Product Team, in its Agency Response rejects each of Eye’s complaints regarding the evaluation of the Facility Training Plan sub-element. In particular, the Product Team takes issue with Eye’s contentions that, because Eye intended to retain all incumbent contractor personnel at each of the sites involved, personnel who were already trained and certified, requiring the submission of a training plan was “arbitrary and capricious”:

Protester states that “It is arbitrary and capricious for the FAA to require Eye Weather to have a training schedule...” because according to the protester: “It should not be too much for an offeror to infer that the Technical team ought to understand if the proposal retains the weather observers at all sites, even explaining the observers are trained, site certified and in position there is no need to have a training schedule to train these people.” *See* p. 10 of protester’s complaint.

What the protester does not seem to understand is, all offerors were required to provide a Facility Training Plan as required by Sections L. 16.2 of the SIR. Eye implies that it is somehow being singled out and these requirements are being foisted on it. Section, L.16.2 requires this from all offerors. Additionally, in those instances where an employee who is neither certified generally nor site-certified specifically, the FAA wanted to see how an offeror would train an applicant to be a certified weather observer. The protester seems to find it impossible that it would ever have to hire and train an observer for any of the six Group 9 facilities or seven Group 10 facilities over the five-year period of performance of the contract. There are other types of training that an offeror would be required to perform. There is refresher training that should be addressed because whenever there are changes in the equipment, *e.g.*, ASOS procedures or regulations, the offeror is required to train its weather observers on the applicable changes. As noted in the TER, p. A-32, and further explained by the Technical Chair, the protester did not address this requirement in an adequate manner.

AR, Vol. IV, page 11.

In the Attachment to its Comments on the Agency Response, Eye again repeatedly challenges the Product Team's findings of "weakness" with respect to Eye's Facility Training Plan. *See* Attachment to Eye Comments at pages 13-17. In the ODRA's view, the arguments presented by Eye represent no more than "disagreement" with the Product Team's evaluation of its submission. As noted above, even if the ODRA were itself inclined to evaluate a proposal differently, "mere disagreement" with evaluation results is insufficient grounds for the ODRA to overturn a Product Team's findings, so long as the ODRA cannot say that those findings were without some rational basis. *Protest of Raytheon Technical Services Company, supra*. The ODRA cannot do so in the present case.

(2) Quality Assurance Plan

The Product Team evaluators found the following [Deleted] strengths and [Deleted] weaknesses when evaluating Eye's Quality Assurance Plan:

Strengths:
[Deleted]

Weaknesses:
[Deleted]

AR, Tab 15, page A-32.

In its Protest, Eye challenged each of the assigned weaknesses. Eye explains that it did not paraphrase or take direct quotes from the SIR at any time in its quality assurance plan and that this conclusion is completely false. Eye asserts that the FAA requirement for quality assurance plans have always focused on the quality control of the observations, while all the other items of consideration were addressed in other areas of the SIR and the Eye Weather proposal package. Moreover, it says, changes in procedures were addressed in the recruitment management plan. In this regard, Eye Protest Exhibit J, page 1, paragraph two, states: "[Deleted]." Eye further asserts that "Revisions are changes in procedures and the process is the supervisor changing them in ink in the 7900.5." Eye Protest at 8.

Eye indicates that the “unforeseen event” process was addressed in the technical proposal. Protest Exhibit K, page 2, Item 2, “Emergency Situations,” details the unforeseen event information sought by the evaluators. The Protest asserts in this regard:

The quality assurance program states that all observers must participate and details how they participate. Each observer is maintaining the files by participating in the quality assurance plan each time they come to work. The quality assurance reporting deadlines are also met by each observer when they perform their observation. Eye Weather explains [in its proposal] this is kept in check by randomly checking their observations via the Internet to ensure the observations are timely and accurate.

Eye Protest at 8.

In its Protest Supplement of December 24, 2002, Eye urges that the assignment to it of a weakness for its failure to provide for the post-award submission of a [Deleted] amounted to “disparaging” – *i.e.*, disparate – treatment of Eye. In this regard, Eye states, it spoke with Consecutive and discovered that Consecutive had made the same omission regarding “this paperwork” and that “no weakness was cited for Consecutive Weather’s failure to do so.” Protest Supplement of December 24, 2002, pages 13-14.

In addition to refuting this assertion – Consecutive was, in fact, assigned a weakness for precisely the same omission (*see* AR, Tab 15, page A-24) – the Product Team rejected Eye’s other arguments concerning the Quality Assurance Plan. *See* AR, Vol. IV, pages 12-13.

In the Attachment to its Comments on the Agency Response, Eye complains that the Product Team, in speaking of Eye’s Quality Assurance Plan, took statements from it “out of context” and did so purposefully, in an effort unfairly to deprive Eye of an award. *See* Attachment to Eye Comments at pages 19-20. Indeed, throughout its filings, Eye’s statements are replete with accusations of bad faith dealings, conspiracy, fraud and deception, such as the following that is said in relationship to the evaluation of its Quality Assurance Plan:

The FAA is creating subterfuge regarding Eye Weather’s proposal in an effort to deny Eye Weather a satisfactory score. * * * The FAA is subverting Eye Weather’s information to eliminate Eye Weather from fair competition of this procurement. This is evidence of the FAA disparaging Eye Weather and favoring Eye Weather competitors. * * * This is evidence of the fraudulent manner in

which the FAA is evaluating Eye Weather's proposal. * * * This is all obvious deception and the use of shifts and stratagems to forward the agenda of the FAA to control who is awarded these contracts.

Id. The ODRA has previously noted that a party alleging bad faith on the part of the Government must ordinarily come forward with "well nigh irrefragable" proof in order to rebut the presumption of good faith attaches to the actions of Government officials. *See Protests of Camber Corporation and Information Systems & Networks Corporation*, 98-ODRA-00079 and 98-ODRA-00080 (Consolidated), Final Redacted Findings and Recommendations at 48-49. The ODRA finds no support whatsoever in the record for Eye's accusations of fraud and bad faith by the Product Team.

In terms of the evaluation of the Quality Assurance Plan, the ODRA finds Eye's contentions clearly in error regarding purported disparate treatment in relationship to assigning it a weakness for lack of any mention of the requirement for post-award Quality Control Plan submission. Moreover, despite all of Eye's verbiage, it has failed to demonstrate that the Product Team was without a rational basis in assigning the other weaknesses relating to Quality Assurance. At most, once again, the arguments raised amount to "mere disagreement" over the scoring of this aspect of Eye's proposal. The Protest in this regard fails.

(3) Phase In/Phase Out Plan

For the Phase In/Phase Out Plan, the Eye proposal was assigned [Deleted] strengths and [Deleted] weaknesses:

Strengths: [Deleted]

Weaknesses: [Deleted]

AR, Tab 15, page A-32.

Eye, in its Protest, disputes these evaluator findings relative to its Phase In/Phase Out Plan. Eye contends that, throughout its proposal and in the Phase In/Phase Out Plan, it indicated that it planned to retain outgoing contractor personnel, except for a few supervisors and that such outgoing personnel were already trained, site certified, were resident in the area of the FAA facility and thus were "in position" to perform. According to Eye, retention of current contract

personnel would not require “lengthy explanation and a phase-in/phase-out plan,” that such a plan was “unnecessary.” Eye states that its proposal “further explains how easy this plan would be even with multiple start up stations.” In this regard, Eye asserts, “since everyone is already in place, even starting up 13 stations would make for an easy transition.” On this basis, Eye maintains, the evaluators’ findings with respect to “phase in/phase out requirements” were “unfounded.” Eye Protest at 9.

Eye’s complaint about the requirement for submission of a Phase In/Phase Out Plan for companies that contemplate retention of incumbent personnel might be viewed as an untimely protest of the terms of the Solicitation, and one that would be dismissed under the ODRA Procedural Rules. *See* 14 C.F.R. §17.15(a)(1). However, Eye did make a submission for this sub-element, and, in this regard, the ODRA notes inconsistency in the Product Team’s approach for the Phase In/Phase Out Plan sub-element. More specifically, as is discussed below with regard to the IBEX Protest, the Product Team has attempted to justify its assignment of a “[Deleted]” rating for the IBEX Phase In/Phase Out Plan by arguing that IBEX missed the “essence” of the Phase In/Phase Out Plan requirement.¹¹ The ODRA, as stated below, rejects the Product Team’s position as a *post hoc* rationale in the context of the IBEX Protest. With respect to the Eye Protest, the ODRA finds no rational basis for rating Eye’s Proposal with a zero (0.00) score for this sub-element, when that proposal – albeit in paraphrased wording of the SIR – clearly indicates Eye’s understanding of what the Product Team characterizes as the essential requirements of the Phase In/Phase Out Plan.

¹¹ In its evaluation of the IBEX Proposal, the Product Team had the following to say with respect to IBEX’s Phase-In/Phase-Out Plan:

This is another subfactor in which Ibex scored a [Deleted] rating. The problem here was that the Ibex proposal [Deleted]. Simply stated, the PI/PO procedure is a two-day event, post award, in which the incoming contractor makes actual, live observations under the supervision of the outgoing contractor on the first day. This is critical, because, on the first day, the incumbent is still responsible for the accuracy of the work. On day #2, the process reverses, with the new contractor bearing full responsibility, and the outgoing contractor overseeing the work product, but no longer responsible.

[Deleted]. The team also took issue with Ibex’s statement about [Deleted]. The protest takes major issue with this finding, but, frankly, this was a relatively minor point.

On balance, it is difficult to fault the team for assigning a score of [Deleted] in a subfactor where the proposal really missed the essence of the procedure. What the team expected was some discussion of the reversed roles and responsibilities during the two-day period of actually taking observations. All else was merely administrative support to this key function. Ibex has not demonstrated the agency acted irrationally here.

See AR, Vol. VI, Agency Response to IBEX Protest at page 7.

c. Technical Methodology and Approach

The Product Team evaluators, as part of their post-protest re-evaluation¹², made the following findings with respect to the elements of Technical Methodology and Approach in the Eye proposal:

Strengths: [Deleted]

[Deleted]

- **Element 1:** [Deleted]
- **Element 2:** [Deleted]
- **Element 3:** [Deleted]
- **Element 4:** [Deleted]
- **Element 5:** [Deleted]

AR, Tab 16, pages A-34, A-35. This aspect of the Technical Proposal appears to have been rated adjectivally as [Deleted] and assigned a numeric score of [Deleted], which represents a score of [Deleted] (corresponding to [Deleted] per the Evaluation Plan) multiplied by the specified weight of [Deleted] that was assigned therein to this Technical sub-element. *Id.*, Table A-3, page A-2; AR, Tab 5, Evaluation Plan, pages 16 and Attachment Two, Part One.

Eye, in its Protest, argues that it did provide the Agency with the offeror's level of knowledge and experience in the operational and functional aspects of weather observation services. Eye also states it provided a contingency plan that discussed the offeror's approach to responding to emergency situations that was contained in section C, Technical Methodology and Approach, under the heading, Emergency situations. Eye cites to the language of its proposal to support its challenges to the weaknesses assigned. *See* Eye Protest at 9-10; Protest Exhibit K. Eye asserts that its proposal presentation on all of the topics addressed in the various weaknesses "met the SIR requirements." Eye Protest at page 12. The essence of the evaluators' criticism, Eye concluded, was "that Eye did not repeat the same information over and over in a redundant format, and as a result was unfairly found to have omitted this information from its proposal." *Id.*

¹² The ODRA cannot accept the Product Team's contention regarding Eye misplacing sections of the Technical Proposal within its Business and Management Proposal. The contention is disproved by the fact that the original IST Report reflects a somewhat detailed evaluation of Technical Methodology and Approach, one of the purportedly "misplaced" segments. *See* FF 99 through 101. In any event, given that all segments were ultimately evaluated, the issue is not who "misplaced" the proposal segments, but rather whether the Product Team's segment evaluations have a rational basis and are consistent with the terms of the Solicitation.

The challenges here, again, amount to “mere disagreement,” and hence do not provide sufficient grounds for the ODRA to recommend that the findings of the evaluators be overturned. Those findings followed the evaluation criteria of the Solicitation and had a rational basis. Further, in terms of Eye’s criticism of the Product Team’s expectations for redundancy, the ODRA agrees with Pacific’s Comments:

Although it may have been burdensome to provide the same information in multiple places in both the technical and business proposal[s] this non-the-less [sic] does not excuse Eye Weather from providing the information as required. Pacific Weather did provide the same information in various places in our proposal which was done according to the instructions given in the solicitation. It was not for an offeror to judge if the information sought was redundant, as the offeror had no way to know the manner in which the offer would be evaluated. Different personnel are often used when evaluating different aspects of a technical and business proposal. Therefore, these personnel may lack critical information if the portions of the technical or business plan which they evaluate are omitted. Finally, the failure to follow instructions when providing an offer is reason for the FAA to suspect that the offeror will not follow instructions when performing work on the awarded contract. This is clearly indicated in ODRA decision docket #99-ODRA-00112, Protest of Consecutive Weather.

Pacific Comments at 2.

d. Personnel and Financial Resources and Recruitment Management

The Product Team evaluators, as part of their re-evaluation effort, found [Deleted] strengths for Personnel and Financial Resources and Recruitment Management and provided the following discussion as to identified “weaknesses”:

Section L.16.4 of the SIR required the vendor to provide a detailed approach for management of the work to be performed under this contract while ensuring adequate experience levels [for] providing quality weather observation services. In addition, the SIR required a discussion of 4 elements. **Element 1:** An organizational structure detailing the proposed mix of supervisory and non-supervisory personnel that would provide the requisite management oversight and quality assurance at the sites. **Element 2:** Discussion of proposed teaming or subcontracting arrangement. **Element 3:** Description of the organization’s methodology to ensure quality personnel are identified, recruited and acquired to

perform the work under the CWO program. **Element 4:** Organization's approach for retaining quality personnel.

[Deleted]

AR, Tab 16, Addendum A, pages A-35, A-36.

In its Protest, Eye asserts that these findings are "false" and states that it sent a 12-page facsimile to the Contracting Officer on August 15, 2002, which answered additional questions concerning Eye's financial and other information, most of which had previously been sent. The information that was sent by facsimile, Eye advises, is contained in its Protest Exhibits B; C; D; E; F, pages 1-4; M; N, pages 1-3; O; and P. This information Eye contends "proves that Eye did indeed provide information addressing Personnel and Financial Resources." Eye further argues that the evaluators' contention that they were unable to determine Eye's technical ability to meet the requirement (L.16.4) is inconsistent with the fact that "Eye's proposal contained two pages on this subject." Eye Protest at 13-15, *citing* Protest Exhibit J, pages 1-2.

The ODRA has reviewed the "additional materials" submitted to the Contracting Officer by facsimile and, although they related to Eye's financial resources, they do not address Elements 1, 3 or 4 of the "Personnel and Financial Resources" sub-element, as outlined in SIR Section L.16.4. As to the two pages included in Eye's proposal that do address such things as personnel recruitment and retention, even if the ODRA would itself have scored Eye higher for this Technical sub-element based on the contents of those two pages, it cannot say that the score assigned – [Deleted], which amounts to a score somewhat above [Deleted] and below [Deleted] (a numeric score of approximately [Deleted])¹³, multiplied by the sub-element weight of [Deleted] under the Evaluation Plan) – had no rational basis. In this regard, the ODRA again finds "mere disagreement" by Eye with the Technical evaluation, not an adequate ground for recommending that the evaluators' findings be overturned.

e. Transition Management

¹³ Because the protester did not request and the Product Team did not include within the Agency Response individual evaluator scoring records or records by which the ultimate scoring was computed, the ODRA can only presume that some averaging of individual sub-element scores had been performed in order to derive the scores appearing within the IST Report and IST Report Addendum, AR, Tabs 15 and 16.

The Product Team, as part of the re-evaluation, noted [Deleted] strengths for the “Transition Management” sub-element and provided the following description as to “weaknesses” in Eye’s proposal:

[Deleted] address the four major required elements. They are: **element 1**, detailed methodology which shows how the vendor will obtain needed labor categories and skill levels and place them in the proper locations in a timely manner; **element 2**, detailed approach to effectively [sic] communication among key players during the transition period; **element 3**, detailed approach to minimize disruptions and provide minimal impact to FAA operations and productivity; and **element 4**, identification of risks envisioned in transitioning from one contractor to another and proposed solutions for risk mitigation.

Element 1: [Deleted]

Element 2: [Deleted]

Element 3: [Deleted]

Element 4: [Deleted]

AR, Tab 16, Addendum A, pages A-36. A-37. In terms of this sub-element, it appears that the evaluators rated Eye’s proposal as [Deleted] assigning Eye a numeric score of [Deleted] for “Transition Management” – by multiplying a [Deleted] for [Deleted] by the [Deleted] weight assigned to this sub-element under the Evaluation Plan. *Id.*, Table A-3, page A-2; AR, Tab 5, Attachment Two – CWO Scoring/Weighting.

In its Protest, Eye challenges the evaluators’ findings, asserting that all required information was addressed in its proposal. Eye Protest at 15, citing to Protest Exhibit Q, pages 1-2. In terms of planning for and management of transition or “phase-in,” the assumption Eye had was that little, if any, “phase-in” would be necessary, and that no risk would be entailed, because it intended to acquire all incumbent personnel at the various sites. Eye indicates that this assumption was reinforced by the following formal exchange of question and answer with the Product Team:

The following is an excerpt from the FAQ’s the FAA offered to help guide bidders with answers from the FAA.

FAQ question: “Are we correct in our thinking that phase in would be zero if, we currently have a site under contract, or we plan to make no personnel changes?”

FAQ answer by the FAA: “Yes, you are correct.”

Attachment to Eye Comments at page 21. From a review of their proposals, the ODRA cannot agree that there has been “disparaging”/disparate treatment of Eye vis-à-vis Pacific and Midwest. In their proposals, both Pacific and Midwest Weather recognized that “phase in” might not be needed for the great majority of CWO employees, since there is a high likelihood that incumbent personnel will be interested in retaining their positions. Yet, both provided detailed, well developed, discussions of the transition process they would engage in at sites where they were not the incumbent contractors, recognizing the potential for a variety of risks and addressing how those risks would be handled, including the steps they would take in the event incumbent contractor personnel opted not to continue with them, should they be awarded contracts under the procurement. AR, General Volume I, Tab 8, Proposal of Pacific Weather, Binder 2, pages 101-121; AR, General Volume I, Tab 11, Proposal of Midwest Weather, Binder 1, Tab 6.

It is evident that Eye and the Product Team disagree about how simple the task of transition is and how detailed a discussion of transition management should be as a result. As stated previously, “mere disagreement” with a Product Team’s Technical evaluation cannot serve as the basis for the ODRA recommending that a Product Team’s findings be overturned. *Raytheon Technical Services Company, supra*. Here, the ODRA cannot say that the [Deleted] rating assigned to Eye’s discussion of the Transition Management sub-element had no rational basis.

2. Overall Risk

The Product Team’s assessment of “Overall Risk” for Eye is confusing. Whereas the Technical Evaluation Report, an Addendum to the Integrated Service Team (IST) Report, contains a section entitled “Overall Risk” that indicates a rating of “**high risk**” for Eye, both in the original version (AR, Tab 15, Addendum, page A-33) as well as the version that was prepared as a result of the re-evaluation (AR, Tab 16, Addendum, page A-37), the IST Report itself, in both iterations, contains summary charts for Site Groups 9 and 10 that reflect an Overall Risk rating of Moderate (“M”). *See* AR, Tab 15, Table 14, Overall Summary, Site Groups 9 and 10, pages 20, 21; AR, Tab 16, page 2, ¶3, Replacement Tables for Site Groups 9 and 10. The Agency Response explains this difference as follows:

[Deleted]

AR, Vol. IV, pages 21-22. Responding to this explanation, Eye asserts that it had initially received a “high” risk rating, not only for its Technical proposal, but for its Business/Management proposal as well and that the Product Team was being manipulative in changing the “overall” rating to “medium” in order for it to look more reasonable:

The FAA states on page 21 of its legal memo that Eye Weather was given a high risk rating by the technical team and that was not the overall risk rating. However on the debriefing slides both the technical and Business/Management scores are listed and totaled and the overall risk is depicted as high.

The FAA also states on page 21 of the legal memo that the addition of the Business/Management portion of Eye Weather’s evaluation resulted in the medium risk upgrade awarded to Eye Weather. **This is in direct conflict to the Business and Management source selection document which declares: “Offeror L’s proposal was determined to present a high risk.”**

The Eye Weather Business/Management evaluation is rated high risk in the source selection as is the technical proposal. The debriefing slide faxed to Eye Weather just prior to the debriefing depicts Eye Weather as being an overall high risk and includes both Technical and Business and Management totals. The very next day, December 18, 2002, the contracting officer overnights Eye Weather a package of debriefing materials which includes a corrected debriefing slide depicting the overall evaluation risk as corrected and upgraded to medium risk level. The scoring totals did not change from the previous debriefing slide, only the risk level.

It appears the FAA manipulated the risk level in an effort to appear to be a more reasonable evaluation risk level. It does not appear possible for the Technical team to award Eye Weather a high risk level and the Business and Management team to award Eye Weather a high risk level and these high risk levels equal an overall medium risk level.

Attachment to Eye Comments at pp. 49-50 (emphasis added).

The Odra notes that, whereas the Business/Management Evaluation Team Report does indeed contain the statement quoted by Eye (**“Offeror L’s proposal was determined to present a high risk.”**), *see* AR, Tab 15, Business/Management Evaluation Team Report, page C-6, the Overall Summary charts for Site Groups 9 and 10 within the original IST Report to which the Business/Management Evaluation Team Report was appended both reflect an “M” rating for “Overall Risk.” AR, Tab 15, pages 20-21. How the IST reached a “Moderate” rating for

“Overall Risk” when both the Technical and Business/Management teams had found Eye to pose a “High” “Overall Risk” is not clear and not explained within either the original IST Report or the Addendum. *See* AR, Tabs 15 and 16. However, because the original IST Report – which contains the “M” rating – itself pre-dates the award and the post-award/post-protest debriefing, the ODRA finds no basis for the allegation that the “Overall Risk” rating was changed, let alone that any change was a “manipulative” effort for the Product Team to make itself appear more reasonable to the ODRA in response to Eye’s Protest.

The only real question pertaining to “Overall Risk” at this point is whether, once the Product Team eliminates the second “weakness” regarding the Leave Coverage sub-element and re-evaluates the Phase In/Phase Out Plan (*see* Conclusions and Recommendations below), Eye’s rating for “Overall Risk” should be revised to “Low.” This is something for the Product Team to determine and to justify as part of the recommended re-evaluation.

3. Prejudice

As the ODRA has noted previously, a protester must establish that the Agency’s acts or omissions about which it complains have resulted in actual prejudice or harm to it in terms of its ability to receive a contract award. *See Protest of A&T Systems*, 98-ODRA-00097.

In the present case, the ODRA agrees with two aspects of Eye’s Protest. First, it finds no rational basis for the assignment of the above-described “weakness” relating to purported “inconsistency” in connection with the Product Team’s evaluation of the Leave Coverage sub-element. Second, it finds the [Deleted] score assigned for Eye’s Phase In/Phase Out Plan to lack a rational basis. Because the previously revised Total Weighted Score for the Eye proposal, at [Deleted], was within [Deleted] of the “4” that the Product Team has stated would qualify an offeror as “Acceptable,” and because the ODRA cannot determine whether correction of these two items will result in Eye’s Total Weighted Score being in excess of that threshold, a possibility of prejudice exists. Under such circumstances, a re-evaluation is necessary.

D. Protest of Windsor Enterprises – Docket No. 02-ODRA-00252

Windsor's Protest of December 8, 2002, which was filed with the ODRA on December 9, 2002, is limited to a single issue and was filed prior to Windsor receiving a debriefing in this case.¹⁴ Windsor essentially challenges, as wrong and subjective, its rating of high overall risk and complains further that bidders were incorrectly evaluated based upon their financial ability to handle two groups rather than a single group. FF at 106.

It should be noted at the outset that, in accordance with the evaluation plan, the Contracting Officer essentially eliminated Windsor and seven other offerors based on the fact that their combined weighted Technical and Business/Management scores were less than the required numerical rating of "4" – *i.e.*, the minimum score necessary to be found "satisfactory." Windsor's Comments attempt to challenge this down-selection process. *See* Comments at 3. However, Windsor has failed to demonstrate that it was in any prejudiced as a result of the down-selection. Rather, substantial evidence in the record supports the finding that Windsor's Proposal was not competitive in any event. The Technical Evaluation Report breaks down the weighted risk ratings and prices of the competitors in the various groups. *See* FF 49. Windsor's combined total weighted score for Technical and Business/Management for Site Group 3 was [Deleted]; while the successful bidder, Midwest, had a total weighted score of 6.43. In other words, Windsor's total weighted score for Site Group 3 was [Deleted] lower than that of the successful bidder. *See* AR, Volume I, Tab 15, IST Report, Page 25. It should be noted in this regard that Windsor's Protest does not specifically challenge or provide evidence calling into question the ratings given to Midwest by the Product Team.

While Windsor score was [Deleted]% lower than that of successful offeror for Site Group 3, its price was only marginally lower. Midwest's raw offer price was \$8,425,620; while Windsor's price was \$[Deleted]. This represents a difference of [Deleted].

As was discussed above, based on the evaluation plan, the IST called for offerors to achieve a minimal rating of "4" in order to be found "acceptable." *See* FF 51 and 73. This was consistent with the AMS, which contemplates a down-selection process during the course of a procurement

¹⁴ Windsor did not submit a supplemental protest following its debriefing which was conducted on December 13, 2002. FF107. It did, however, submit Comments on the Agency Response on January 31, 2003.

that narrows the field of competition to those offerors “most likely to receive the award,” *i.e.*, those “ultimately which . . . will provide the FAA with the best value.” *See* AMS 3.2.2.3.1.2.1. Windsor’s scores for both Site Groups 3 and 11 were [Deleted]. Thus, it achieved little more than [Deleted] of minimum total weighted score of 4.0 deemed necessary to be considered “acceptable” for purposes of a contract award for either Site Group. Windsor’s Protest provides no basis to support a finding that the Contracting Officer or the Product Team acted arbitrarily or without a rational basis in scoring Windsor’s Proposal or in down-selecting Windsor during the competition. In any event, as noted above, Windsor’s total rated score is little more than [Deleted] of the successful bidder’s offerors score. Combined with a minimally lower price than that of the successful offeror, Windsor simply was not in line for an award of Site Group 3.

With respect to Site Group 11, neither Windsor nor the only other bidder for the Site Group achieved the minimum total rated score of 4 required in order to be found satisfactory. Windsor’s total weighted score was [Deleted]. Its price was [Deleted] and it was found to have been a high risk. The only other bidder had a total weighted score of [Deleted], price of \$[Deleted] and an identical “high” Overall Risk score. Even assuming that Windsor or the other offeror on Group 11 were viewed as eligible for award, Windsor’s total score was [Deleted]% lower than that of the other offeror, while its price was only [Deleted] lower. Thus, Windsor would not have been in line for award of Site Group 11, even absent the finding that neither it nor the other offeror met the minimum total weighted score to be considered “satisfactory.”

As is noted above, Windsor’s Protest focuses primarily on the high risk rating it received. Windsor attempts to argue that its Proposal posed no financial risk to the Agency. The current sites it was operating would be expiring as the newly awarded sites were being phased in. Thus, in Windsor’s view, there would be no financial strain on the company. *See* Windsor Protest at 1. Windsor further speculates that “perhaps bidders were incorrectly evaluated based upon their financial ability to handle two Groups rather than a single Group.” Windsor Protest at 2.

Windsor notes that it was prepared to finance at least one Group, utilizing [Deleted], *see* Windsor Comments at 2, notwithstanding the fact that the Solicitation specifically requested that offerors provide certified letters of credit from a financial institution. *See* FF 20. Windsor did

not protest this term of the Solicitation.¹⁵ Accordingly, there is no basis upon which the ODRA can conclude that the Product Team acted without a rational basis or arbitrarily in concluding that the financing arrangement proposed by Windsor posed a high risk.

Although Windsor attempts to rebut several portions of the Technical evaluation in its Comments, *see* FF 110-112, the ODRA finds in this regard that Windsor's allegations constitute mere unsupported disagreement with the Technical evaluation scoring and that Windsor has failed to meet its burden of proving that the scoring lacked a rational basis or that it was arbitrary or capricious. *See Protest of Raytheon Technical Services Company, supra*. For all the above reasons, the ODRA finds Windsor's Protest to be without merit.

E. Protest of IBEX Group, Inc. – Docket No. 02-ODRA-00254

1. Standing to File a Protest

Under the ODRA Procedural Regulations, a protest may only be brought by an "interested party." 14 C.F.R. §17.15(a). The term "interested party" is defined as follows:

An interested party, in the context of a bid protest, is one whose direct economic interest has been or would be affected by the award or failure to award an FAA contract.

14 C.F.R. §17.3(k). As the ODRA explained in *Protest of Rocky Mountain Tours, Inc.*, 01-ODRA-00183, this definition purposefully was patterned after the definition contained in the General Accounting Office ("GAO") Bid Protest Regulations. In this regard, as was noted in *Rocky Mountain Tours*, "the GAO consistently has held that, where a protester fails to demonstrate that it would be in line for an award, even were its protest to be sustained, the protest must be dismissed, since it would thus 'lack the direct economic interest necessary to be an interested party under General Accounting Office's Bid Protest Regulations.' [Citations omitted]." On the other hand, where the protest alleges grounds that, if sustained, could reposition the protester such that it would stand a reasonable chance for award, the matter should not be dismissed for lack of standing. *See Protest of Boca Systems, Inc.*, 96-ODRA-00008 (A

¹⁵ It should be noted in this regard that the Solicitation in this case specifically required that offerors provide evidence of financial ability to finance the two largest Groups for a period up to three months. *See* FF 20. To the extent that Windsor seeks to challenge such terms as part of its current Protest, the challenge is untimely. *See* 14 C.F.R. §17.15(a)(1).

motion to dismiss for lack of standing was denied, where the ODRA found that protester would be in line for award, if the protest allegations were sustained.).

In the present case, as stated above (FF 38), evaluators were required to score the proposals, including the Technical Factor and its sub-elements, based on the following specified adjectival ratings and corresponding point scores:

Adjective	Score
[Deleted]	

For purposes of the Technical evaluation, consistent with the relative degrees of importance indicated in Section M of the Unrestricted Solicitation (*see* FF 27 and 37 above), the Evaluation Plan called for the evaluators to score proposals based on the following weight percentages being applied to the specified Technical evaluation subfactors and sub-elements:

Subfactor A – Staffing Plans, etc. [Deleted]	
Subelement a – Staffing Plans and Sample Schedules	[Deleted]
Subelement b – Leave Schedules	
Subfactor B – Technical Implementation Plans [Deleted]	
Subelement a – Facility Training Plan	
Subelement b – Quality Assurance Plan	
Subelement c – Phase-In/Phase Out Plan	
Subfactor C – [Deleted]	
Subelement a – Technical Methodology and Approach	
Subelement b – Personnel and Financial Resources and Recruitment Management	
Subelement c – Transition Management	
TOTAL	100%

AR, Vol. I, Tab 5, Evaluation Plan, Attachment Two, CWO Scoring/Weighting, Part One. Under the Evaluation Plan, the Technical Factor was to be assigned an overall weight of 60%, and the Business and Management Factor was to be assigned a weight of 40%. *Id.*, Part Two.

Pursuant to this scoring and weighting regime, of the ten proposals submitted under the Unrestricted Solicitation, IBEX (Vendor D) was ranked [Deleted] for the Technical Factor, with an overall weighted Technical score of [Deleted], derived as follows:

	SUBFACTOR A		SUBFACTOR B			SUBFACTOR C			TOTAL	
VENDOR	Staff	Leave	Trng	QA	Phase	Meth	Pers	Trans	Unwtd	Wtd
D	[Deleted]									

See AR, Vol. I, Tab 15, Integrated Service Team Report, page 14, Table 8. The two awardees of Site Groups 13 through 16, MAB (Site Groups 13 and 15) and SERCO (Site Groups 14 and 16), designated as Vendors E and G, had total weighted Technical scores of [Deleted] and [Deleted], respectively. *Id.*

The IBEX Protest only challenges the scoring of the IBEX Proposal with respect to Technical Subfactors A and B, and asserts no complaint regarding the scoring of its proposal for Technical Subfactor C. IBEX also raises no protest concerning the scoring of the proposals of either MAB or SERCO. Assuming, for the sake of argument, that all of its Protest challenges were deemed meritorious and that IBEX received full credit under both Subfactors A and B – *i.e.*, “[Deleted]” adjectival ratings with corresponding raw scores of [Deleted] for each sub-element, after applying the specified weights for the sub-elements and for the Technical Factor as described above, IBEX conceivably could have achieved an overall unweighted Technical score of [Deleted] and an overall weighted Technical score of [Deleted]:

	SUBFACTOR A		SUBFACTOR B			SUBFACTOR C			TOTAL	
VENDOR	Staff	Leave	Trng	QA	Phase	Meth	Pers	Trans	Unwtd	Wtd
D	[Deleted]									

IBEX did not challenge the scoring for the Business and Management Factor for itself or any of the other offerors. For that Factor, the overall weighted score IBEX (Vendor D) achieved was [Deleted] the scores assigned to both SERCO (Vendor G) and MAB (Vendor E):

Business and Management Factor Evaluation

Vendor	Total Weighted Score
D	[Deleted]
E	[Deleted]
G	[Deleted]

See FF 49. Theoretically, were its Protest to be sustained on all counts, IBEX’s overall weighted point score could approach that of both MAB (Vendor E) and SERCO (Vendor G):

Theoretical Overall Total Weighted Point Scores

Vendor	Technical Total	Bus. & Mgt. Total	Overall Total
D	[Deleted]		
E			
G			

Nevertheless, as to Site Group 16 (where the price differential between the SERCO and IBEX proposals, \$[Deleted], would represent a savings of less than [Deleted] %), even if the IBEX overall risk rating were amended to “Low” rather than [Deleted], there could be no rational basis under the stated Solicitation evaluation criteria to award that Site Group to IBEX (Vendor D) rather than SERCO (Vendor G), given the nearly 4% gap that would still exist in their respective overall weighted point score totals and given that price was to be less important in the overall evaluation. See AR, Tab 4, Solicitation §M.3.

Although IBEX’s Protest raises a complaint regarding the lack of discussions, that complaint appears to be aimed at bolstering IBEX’s arguments concerning the scoring of Technical Subfactors A and B (*i.e.*, the arguments regarding “conflicts” and “inconsistencies” in IBEX’s staffing plan and target schedules) and the overall risk rating and does not allege that the scoring of Technical Subfactor C or the Business and Management Factor were somehow compromised by a lack of discussions or attempt to demonstrate how discussions would have alleviated the Product Team’s concerns regarding those aspects of IBEX’s proposal:

As explained above, the FAA downgraded IBEX's technical proposal on the basis of alleged "conflicts" and "inconsistencies" contained in IBEX's staffing plan and target schedules. The FAA then relied on the same allegations to assign IBEX's [sic] an overall risk rating of [Deleted]. Similarly, the TEP contains numerous assertions that IBEX's proposal lacked information or failed to provide details requested. As discussed above, these allegations are simply without merit.

However, even if it is assumed that some of these criticisms were accurate, the FAA's failure to seek clarification was clearly unreasonable and prejudicial to IBEX. Even where a solicitation states that no discussions are to be conducted prior to award, the discretion of the Contracting Officer to refrain from holding discussions is not unfettered. [Citations omitted] The exercise of the discretion not to seek clarifications is reviewable to ensure that it was reasonably based under the particular circumstances of the procurement. *Id.*

IBEX Protest at 22. Thus, even if IBEX's allegations concerning lack of discussions were found meritorious, they would be insufficient to establish its standing to challenge the award to SERCO of Site Group 16.

On the other hand, assuming that all of IBEX's protest grounds were sustained, including its Protest regarding the "[Deleted]" Overall Risk rating, it is conceivable that the SSO could determine, based on the price advantages offered by IBEX for Site Groups 13, 14 and 15, to award IBEX one or two of those Site Groups¹⁶ in lieu of MAB and/or SERCO. Under that assumption, the comparisons theoretically could be: (1) a gap in overall weighted point scores of nearly 4% versus a price savings of [Deleted] for Site Group 14; and (2) a gap in overall weighted points scores of 6.9% versus price savings of [Deleted] for Site Group 13 and [Deleted] for Site Group 15. Because an award to IBEX is possible, the ODRA cannot find that IBEX lacks standing to protest the awards of those three Site Groups.

2. Technical Evaluation

a. Subfactor A (Staffing Plans, etc.)

(1) Sub-element a – Staffing Plans and Sample Schedules

¹⁶ Pursuant to the Solicitation language, a contractor could receive awards for **no more than** two Site Groups. *See* AR, Tab 4, §L.5, "Number of Awards," page L-3. The Solicitation does not preclude limiting an award to a single Site Group for a particular contractor.

The Integrated Service Team (IST) Report, in terms of the IBEX proposal evaluation, identified the following strengths and weaknesses with respect to Technical Subfactor A, sub-element a:

Staffing Plans and Sample Schedules

Strengths:

[Deleted]

Weaknesses:

[Deleted]

AR, Tab 15, IST Report, page A-34.

“Inconsistencies” Between Staffing Plans and Sample Schedules

In terms of the alleged inconsistency between the IBEX staffing plans and its sample schedules, the IBEX Protest relates that the Product Team, during the debriefing, specifically cited to the proposed staffing for the Washington Reagan International Airport, stating that the proposed staffing [Deleted] was inconsistent with the IBEX Target Schedule for that site [Deleted]. Along the same lines, the Product Team evaluators noted that, whereas for four other sites, Allegheny Co., PA, Charleston, WV, Ft. Lauderdale, FL and Tampa, FL, the proposal states “Our proposed staffing for this site is to continue with the above staff” and shows [Deleted], the corresponding Target Schedule for the sites showed only [Deleted]. IBEX Protest, pages 8-9, and Attachment C, page 2.

IBEX, in its Protest, takes issue with this finding of “weakness,” based on an alleged staffing-related “inconsistency,” offering a lengthy discussion to demonstrate the lack of any “inconsistency.” See IBEX Protest, pages 12-15. In its Agency Response, the Product Team attempts to reframe the “weakness” as stemming from IBEX’s failure to define what it terms “Extra” employees and adds yet another factor, the confusion the Product Team allegedly encountered with IBEX’s full time equivalent (FTE) computations:

The root of the problem is that Ibex introduces the concept of an “Extra” employee, which is somehow distinct from either a “full time” or a “part time” employee. Nowhere in Ibex’s proposal is the term “extra” defined. This is

significant because however the term was intended, the evaluators were given no insight about the “extras” as compared to “full time” and “part time” employees.

* * *

The problem was exacerbated by Ibex’s total FTE, (Full Time Equivalent), count in the “legend” of [Deleted]. Again, there was no explanation for this.

AR, Vol. VI, Response to IBEX Protest, pages 2-3 .

IBEX, in its Comments, addresses the Product Team’s assertion regarding the lack of definition of the term “Extra” as being the “root of the problem” with IBEX’s treatment of its staffing schedules:

In the AR, the FAA provides a variety of new and contradictory explanations regarding its downgrading of IBEX's staffing proposal. In the Declaration of the Technical Evaluation Team ("TET") Chair, Cynthia Schauland (AR, Vol. I, Tab 1), the FAA claims that the real problem with IBEX's staffing plans and sample schedules was that the FAA evaluators were confused by IBEX's use of the term "Extra" to describe the additional employees to be utilized on an as-needed basis and IBEX's proposed FTEs.

* * *

Post hoc explanations and rationalizations offered in support of an award decision should be accorded limited consideration and little or no weight when not supported by contemporaneous documentation. [Citations omitted]. * * * While IBEX welcomes a proper re-evaluation of its technical proposal, it does not consider the post-hoc explanations of FAA officials offered in defense of its decision appropriate. * * * Nowhere in the contemporaneous record is there any mention, let alone criticism, of the use of the term "Extra" or of the FTEs proposed by IBEX. As a result, the FAA's post-protest explanations regarding its downgrading of IBEX's staffing plan reflect advocacy in defense of its previous decision rather than an explanation of the basis for that decision. Therefore, they should be afforded no weight.

Moreover, the FAA's post hoc explanations for the downgrading of IBEX's staffing plan are completely irrational. First, FAA claims that the use of the term "Extra" confused the evaluators and that the "evaluators did not know how and when these 'extras' fit into the staffing plans and corresponding sample schedules." AR, Vol. VI, p. 2. Similarly, the FAA now contends that its evaluators could not determine whether the "Extra" employees were full-time or part-time employees. *Id.* However, even the most cursory review of IBEX's

proposal and the contemporaneous procurement record reveals that these criticisms are utterly nonsensical.

[Deleted]

Therefore, IBEX's proposal very clearly explained how these "extra" employees would be utilized. Indeed, the FAA's own evaluators indicated that they understood exactly how and when IBEX would use of these extra part-time employees and specifically identified this aspect of IBEX's proposal as a strength:

[Deleted]

TER, p. A-34. Accordingly, despite FAA's post-protest claims to the contrary, the contemporaneous record indicates that the evaluators were not at all confused by IBEX's use of "Extra" part-time employees to work as-needed in response to contingencies. Therefore, your office should afford no weight to this contrived explanation because it is soundly belied by the contemporaneous evaluation record.

IBEX Comments, pages 15-17.

The IBEX Comments also provide a lengthy rebuttal regarding the Product Team's criticism of FTE computations:

It must be noted at the outset that the contemporaneous technical evaluation record provides no mention, let alone criticism, of IBEX's stated FTEs. Indeed, there is absolutely no support in the record for the FAA's current claim that confusion regarding IBEX's FTEs was the real reason for the substantial downgrading of IBEX's staffing plan. As a result, this post-hoc explanation should receive no weight whatsoever. The question in this protest is whether or not the FAA's actual evaluation and award decision was reasonable -- not whether the FAA is creative enough to now fabricate new reasons to defend an indefensible decision.

Second, the record reveals that any downgrading of IBEX's proposal on the basis of its FTEs would have been completely unreasonable and arbitrary. Part L of the SIR instructs offerors to "provide staffing numbers for both supervisory and non-supervisory personnel in the form of full time equivalents." SIR, p. L-8. The SIR also provides the following definition of FTE:

A FTE is the total number of regular straight-time hours (i.e., not including overtime or holiday hours) worked by employees divided by the number of compensable hours applicable to each fiscal year. Annual leave, sick leave, compensatory time off and other

approved leave categories are considered to be "hours worked" for purposes of defining full-time equivalent. (To determine FTE employment, the total number of regular hours (worked or to be worked) is divided by the number of compensable hours applicable to each fiscal year. For a year of 260 compensable days, the divisor is 2,080; and for 261 days, 2088).

(emphasis added) SIR, p. C-27.

In accordance with these requirements, IBEX properly calculated and presented the FTEs for each site in its proposal. An example for the Tampa, FL site is found on page 30 of IBEX's proposal:

[Deleted]

AR, Vol. I, Tab 14, Volume II Technical Proposal at p. 30. [Deleted]. Therefore, contrary to the claim in the AR, there is nothing inconsistent between the Tampa FTE and the corresponding sample schedule. Moreover, because the number of vacation days, sick days, etc. to which an employee is entitled varies with the employees seniority, the additional hours that must be added to the base labor hours of 8760 varies from site to site. It is for this reason that there are slight variations in the FTEs identified by IBEX from site to site -- even though the coverage requirements are the same.¹⁷

While the SIR did require the offerors to submit FTEs for each site, there was no requirement in the SIR that offerors provide, in the technical proposal, a detailed explanation of the numbers supporting that calculation. To the extent that the FAA was confused regarding this issue, it could have very easily sought clarification from IBEX or merely looked to other portions of IBEX's proposal to locate the supporting data. It is submitted that no such clarification was sought because concerns regarding IBEX FTEs have only been manufactured in response to this protest. If indeed the FAA actually had concerns regarding this issue, it should have (as required by AMS § 3.2.2.3.1.2.2 and discussed more fully below) engaged in communications with IBEX to seek clarification.

See IBEX Comments, pages 17-19.

The ODRA finds merit in IBEX's arguments on both counts. The Product Team argument regarding the lack of definition for the term "Extra" constitutes the kind of *post-hoc* rationalization that the ODRA will not ordinarily afford weight in the absence of support in the

¹⁷ **IBEX Footnote:** "For at least one site, awardee Serco provided a similar total of [Deleted]. AR, Tab 11 ("Communications between FAA and SERCO"), p. 28. Accordingly, any suggestion by the FAA that the numbers should not have varied from [Deleted] respectively is simply incorrect and not credible. See AR, Vol. VI, p. 3."

contemporaneous record. *See Protest of Enroute Computer Solutions*, 02-ODRA-00220. Furthermore, from the ODRA's perspective, the use of extra personnel on an unscheduled as-needed basis was adequately explained within the context of the IBEX proposal. At least one of the evaluators appears not only to have understood, but to have appreciated what was intended by the term "extra." More particularly, IBEX had been assigned a "strength" for the "Leave Coverage" sub-element on the basis that its use of [Deleted]. *See* III.E.2.a(2) below. The "weakness" assignment under this "Staffing Plans and Sample Schedules" sub-element is completely at odds with such an appraisal of "strength." For this and for the other reasons stated by IBEX, the ODRA finds the assignment of a weakness for alleged inconsistency between the IBEX staffing schedules and target plans to have been without a rational basis. Likewise, for the reasons amply demonstrated by IBEX, there is no rational basis for faulting its FTE computations. To the extent the numeric and/or adjectival scoring of Technical Subfactor A, sub-element a, was impacted by an incorrect perception of IBEX's FTE computations, that scoring similarly lacked a rational basis.

The Presence of Unauthorized Personnel

The evaluator(s) who assigned IBEX a weakness for "the presence of unauthorized personnel" by reason of its stated intention to have prospective CWO trainees on site for training purposes obviously misinterpreted the meaning and intent of the Solicitation provision (Paragraph C.5.1) regarding the prohibition of "unauthorized personnel." As has been correctly suggested by IBEX (*see* IBEX Protest at 17, *citing* SIR Section C 5.12), the Solicitation itself contemplates the presence of trainees for the taking of observations. The presence of trainees was, in the words of SIR Paragraph C.2, the "conduct of business at the contract weather office . . . which is called for in this contract." Moreover, this purported "weakness" is again directly at odds with a "strength" that was assigned to IBEX, in connection with the Team's evaluation of Facility Training. *See* III.E.2.b(1) below. ("Vendor stated that the vendor would have one potential new hire in training at each site at all times. This would assure consistent level of proficiency in performance by the vendor." AR, Vol. I, Tab 15, IST Report, page A-34.) The "unauthorized personnel" weakness in connection with Subfactor A, sub-element a, was thus clearly inappropriate and without a rational basis.

The Supervisor Working Unauthorized Hours

Finally, with respect to Subfactor A, sub-element a, the assignment of a weakness to IBEX is based on the misperception that it planned to permit its supervisor to work “unauthorized hours.” The Solicitation (SIR Section C, paragraph C.4.4) called for the “normal duty hours” of the contractor’s supervisor to be 8:00 A.M. to 4:00 P.M. In strict compliance with this specification, IBEX’s staffing schedules showed the supervisors at each site working from 8:00 A.M. to 4:00 P.M. *See* IBEX Protest, Attachment D, page 24. What apparently confused the evaluators was the statement contained in the narrative staffing plan that the supervisor would be “on duty for the preponderance of the normal business hours of 8am-5pm.” *See* IBEX Protest, Attachment D, page 23. The evaluators, it seems, equated the term “duty hours” and “business hours,” concluding somehow that IBEX intended for its supervisors to be on duty regularly until 5 P.M., the end of IBEX’s planned “business hours,” and that this would be violative of the Solicitation in terms of when the supervisor should “normally” be “on duty.” This conclusion was inconsistent with the statement contained in IBEX’s staffing plan that immediately preceded its reference to “business hours,” *i.e.*, the statement that “in no event will anyone be scheduled more than 40 hours per week.” Further, the statement regarding the supervisor being on duty for the “preponderance” of the “normal business hours of 8am-5pm” was entirely consistent with the Solicitation requirement that the supervisor’s duty hours be 8:00 A.M. to 4:00 P.M. The assignment of a weakness in this connection was an apparent misinterpretation by the evaluators and had no rational basis.

(2) Sub-element b – Leave Schedules

As to Technical Subfactor A, sub-element b, the IST Report had the following to say with respect to the IBEX proposal:

Leave Coverage

Strengths:

[Deleted]

Weaknesses:

[Deleted]

AR, Tab 15, IST Report, page A-34.

In its Protest, IBEX recognized that the scoring for leave coverage was directly tied to the Product Team's perception of how IBEX had handled staffing plans and sample schedules, and responded accordingly:

The second element the FAA considered under Factor I, Subfactor A was Leave Coverage. At the debriefing the FAA indicated that it reduced IBEX's score under this element for precisely the same reasons stated above. Although the TEP indicated that the FAA found that IBEX's proposed [Deleted] was a "strength" that [Deleted]. (Attachment B at p. A-34). the FAA irrationally and inconsistently found that IBEX's use of more than one person as an "Extra" created a "conflict of information" that precluded the evaluators from ascertaining whether IBEX had sufficient coverage during leave. The supposed conflict was again based upon situations where IBEX had more than one individual identified as being available as an "Extra" observer. However, IBEX's schedules very clearly show appropriate coverage for leave situations. Indeed, reading the schedule is quite simple. The samples provided plainly demonstrate that when a core staff member is absent IBEX will use its part-time and Extra personnel to ensure the site is fully manned. The FAA's downgrading of IBEX's proposal under this element was also unreasonable and without any factual basis.

The Product Team, in its Agency Response, confirmed that its scoring of Subfactor A, sub-element b, Leave Coverage, was indeed a by-product of its scoring of sub-element a, Staffing Plans and Sample Schedules, and was based on its perception of "inconsistencies" in that regard. The Response also criticizes the IBEX proposal as being "scant on detail" with respect to Leave Coverage:

Leave Coverage. Protest p. 15, proposal p.4, Tech evaluation p. A-34.

Ibex assails the findings made by the evaluation team respecting the subfactor, *Leave Coverage*, both because it disagrees with the negative findings, and because it perceives a contradiction with a noted *strength*. While it is true that the evaluation team did find Ibex's use of [Deleted] as a *strength*, the team also saw a weakness in the same lack of specificity and inconsistencies found in the staffing plan.

Ibex's Leave Coverage Plan, (proposal, p. 4), consisted of [Deleted]. Any objective review, however, cannot conclude but that the team acted rationally by declining to assign a score of [Deleted] to these two paragraphs. Given the definitions contained in the Evaluation Plan, even the rating of [Deleted] was generous.

IBEX, in its Comments, provided the following brief reply for this sub-element:

The second element the FAA considered under Factor I, Subfactor A was Leave Coverage. The procurement record indicates that the FAA severely downgraded IBEX's rating for this factor because of the alleged "conflicts" and "inconsistencies" in IBEX's staffing plan. As explained above, the FAA irrationally and inconsistently found that IBEX's use of more than one person as an "Extra" created a "conflict of information" that precluded the evaluators from ascertaining whether IBEX had sufficient coverage during leave. The supposed conflict was again based upon situations where IBEX had more than one individual identified as being available as an "Extra" observer. However, IBEX's schedules very clearly show appropriate coverage for leave situations. Indeed, reading the schedule is quite simple. The samples provided plainly demonstrate that when a core staff member is absent IBEX will use its part-time and Extra personnel to ensure the site is fully manned. The FAA's downgrading of IBEX's proposal under this element was also unreasonable and without any factual basis.

IBEX Comments, page 20.

The ODRA notes that the IST, when describing a weakness for this Technical sub-element, does **not** say that the IBEX proposal was "scant on detail" generally. Rather, the IST Report describes the weakness as being a lack of "sufficient detail **due to the conflict of information presented in [the] narratives**" for staffing plans and schedules. *See* AR, Tab 15, IST Report, page A-34. The Product Team's arguments regarding how much more detailed other proposals may have been in addressing the sub-element is, again, a *post hoc* rationale that has no relationship to or support in the IST's contemporaneous record as to why the IBEX proposal had been assigned a weakness and why it had been rated as merely [Deleted] for that sub-element. Such a rationale cannot be accorded significant weight. *Protest of Enroute Computer Solutions, supra*. For the same reasons the ODRA rejects the Product Team position regarding Subfactor A, sub-element a, it finds the scoring of sub-element b to have lacked a rational basis.

b. Subfactor B (Technical Implementation Plan)

(1) Sub-element a – Facility Training

The IST Report identified the following strengths and weaknesses in IBEX's proposal for this sub-element:

Facility Training

Strengths:

[Deleted]

Weaknesses:

[Deleted]

AR, Vol. I, Tab 15, IST Report, pages A-34 and A-35.

In its Protest, IBEX presents the following with respect to the Product Team's scoring of its proposal regarding facility training:

The FAA significantly downgraded IBEX's proposal based on alleged deficiencies in IBEX's Facilities Training Plan. However, an examination of the record reveals that these alleged weaknesses are also without factual support. For example, the TEP identifies the following weaknesses in IBEX's plan: (1) "Vendor did not state what specific training pre-certified employees would receive, other than familiarization," (2) "The vendor stated only potential employees with no experience would be trained and did not furnish a plan for refresher training," and (3) the "[v]endor did not describe proficiency training."¹⁸ (Attachment B at p. A-35). However, Volume II, Section B2 of IBEX's proposal specifically contained the following extensive discussion of training that responds directly to these issues:

[Deleted]

(Attachment D at p. 55). Accordingly, the FAA's downgrading of IBEX's proposal on the basis of these alleged weaknesses is unreasonable and could only have resulted from a complete failure to even read IBEX's proposal.

Similarly, there is no merit to the FAA's claim that IBEX's proposal failed to address LAWRS training or certification training. This criticism improperly suggests that there is a distinction between LAWRS training and certification

¹⁸ **IBEX Footnote:** "The alleged lack of 'proficiency training' is actually listed twice in the TEP's list of alleged weaknesses in IBEX's training proposal. Counting this alleged weaknesses twice only further evinces the unreasonable and illogical nature of the TEP's evaluation of IBEX's proposal."

training when there is not. LAWRS training and certification are the same thing. As indicated in its proposal, IBEX has provided LAWRS training to well over 100 weather observers during the last six years. By contrast, on information and belief, the awardees of the subject groups have not provided such training to a single employee. Therefore, the FAA's evaluation of IBEX's Training Plan was clearly unfounded and/or unreasonable. See *Protest of Computer Associates International, Inc.*, 00-ORDA-00173; *Protests of Camber Corporation and Information Systems & Networks, Inc.*, 98-ODRA-00079 and 98-ODRA-00080.

IBEX Protest at pages 17-18. The Product Team provided the following reply in its Agency Response:

Facility Training Plan. Protest p. 17, Proposal p. 54, Tech evaluation pp. A-34-35.

The team noted [Deleted] strength and [Deleted] weaknesses here, resulting in a rating of [Deleted] for the subfactor. The first point to note is that some of the items that Ibex claims it did address were actually in its *Quality Assurance Plan*, which made the evaluation more difficult. Nonetheless, the team did evaluate and rate them, though some were still deemed deficient.

Per SIR Section C.5.0, there were three types of training that the team expected the offerors to discuss: initial training, refresher/proficiency training, and training necessitated by the introduction of new equipment or procedures. As the first “weakness” bullet of the tech evaluation notes, (P. A-35), Ibex addressed only [Deleted] training. There is mention in the QA plan of a [Deleted] test, (p. 55), but no indication of [Deleted].

Another aspect missing from Ibex’s plan was any reference to the [Deleted] referenced in SIR Section 2.0 and outlined in FAA Order 7900.5. The evaluators sought [Deleted]; a complete lack of explanation was considered a deficiency.

The bullet mentioning [Deleted]. As pointed out in the debriefing, NWS is responsible for certifying all civilian weather observers. FAA personnel proctor the written certification examinations given at FAA facilities. Individuals who are not government employees are not authorized to proctor written examinations.

The protest also contests the technical finding that there was no mention of LAWRS training. This is another area where Ibex has misstated the nature of the technical finding. Contrary to the protest, the issue was not whether there was a distinction between LAWRS and certification training; rather, the noted weakness was that the proposal never really explained how the company would provide the training for either.

LAWRs, in short, is a program to train those air traffic control specialists located at a limited aviation weather reporting station who have limited weather reporting duties for surface aviation weather. As Ibex notes, the training is indeed similar to the standard certification training by NWS. The problem here was that even though Ibex described [Deleted]. Again, Section 2.0 of the SIR discussed minimum standards of performance in some detail. Ibex, however, did not explain how it would achieve those standards. Rather, it simply noted that the company would [Deleted].

This contrasts with MacAulay Brown's training plan, in which the firm explained its approach to [Deleted]. This was a strength.

AR, Vol. VI, Response to IBEX Protest, pages 5-6.

In its Comments on the Agency Response, IBEX addresses the Agency's points regarding facility training in the following manner:

In the AR, the FAA attempts to explain this evaluation by making even more irrational and factually incorrect statements that are not supported by the contemporaneous procurement record:

... Ibex addressed only [Deleted] training. There is mention in the QA plan of a [Deleted] test, (p. 55), but no indication of when or how [Deleted]. Another aspect missing from Ibex's plan was any reference to the [Deleted] referenced in SIR Section 2.0 and outlined in FAA Order 7900.5

(emphasis in original) AR, Vol. VI, p. 5. The patent irrationality of these statements is self-evident. First, the lengthy quote from IBEX's proposal provided above clearly states that the training discussed is required to "ensure the continuing skills" of "all of our weather observers."

The IBEX proposal also included a sample "[Deleted] test" that would be given to each employee every six months. The FAA's current claim that this does not constitute "[Deleted] training" is simply incredible and only further demonstrates the wholly unreasonable nature of its evaluation of IBEX's proposal.

Second, the FAA's current claim that IBEX failed to make "any reference" to "FAA Order 7900.5" is simply wrong. As the quoted material above clearly indicates, IBEX specifically referenced this document: "[i]n addition [Deleted] the FAA Order 7900.5B (Surface Weather Observing manual) [Deleted]." (emphasis added) AR, Vol. I, Tab 14, Volume II, Technical Proposal, p. 55. Accordingly, even the FAA's post-protest explanations are riddled with factual inaccuracies and completely unreasonable explanations.

Similarly, there is no merit to the FAA's claim that IBEX's proposal failed to address LAWRS training or certification training. This criticism improperly suggests that there is a distinction between LAWRS training and certification training when there is not. LAWRS training and certification are the same thing. Indeed, in the AR the FAA now admits that certification and LAWRS training are the same and that IBEX did actually propose to [Deleted]. *See* AR, Vol. VI, p. 6. Now, however, the FAA claims that the real problem with IBEX's LAWRS training is that it failed to make references to the [Deleted] contained in Section 2.0 of the SIR. *Id.* As indicated in its proposal, IBEX has provided LAWRS training to well over 100 weather observers during the last six years. The FAA is well aware of this fact. Moreover, nothing in Section 5.0 ("Personnel Training and Certification Requirements") of the SIR requires an offeror to make reference to [Deleted] in describing its proposed training. *See* SIR, Section C, 5.0. Accordingly, the FAA's new post-protest explanations are unreasonable and not supported by the contemporaneous procurement record.

For all of the reasons stated above, the FAA's evaluation of IBEX's Training Plan was clearly unfounded and/or unreasonable. *See Protest of Computer Associates International, Inc.*, 00-ORDA-00173; *Protests of Camber Corporation and Information Systems & Networks, Inc.*, 98-ORDA-00079 and 98-ORDA-00080. IBEX lost significant points based on the alleged weaknesses discussed above. Had the FAA properly and reasonably evaluated this aspect of IBEX's proposal its technical score would have been much higher and its "price-per-point" ratio would have been much lower. When combined with the significant price advantage offered by IBEX's proposal, a proper technical evaluation in this area would have clearly resulted in a finding that IBEX's proposal presented the best value. As a result, the FAA's award decision cannot stand.

IBEX Comments, pages 25-26.

Based on its review of the Solicitation requirements for training and certification as set forth in SIR Sections C.5.1 and C.5.2 and for the submission of a facility training plan as set forth in SIR Section L.16.2 and its review of the meager, *i.e.*, less than one-page, Facility Training Plan offered by IBEX in its proposal (AR, Vol. I, Tab 14, page 54), the ODRA cannot agree with IBEX's assessment. SIR Section L.16.2 provides:

Section 1 – Facility Training Plan – The Offeror shall provide a **detailed** Facility Training Plan which addresses **all** of the requirements in Section C. This plan shall address **how** the Offeror shall approach training employees **with different qualifications**.

AR, Vol. I, Tab 4, page L-8 (emphasis added). In terms of the "requirements in Section C," Section C.5.1 calls for the contractor to be "responsible for the training and proficiency of all

contractor personnel assigned the duties of providing weather observations under this contract.” It goes on to say: “This training includes operation of ASOS equipment, in addition to the back-up equipment located at the CWO, as well as the LAWRS certification training. This includes any training required by changes in equipment, procedures, or regulations.” That Solicitation Section states that the Government “shall provide the CWO . . . with a copy of the ASOS Operator Training Course and at least one copy of the ASOS Operator Course Student Workbook, and a copy of the ASOS Ready Reference Guide.” As to certification, the Solicitation (SIR Section C.5.2) not only details the requirements to obtain certification (including meeting certain vision standards, successfully passing a closed-book examination with a score of 80% or better, and demonstrating to the National Weather Service (NWS) “that the observer can accomplish a correct observation, and meet all transmission schedules”), but it emphasizes (in two places having identical language) the need for observer certificates to be “current, station specific, and immediately available to the Government for review.”

From this language, one reasonably would expect to see an offeror’s proposal containing a facility training plan that provides some detail not only on **how** the offeror intends to furnish its employees with LAWRS certification training and training on the operation of the ASOS equipment and backup equipment current at each location, but on **what specifically the offeror intends to do** to train employees on any new equipment, procedures, or regulations that may be introduced during the course of contract performance. One also would expect some mention of **how the offeror would approach** making sure that prospective CWOs are able to meet NWS certification standards and requirements and of how the offeror plans to keep the weather observers’ certifications current. Further, one would expect some discussion of “site specific” training, *i.e.*, those aspects of training that may be unique to individual CWO sites. Measured against these reasonable expectations, based on any objective analysis, the IBEX Facility Training Plan was inadequate.

The IBEX Plan starts out by stating that IBEX has had past success in training, but says nothing about how training was accomplished in order to achieve that success:

[Deleted]

Next, the IBEX Facility Training Plan has two paragraphs that parrot what is already stated in the Solicitation regarding a contractor's responsibility, the materials and resources that will be available from the Government, as well as what will be required to obtain NWS certification, but provide no additional detail on the IBEX approach to how training is to be conducted, and conclude with an assumption regarding what the Government staff will provide in terms of support to IBEX:

[Deleted]

The Plan then proceeds to delegate all responsibility for training to the individual Station Managers (STMs), who are to do "extensive, in-depth one-on-one training" of prospective employees. It also seems to shift responsibility for training to the prospective employees themselves – who are to engage in "independent study." Nothing is said about how these individuals are to fulfill these responsibilities and nothing is mentioned about guidance being furnished to assure that uniform, quality training standards are developed and maintained throughout any Site Groups that are to be awarded the offeror. Further, nothing whatsoever is said in the Training Plan regarding training of anyone but prospective new hires. In other words, the Plan is silent about how training of previously certified individuals already on the IBEX payroll is to be conducted, in order to assure that their skill levels are current and site-specific, and that they know how to deal with any changes that may occur in the equipment, procedures or regulations. The only mention in the Facility Training Plan of "pre-certified employees" relates to the kind of welcome and orientation they are to receive, how they are to tour the facility and be supplied with W-4 forms, etc. AR, Vol. I, Tab 14, page 54.

Moreover, the proposal language relied on in IBEX's Protest as providing an "extensive discussion of training," language that appeared in the IBEX Quality Assurance Plan and not in its Facility Training Plan, says nothing whatsoever about how training is to be approached and conducted. Why IBEX thinks a description of how errors are to be marked – whether by "over-writing" or by means of a "single black line" through an "erroneous entry" – is somehow a statement of how training is to be done is utterly inexplicable.

In short, regardless of whether or not the ODRA concurs fully with each of the many items of weakness enumerated by the evaluators in the IST Report (although the ODRA does note that several weaknesses have never even been mentioned by IBEX, *e.g.*, the finding regarding its failure to address “training required due to changes in equipment/procedures”), and although the ODRA agrees with IBEX that two of the identified weaknesses do overlap to a degree (“proficiency training” is indeed mentioned in two bulleted weaknesses), the IBEX Facility Training Plan is patently deficient in terms of what is contemplated by the Solicitation for such a plan. For this reason, the ODRA cannot conclude that the assignment of a “[Deleted]” rating for this aspect of the IBEX proposal lacked a rational basis.

(2) Sub-element b – Quality Assurance (QA)

The IST Report contains the following assessment of strengths and weaknesses with respect to sub-element b, Quality Assurance, in IBEX’s proposal:

Quality Assurance (QA)

Strengths: [Deleted]

Weaknesses: [Deleted]

AR, Vol. I, Tab 15, IST Report, page A-35.

In its Protest, IBEX explains why it believes this evaluation to be seriously flawed:

The procurement record indicates that the FAA severally [sic] penalized IBEX for various alleged omissions in its Quality Control approach proposal. However, a basic review of IBEX's proposal reveals that the vast majority of the allegedly missing information was specifically provided as requested.

For example, in connection with its evaluation of Quality Assurance portions of IBEX's proposal the TEP identified the following significant weaknesses that presumably led to IBEX's low rating in this area:

[Deleted]

(Attachment B at p. A-35). Neither criticism is valid.

First, IBEX provided in its proposal a two-page discussion of its Quality Assurance Plan including: (1) the requirement that all observers complete eight manual observations per month; (2) the procedures used to identify and correct

any errors; (3) the procedures used to review and grade the required manual observations; (4) the remedial training required of any observer making an error; (5) the requirement that all observers take a mandatory weather proficiency test every six months; (6) procedures used to check and correct equipment irregularities; and (7) workplace policies designed to insure quality performance. (Attachment D at p. 55). This information in and of itself covered the basic QA requirements of the SIR.

In addition, IBEX's proposal included the following clear statement:

[Deleted]

(Id.) (emphasis added).

The FAA's comment that IBEX "failed to show a relationship between the submitted manual and the requirement for quality assurance plan" is simply wrong. IBEX plainly indicated throughout its Quality Assurance section that it would use a SDM at each site. The sample SDM provided included specific "quality control procedures," which augmented the more general description of IBEX's quality control plans set forth in the text of its proposal. Additionally, IBEX clearly advised the FAA that its SDM at each site would be "similar in content and detail" to the sample provided. Thus, evaluating IBEX's quality control plans fairly would require the FAA to simply review the QA section of IBEX's proposal and the more specific procedures set forth in the SDM. However, it is clear that the FAA failed to review the SDM at all. This failure greatly prejudiced IBEX's evaluation score under this element.

Similarly, although the FAA complained that IBEX did not include a plan for dealing with unforeseen events, this is plainly not true. Volume II, Section C 2 of IBEX's proposal is entitled "Emergency Situation Plans" and detailed IBEX's plans for dealing with unforeseen events as required by the SIR. In particular, this Section of IBEX's proposal specifically included a plan for dealing with power outages. (See Attachment D at p. 60). IBEX's SDM also includes procedures for handling emergency situations.

Accordingly, an examination the record plainly reveals that the FAA's evaluation of IBEX's Quality Control Plan was significantly flawed and cannot stand.

IBEX Protest, pages 18-20 (emphasis in original).

The Product Team rejected these arguments, defending its evaluation based on an assertion that IBEX once again failed to specify in its plan **how** quality was to be assured, more particularly how IBEX planned to meet the standards of FAA Order, 7900.5, and further based on a comparison of the IBEX plan with that offered by MAB:

Quality Assurance Plan. Protest p. 18, Proposal p. 55, Tech evaluation p. A-35

This is a subfactor in which the team noted enough deficiencies to warrant a rating in the [Deleted] range. There are three distinct negative findings on p. A-35 of the evaluation, but what they cumulatively portray is a lack of specificity in how Ibex would achieve its professed goals.

For example, the first paragraph on proposal p. 55 proclaims that the company will "[Deleted]." As a general proposition, this is laudable, but there is no explanation of what the standards are, how they will be achieved, or reference to the relevant SIR Section, C.2.1. More importantly, the plan nowhere references or addresses the controlling FAA Order, 7900.5, or how specifically the company will meet the standards therein. Rather, Ibex relied heavily on its submission of a sample "Station Duty Manual" from an existing site. While this sufficed to demonstrate that the firm had a basic understanding of QA procedures, the team found that it did not warrant a [Deleted] rating.

Here, since the Agency is attempting to justify a [Deleted] rating, it helps to contrast Ibex's plan with that of the awardee, MacAulay-Brown. The evaluators were clearly impressed with many aspects of MacAulay's QA plan, as shown by these findings:

[Deleted]

See evaluator raw score sheets, attachment #1. In sum, the evaluators found numerous strengths and innovations in the MacAulay proposal that added value. To be sure, one evaluator also found several weaknesses in MacAulay's QA plan, including [Deleted]. This however, only reinforces the fundamental point of this whole exercise. Every offeror had strengths and weaknesses- some more than others. On balance, however, the QA findings for MacAulay were overwhelmingly positive, while Ibex's were almost entirely negative. That was the distinction between a [Deleted] and a [Deleted] rating.

AR, Vol. VI, pages 6-7.

In its Comments on the Agency Response, IBEX again criticizes the Product Team for resorting to *post hoc* rationalizations and asserts that its Quality Control Plan was complete as submitted:

In the AR, the FAA does not even attempt to address these [Quality Control Plan related] issues. Instead, the FAA proffers a new claim that the real problem with IBEX's quality plan was that the "plan nowhere references or addresses the controlling FAA Order, 7900.5, or how specifically the company will meet the standards therein." AR, Vol. VI, p. 6.¹⁹ However, once again, the post-hoc

¹⁹ In her declaration, the TET Chair provides the following explanation of the FAA's new argument in support of the evaluators' rating of IBEX's proposed quality plan:

explanation offered by the FAA is simply devoid of any merit. IBEX presented a narrative of its Quality Assurance Plan on page 55 of its Technical Proposal. This plan specifically makes reference to and explains how IBEX plans on meeting the standards contained therein:

[Deleted]

(emphasis added) AR, Vol. I, Tab 14, Volume II, Technical Proposal, p. 55. Accordingly, even the FAA's post-hoc attempts to explain its evaluation of this aspect of IBEX's proposal are completely unreasonable and factually inaccurate.

An examination of the record plainly reveals that the FAA's evaluation of IBEX's Quality Assurance Plan was significantly flawed and cannot stand. *See Protest of Computer Associates International, Inc.*, 00-ODRA-00173; *Protests of Camber Corporation and Information Systems & Networks, Inc.*, 98-ODRA-00079 and 98-ODRA-00080.

IBEX Comments, pages 27-28.

As was noted above, *post hoc* rationalizations will only be given weight when they are supported by the contemporaneous record, *Protest of Enroute, supra*, and, in this instance, the contemporaneous record shows that IBEX's Quality Assurance Plan was not downgraded because of its perceived failure to demonstrate how the contractor would satisfy the standards of FAA Order, 7900.5. Nevertheless, upon review of the Solicitation requirements pertaining to quality control and the submission of a Quality Control Plan and of the Plan submitted by IBEX, the ODRA concludes that the evaluators had a rational basis in assigning at least two of the three specific weaknesses under protest.

Section L.16.2 of the SIR requires that offerors provide "a detailed Quality Assurance Plan which addresses all of the requirement[s] in Section C. . . ." Notwithstanding that IBEX's Quality Assurance Plan does appear to address aspects of quality assurance, including the correction of [Deleted]. More specifically, SIR Paragraph C.8.1.2 requires, in terms of the Quality Assurance Plan, that "initiative" be taken "in the case of unforeseen event to obtain

The Technical Evaluation Report outlined [Deleted] relate the performance standards in Section C.2.1 and the requirements in the controlling FAA Order, 7900.5 and the references contained within that Order.

AR, Vol. I, Tab 1, p. 5.

required data and make it available to the users.” SIR Paragraph C.8.1.3 speaks of the contractor having “a thorough knowledge of instrumental capabilities and limitations, such that suspected outages or malfunctions can be called to the attention of the appropriate parties.” Nothing in the IBEX Quality Assurance Plan speaks to the contractor acquiring and maintaining a “thorough knowledge of instrumental capabilities and limitations” in this regard or even hints at reports being made to cognizant FAA officials or other interested parties in cases of suspected or actual outages or malfunctions.

Further, SIR Paragraph 8.1.1 states:

Within fifteen (15) days after contract award, the contractor shall furnish to the Contracting Officer two (2) copies of a Quality Control Plan for approval by the CO. Upon approval by the CO, no further changes shall be made to the plan by the contractor without prior written approval of the CO.

Nothing in the IBEX Quality Assurance Plan makes mention of how IBEX would prepare the required Quality *Control* Plan (which the ODRA takes to be something separate and apart from the Quality *Assurance* Plan) and submit it within 15 days of contract award. Thus, the ODRA cannot say that there was no rational basis for the evaluators to have assigned IBEX a weakness for not having included such mention of this Section C quality assurance requirement as part of the proposal’s Quality Assurance Plan.

As to the final weakness, *i.e.*, [Deleted], it is not clear why this purported failing should have warranted the assignment of a weakness. For one thing, the submission of such an [Deleted] was never a Solicitation requirement. It was clearly something extra that was meant to lend credibility to IBEX’s claim in the Quality Assurance Plan it submitted that [Deleted]. Also, the Quality Assurance Plan does draw at least some connections between [Deleted], certainly a quality control assurance measure. Thus, there does not appear to have been a rational basis for assignment of this one weakness in connection with the Quality Assurance Plan evaluation.

(3) Sub-element c – Phase In/Phase Out (PI/PO)

The IST Report contains the following assessment of strengths and weaknesses with respect to sub-element c, Phase In/Phase Out, in IBEX’s proposal:

Phase In/Phase Out (PI/PO)

Strengths: [Deleted]

Weaknesses: [Deleted]

AR, Vol. I, Tab 15, IST Report, pages A-35 and A-36 (emphasis in original).

The IBEX Protest appears to respond to the first two of these identified “weaknesses” but omits any mention whatsoever of the last two:

The FAA also criticized and downgraded IBEX's proposal based on its Phase In/Phase Out plan for several equally unfounded reasons. Specifically, the TEP identified the following weaknesses in this portion of IBEX's proposal: (1) [Deleted].

First, contrary to FAA's claims, the SIR does not require that PI procedures begin "on the first day of the contract." Instead, the SIR merely provides:

7.2 Initial Phase-in Period. For purposes of this SOW, the initial transition period shall be defined as the period between contract awards to total performance of all requirements, in this case no more than 2 calendar days. The transition period is the time between contract award and the contractor's ability to fully perform all requirements under the contract, but not later than October 1, 2002.

Accordingly, the SIR simply contemplates that there will be a two-day PI period after contract award which is completed prior to October 1, 2002. Consistent with this portion of the SIR, IBEX's proposal contained the following statements regarding its PI/PO plan:

[Deleted]

(Attachment D at p. 57). Accordingly, there is nothing inconsistent between IBEX's proposed timing of PI procedures and the corresponding requirements of the SIR. If anything, the IBEX plan goes beyond the SIR requirements to insure a smooth transition by requiring personnel to arrive in advance of the PI period. Indeed, at the debriefing the FAA admitted that IBEX's plans to [Deleted] could not logically be construed as a weakness in IBEX's proposals. Nonetheless, it is clear that the FAA characterized this aspect of IBEX's proposal as a "significant weakness." (See Attachment A at p. 1 (stating that the letter identifies "significant weaknesses" and identifying pre-contract activity as a weakness).

Similarly, there is no merit to the FAA's criticism of IBEX's statement in its plan that [Deleted]. The NWS certifies visibility markers -- they do not create them. On many previous contracts IBEX has updated the visibility markers at the beginning of contract performance to insure that they incorporate updates to the landscape (i.e., new buildings and other construction) since that last markers had been certified. Accordingly, IBEX's proposal merely indicated [Deleted].

While the FAA could, perhaps, determine that such a plan was not a significant benefit, it is simply unimaginable that [Deleted] is a significant weakness. Would the FAA rather contractors blindly rely on whatever materials are left behind? The FAA's criticisms of IBEX's PI/PO plan are completely unfounded and/or unreasonable.

IBEX Protest, pages 20-21.

In its Agency Response, the Product Team, rather than focusing on the arguments raised in the IBEX Protest, chose to justify the “[Deleted]” rating assigned IBEX for this sub-element based on the evaluators’ perception that IBEX’s proposal failed to [Deleted]. The Product Team emphasized the proposal’s failure to mention that: [Deleted]:

Phase-in/Phase-out Plan. Protest p. 20, Proposal p.57, Tech evaluation p. A-35

This is another subfactor in which Ibex scored a [Deleted] rating. The problem here was that the Ibex proposal included a number of items that were not strictly part of the Phase-in/Phase-out process, while failing to demonstrate an understanding of what the process does entail. Simply stated, the PI/PO procedure is a two-day event, post award, in which the incoming contractor makes actual, live observations under the supervision of the outgoing contractor on the first day. This is critical, because, on the first day, the incumbent is still responsible for the accuracy of the work. On day #2, the process reverses, with the new contractor bearing full responsibility, and the outgoing contractor overseeing the work product, but no longer responsible.

Nowhere in its proposal, (p.57), did Ibex demonstrate an understanding of the essential process. As the team noted, the proposal described several administrative, or “nice to know” functions such [Deleted]. The team also took issue with Ibex’s statement about [Deleted]. The protest takes major issue with this finding, but, frankly, this was a relatively minor point.

On balance, it is difficult to fault the team for assigning a score of [Deleted] in a subfactor where the proposal [Deleted]. What the team expected was some discussion of the reversed roles and responsibilities during the two-day period of actually taking observations. All else was merely administrative support to this key function. Ibex has not demonstrated the agency acted irrationally here.

In its Comments, IBEX again notes that the Product Team's arguments represent *post hoc* rationalizations that merit no weight:

In the AR, the FAA does not even respond to this protest issue other than to say that this is a "relatively minor point." AR, Vol. VI, p. 7. Instead, the FAA now claims that the real problem with IBEX's PI/PO plan was that IBEX failed to "demonstrate an understanding of the essential process." AR, Vol. VI, p. 7.²⁰ The FAA then claims that while several of the items addressed in IBEX's plan were "administrative" and "nice to know," they were not part of the PI/PO:

As the team noted, the proposal described several administrative, or "nice to know" functions such as [Deleted].

AR, Vol. VI, p. 7. However, as noted previously, the record reveals that in evaluating other proposals the FAA actually considered these same proposed actions to be strengths. For example, the TER listed the following as strengths for other offeror's PI/PO plan:

Strengths:

[Deleted]

TER, p. A-47.

Strengths:

[Deleted]

TER, p. A-39. Accordingly, it is clear that the FAA's current post-hoc explanations are not only unreasonable, but also directly contradicted by the contemporaneous procurement record. Therefore, these explanations should be afforded no weight.

An examination of the record plainly reveals that the FAA's evaluation of IBEX's PI/PO proposal was significantly flawed and unreasonable. *See Protest of Computer Associates International, Inc.*, 00-ORDA-00173; *Protests of Camber Corporation and Information Systems & Networks, Inc.*, 98-ORDA-00079 and 98-ORDA-00080. IBEX lost significant points based on the alleged weaknesses discussed above. Had the FAA properly and reasonably evaluated this aspect of

²⁰ **IBEX Footnote:** "In her declaration, the TET Chair now provides a new litany of alleged deficiencies in IBEX's PI/PO plan. However, none of these post-hoc explanations were noted in the TER. Indeed, like with the majority of the other post-hoc explanations contained in the AR, the FAA does not even allege that these new explanations are even related to the bases cited in the TER as supporting the downgrading of IBEX's proposal. As a result, these explanations should be afforded no weight whatsoever."

IBEX's proposal its technical score would have been much higher and its "price-per-point" ratio would have been much lower. Therefore, when combined with the significant price advantage offered by IBEX's proposal, a proper technical evaluation in this area would have clearly resulted in a finding that IBEX's proposal presented the best value. As a result, the FAA's award decision cannot stand.

The Product Team's argument about IBEX missing the "essence" of the Phase-In/Phase-Out process as justification for assigning it a "[Deleted]" rating for this Technical sub-element is a *post hoc* rationalization and one that has no support in the contemporaneous record. Accordingly, the ODRA agrees with IBEX that such an argument cannot be afforded weight. *See Protest of Enroute Computer Solutions, supra*. Also, it does appear that IBEX received disparate treatment in terms of its competitors having been assigned a "strength" for the very aspect of its proposal ([Deleted]) that had been assigned a "weakness." As IBEX correctly notes, the SIR did not require that PI activities not begin before the contract start date. Further, there does not appear to have been a rational basis for IBEX to have been downgraded for its plan to [Deleted]. IBEX's explanation of what it had in mind appears perfectly sensible.

By the same token, the Protest is conspicuously silent when it comes to either of the other "weaknesses" that had been assigned to the IBEX proposal – *i.e.*, those assigned for (1) [Deleted]. There is nothing in the record that would support a conclusion that either "weakness" assignment was without a rational basis. Thus, it would appear that IBEX should have received a net of [Deleted] and [Deleted] for the PI/PO sub-element. It is unclear what this would mean, in terms of the overall adjectival rating or the related point score assigned for the sub-element.

3. Evaluation of Overall Risk

In terms of the Overall Risk rating of "Moderate" assigned to IBEX, the IST Report contains the following risk assessment:

Overall Risk

[Deleted]

AR, Vol. I, Tab 15, IST Report, page A-37.

Based on the foregoing discussion of the Technical evaluation, it is apparent that the Product Team erred with respect to its perception of a number of deficiencies in the IBEX proposal, including the above-described “weaknesses” assigned to purported inconsistencies in the staffing schedules, etc. Certainly, correction for its perception errors could result in an improved Overall Risk rating.

4. The Challenge Regarding Lack of Discussions

In terms of contesting the Product Team’s failure to conduct “meaningful discussions,” IBEX’s Protest again makes reference to the weaknesses assigned for alleged “inconsistencies” in the staffing schedules. In essence, IBEX contends that, had the Product Team raised appropriate questions early on and thus followed the AMS guidance regarding “communication,” any misunderstandings by the evaluators would have been averted:

As explained above, the FAA downgraded IBEX's technical proposal on the basis of alleged "conflicts" and "inconsistencies" contained in IBEX's staffing plan and target schedules. The FAA then relied on the same allegations to assign IBEX's an overall risk rating of "Moderate." Similarly, the TEP contains numerous assertions that IBEX's proposal lacked information or failed to provide details requested. As discussed above, these allegations are simply without merit.

However, even if it is assumed that some of these criticisms were accurate, the FAA's failure to seek clarification was clearly unreasonable and prejudicial to IBEX. Even where a solicitation states that no discussions are to be conducted prior to award, the discretion of the Contracting Officer to refrain from holding discussions is not unfettered. See *Southwest Marine; American Systems Engineering Corporation*, B-265865.3, B-265865.4, Jan. 23, 1996, 96-1 CPD ¶ 56; *Facilities Management Company, Inc.*, B-259731.2, May 23, 1995, 95-1 CPD ¶ 274; *The Jonathan Corporation; Metro Machine Corporation*, B-251698.3, B-251698.4, May 17, 1993, 93-2 CPD ¶ 174. The exercise of the discretion not to seek clarifications is reviewable to ensure that it was reasonably based under the particular circumstances of the procurement. Id.

Under the AMS, communication throughout the entire procurement process is strongly encouraged. AMS § 3.2.2.3.1.2.2. In fact, the AMS took steps to remove some of the perceived barriers inherent in the Federal Acquisition Regulation that inhibited agencies from communicating with offerors. The AMS does not distinguish between "clarifications" and "discussions" or mandate communications with all offerors or require the submission of new best and final offers. Id. Here, a few very simple questions could have cleared up any confusion regarding IBEX's proposed staffing plans and schedules. Similarly, had FAA asked IBEX about the alleged omissions of information, IBEX could

have directed FAA to the portions of its proposal where the information was presented. The FAA's failure to take these modest steps was irrational and inconsistent with the policies contained in the AMS.

IBEX Protest at 21-22. In its Comments on the Agency Response, IBEX for the first time asserted that it received disparate treatment in terms of discussions, the Product Team purportedly having engaged in discussions with SERCO and MAB concerning the same or similar issues:

What makes the FAA's failure to seek clarification particularly poignant in this cases is that the FAA openly discussed the very same or similar issues with the awardees. This blatant disparate treatment highlights the unreasonable and unsupportable nature of the conduct of the procurement and award decisions.

* * *

First, there can be no dispute that the vast majority of the alleged deficiencies in IBEX's proposal could have been easily and quickly explained and/or corrected had IBEX known of the FAA's concerns. As the discussion above reveals, in many instances the evaluator's criticisms were based on a simple failure to look at the portions of IBEX's proposal where the desired information was contained. A few very simple questions could have cleared up any confusion regarding IBEX's proposed staffing plans and schedules. Similarly, had FAA asked IBEX about the various alleged omissions of information or areas of confusion, IBEX could have directed FAA to the portions of its proposal where the information was presented or provided an explanation concerning the areas of uncertainty. However, the FAA failed to do so.

While the FAA's failure to take these modest steps was unreasonable and inconsistent with the policies contained in the AMS, the facts here are much worse because the record reveals that the FAA did seek clarification over many of the very same issues from the awardees.²¹ For example, the FAA significantly downgraded IBEX's proposal on the basis that IBEX proposed [Deleted]. Nonetheless, the FAA did not advise IBEX of this issue during discussions or any other communication. By contrast, when awardee MB and Serco Management Services ("SERCO") both clearly proposed to have their [Deleted], the FAA advised them of this perceived deficiency and asked for their "rationale for [that] aspect of the proposal." See AR, Tab 11 ("Communications between FAA and SERCO"), p. 5; Tab 12 ("Communications between FAA and MacAulay Brown"), p. 3. In response, awardee MB was able to modify its

²¹ **IBEX Footnote:** "In the AR, the FAA repeatedly cites to Section M.1.4 of the SIR and claims that the FAA had the right to make a contract award on initial offers without conducting any discussions. AR, Vol. VI, p.9. To the extent that the FAA is in fact suggesting that this is what occurred, the argument is clearly erroneous. See AR, Tab 11, p. 5; Tab 12, p. 3."

proposal and thereby increase its chances for award. *See* AR, Tab 12 ("Communications between FAA and MacAulay Brown"), p. 9. The FAA's failure to afford IBEX the same opportunity was clearly unreasonable, improper and highly prejudicial.²²

Similarly, although the FAA now claims that an inconsistency between [Deleted], the FAA did not advise IBEX of this alleged problem during discussions. By contrast, when the FAA perceived a similar problem [Deleted] SERCO, the FAA asked them about this issue during discussions and afforded SERCO an opportunity to explain. AR, Tab 11 ("Communications between FAA and SERCO"), p. 5, 28.

The record therefore clearly reveals that the FAA failed to comply with the requirements of AMS § 3.2.2.3.1.2.2 by conducting unreasonable and unfair discussions. As a result of this failure, IBEX was not afforded an opportunity to explain perceived deficiencies in its proposal or correct minor transcription errors which the FAA now claims were the bases for IBEX's low technical rating. As a result, the FAA's award decision cannot stand.

IBEX Comments at 2, 33-34 (emphasis added).

IBEX states – without any apparent contradiction in the record – that the information it obtained concerning disparate treatment was first obtained by it with its receipt of the Agency Response. The contentions regarding such treatment were raised by it within its Comments on the Agency Response, within five (5) business days of becoming aware of the facts concerning such treatment.

Accordingly, regardless of whether the contention relating to disparate treatment were to be considered a separate supplemental ground of protest (as the ODRA had initially perceived of it) or merely as an expansion upon its original ground relating to lack of meaningful discussions (as IBEX has argued – *see* IBEX letter to the ODRA of February 27, 2003), the protest was timely raised. Moreover, the ODRA agrees not only that the Product Team misunderstood and improperly downgraded the IBEX proposal for such things as alleged inconsistencies in the [Deleted], for the reasons previously enunciated, but that the Product Team might well have avoided its incorrect conclusions had it engaged in the same kinds of communications that apparently it did engage in with IBEX's competitors in connection with the same or similar

²² **IBEX Footnote:** "Of course, as explained above, IBEX did not actually propose [Deleted]. Nonetheless, perhaps IBEX could have alleviated the FAA's confusion regarding this issue had it been afforded the same opportunities provided to the awardees."

issues – communications that were in accord with AMS §3.2.2.3.1.2.2 and that were permitted by the instant Solicitation.

In terms of clarifications or other forms of discussions or communications, it should be understood that the ODRA does not mean to convey that discussions are required in all cases or that the Product Team in this case was without a rational basis in limiting the amount or types of communications it had with the offerors. As IBEX itself correctly observes: “The AMS does not distinguish between ‘clarifications’ and ‘discussions’ or mandate communications with all offerors or require the submission of new best and final offers.” IBEX Protest at 22.

For the proposals of Consecutive and Eye, it appears that the Product Team did not engage in discussions for two reasons. First, the scoring for their proposals indicated that they were not in a “Satisfactory” or “Acceptable” range, such that they would be among the offerors “most likely to receive award.” AMS §3.1.1, “Introduction.” Second, from the discussion in the Agency Responses for Docket Nos. 02-ODRA-00250 and 02-ODRA-00251, it appears that the major thrust of the evaluators’ complaints about those proposals did not revolve merely around perceived conflicts or inconsistencies in their proposals, but rather the complete absence of detail concerning how the Solicitation requirements would be satisfied. For this sort of proposal deficiency, what would have been necessary would not have been simple clarification. Rather, substantial supplementation or rewrite of various aspects of the proposals would have been needed to bring their proposals into line with those “most likely to receive award.” It is not the intent of the AMS to suggest that communications be utilized to allow offerors a “second bite of the apple.”

In contrast, the Product Team itself acknowledges that the IBEX proposal had been scored as “[Deleted]” overall. Further, the complaints IBEX voices regarding lack of “meaningful discussions,” as noted above, relate to the Product Team’s perceptions of conflicts or inconsistencies that could have been resolved readily by means of appropriate requests for clarification.

5. The Challenge to the Best Value Determination

The IBEX Protest takes issue with the manner in which “best value” was determined for the instant procurement, alleging that too much emphasis was placed on mathematical scoring and that insufficient emphasis was placed on determining real “qualitative” differences among offerors and performing a proper price/technical tradeoff – affording appropriate weight to the benefits of IBEX’s price proposals:

The SIR provides that the FAA would conduct a best value analysis of the offers submitted. Specifically, the SIR indicated that the FAA would conduct cost/technical tradeoffs, if appropriate, in determining the contract awardees:

Best value is defined as the proposal that presents the most advantageous solution to the FAA, based on the evaluation of technical, price, and other factors specified in the SIR. The best value approach provides the opportunity for a technical cost/price tradeoff and does not require that award be made to either the offeror submitting the highest rated proposal or the offeror submitting the lowest cost/price, although the ultimate award may be to either one of those offerors.

Despite this promise, the FAA conducted no such qualitative analysis of the proposals submitted. Instead, it is clear that the FAA relied exclusively on the point scores assigned the offerors' technical proposals in making its final award decision. Such an over-reliance on numerical scores is clearly improper where the record fails to provide a reasonable basis for those scores.

Here, there was no apparent evaluation of the qualitative cost/technical tradeoff that evaluated the differences of the strengths and weaknesses of the proposals. Instead, it is clear that the selection decision was based solely by the point scores awarded with some minor mathematical manipulation of those scores to develop a "point-per-price" ratio.

In this case, the FAA employed an evaluation process that failed to make any true, meaningful tradeoff of the relative merits of a lower ranked offeror against a higher ranked/higher priced competitor. To the extent that such an analysis was performed at all, it consisted of merely dividing the price of each offeror by its technical score in order to arrive at a "price-per-point" ratio. However, this rationale provides no insight into the relative benefits that one proposal offers over another and, therefore, provides no basis for FAA to ascertain whether differences in technical solutions justify payment of a cost premium.

In reviewing cost-technical tradeoffs, the GAO has held that "numerical scores are useful guides for intelligent decision-making and are not generally controlling for award because they often reflect the disparate, subjective judgments of the

evaluators." *National Medical Seminars Temparmacists*, B-233452, Feb. 22, 1989, 89-1 CPD ¶ 191 (citing *Bunker Ramo Corp.*, 56 Comp. Gen. 712 (1977), 77-1 CPD ¶ 427). Instead, the agency must exercise its considered judgment and assure that the point scoring reflects actual differences in the proposals. *Id.* Here, the FAA did not exercise any considered judgment in performing the cost/technical tradeoff but instead performed a meaningless mathematical exercise to choose between proposals.

FAA's action in this regard caused IBEX significant prejudice as IBEX's proposed prices offered a significant savings over the awardees for each of the subject groups.²³ While the FAA may argue that the awardees in the above groups scored higher points in the technical evaluation than IBEX, even if the technical evaluation was done properly, as explained above, FAA never determined whether the perceived technical benefits outweighed the cost savings offered by IBEX. Accordingly, the best value analysis conducted by FAA was flawed and cannot sustain the awards made.

IBEX Protest, pages 23-24. IBEX's Comments on the Agency Response voice similar complaints about the Product Team's "best value" determination:

The myriad of errors found in the FAA's technical evaluation alone suffice to render the FAA's best value analysis invalid. The FAA's Source Selection Officer was not presented a fair or reasonable assessment of IBEX's proposal. Beyond this point, however, it is clear that the methodology itself was flawed. Instead of properly weighing the qualitative benefits associated with IBEX's proposal and those of the other offerors, the FAA applied a rigid and mechanistic "point-per-dollar" scheme that was based on its erroneous technical scores. Because this process failed to consider the qualitative analysis and tradeoffs contemplated by the SIR, this analysis was improper and cannot sustain the awards made. The selection decision is utterly devoid of any reasoned analysis explaining why the substantial price premiums associated with the winning offers will be justified by objective gains in performance.

* * *

Here, the FAA did not exercise any considered judgment in performing the cost/technical tradeoff but instead performed a meaningless mathematical exercise to choose between proposals. Indeed, a review of the SSDM reveals that the SSO did not perform any qualitative analysis of the proposals. Instead, the SSO merely relied on the recommendations of the IST which were based solely on its mechanistic "price-per-point" calculations. By the FAA's own admission, this point-per-price methodology only gave the SSO, at best, an "at a glance" view of the technical merits and costs associated with each proposal. AR, Vol. VI, p. 11. It is respectfully submitted that the AMS requires the SSO to consider more than

²³ The cost savings associated with IBEX's proposal for Site Groups 13-16 totals approximately \$[Deleted].

an "at a glance" comparison of the qualitative technical and cost elements of the proposals when conducting a proper best value procurement.

The FAA's action in this regard caused IBEX significant prejudice as IBEX's proposed prices offered a significant savings over the awardees for each of the subject groups.²⁴ While the FAA may argue that the awardees in the above groups scored higher points in the technical evaluation than IBEX, even if the technical evaluation was done properly, as explained above, FAA never determined whether the perceived technical benefits outweighed the cost savings offered by IBEX. Accordingly, the best value analysis conducted by FAA was flawed and cannot sustain the awards made.

IBEX Comments, pages 2-3, 35-36.

Based on its review of the IST Report and the Source Selection Decision Memorandum (SSDM) (AR, Tabs 16 and 18), aside from the items improperly downgraded within the Technical scoring, as noted above, it appears to the ODRA that the Product Team evaluators followed the specified evaluation criteria and weighting scheme as set forth in the Solicitation when making their "best value" determination. As to the purported absence of a "qualitative" analysis of the proposals, it would seem that the Overall Risk analysis was intended to be precisely that. In other words, when assigning an adjectival rating for overall risk, the Product Team would necessarily consider not only the scoring of individual Technical and Business/Management sub-factors and sub-elements, and any associated computations such as those of "price-per-point," but the nature and significance of the individual strengths and weaknesses noted by the evaluators on an overall *qualitative* basis.

Moreover, in terms of a price/technical tradeoff, the SIR speaks about the "opportunity" for a tradeoff (AR, Tab 4, Section M.1.1), and *does not mandate* a tradeoff analysis or discussion under all circumstances. Where, as had been the case here, the overall weighted score assigned to IBEX was found to have been substantially below the scores of the awardees, and its Overall Risk rating was higher than theirs, the Product Team had a rational basis for dispensing with a tradeoff analysis, especially where their prices were similarly evaluated as fair and reasonable in accordance with the specified evaluation criteria for price proposals. On the other hand, were the

²⁴ **IBEX Footnote:** "The cost savings associated with IBEX's proposal for groups 13-16 totals approximately \$[Deleted]."

Technical scoring to be modified in the manner previously described, and were the Overall Risk rating also to improve as a result, some analysis of price versus weighted scoring and Overall Risk might be required.

IV. Conclusions and Recommendations

For the reasons enumerated above, the ODRA finds the Protests of Consecutive and Windsor to be completely without merit. The Eye Protest has merit, but only to the extent indicated above. Finally, the ODRA finds that, whereas IBEX was without standing to protest the award to SERCO of Site Group 16, IBEX had standing to protest the awards of Site Group 14 to SERCO and Site Groups 13 and 15 to MAB. As to those three Site Groups, the ODRA finds the Protest meritorious, but only to the extent indicated above.

Accordingly, the ODRA recommends that the Administrator deny the Protests of Consecutive and Windsor under Docket Nos. 02-ODRA-00250 and 00252, and dismiss the Protest of IBEX under Docket No. 02-ODRA-00254 insofar as it applies to Site Group 16. Further, the ODRA recommends that the Eye Protest under Docket No. 02-ODRA-00251 and the remainder of the IBEX Protest under Docket No. 02-ODRA-00254 be sustained in part, as discussed hereinabove. The ODRA further recommends that the Product Team be directed to re-evaluate portions of the Eye and IBEX Proposals consistent with the foregoing discussion and determine whether either would be entitled to an award – Eye to an award of Site Groups 9 and/or 10 and IBEX to an award of Site Groups 13, 14 and/or 15.²⁵

In the event its re-evaluation results in such a determination, the Product Team should be directed to terminate the prior award(s) involved for the FAA's convenience and forthwith make awards to Eye and/or IBEX. Otherwise, the awardees should retain the previously awarded contracts. The Product Team should submit a written report on its re-evaluation to the Administrator through the ODRA within 30 days of the Administrator's Order.

-- Signed --

²⁵ See Note 16, *supra*.

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