

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

FINDINGS AND RECOMMENDATIONS

Matter: **Protest of Caribe Electronics, Ltd., Inc.**

Pursuant to Solicitation No. DTFAAC-07-R-00017

Docket No.: 07-ODRA-00412

Appearances:

For the Protester, Caribe Electronics, Ltd, Inc.: Ms. Barbara Webber

For the FAA Mike Monroney Aeronautical Center:

Linda M. Modestino, Esq., Office of the Aeronautical Center Counsel

I. INTRODUCTION

On June 14, 2007, Caribe Electronics, Ltd., Inc. (“Caribe”) filed the above captioned pre-award Protest at the Federal Aviation Administration (“FAA”) Office of Dispute Resolution for Acquisition (“ODRA”). Caribe, which is a small woman-owned business, challenges the unrestricted size status of a solicitation (“Solicitation”) issued by the FAA’s Mike Monroney Aeronautical Center (“the Center”) for Food, Central Desk Support, and Maid & Linen Services (“Support Services”) required by the FAA’s Center for Management and Executive Leadership (“CMEL”) located in Palm Coast, Florida. Caribe also challenges the Center’s decision to consolidate the services involved into one acquisition, thereby “causing a further complication for [interested] 8(a) and small businesses to compete” because “[t]hey needed more time to team with each other . . . to effectively fulfill the requirements of this solicitation.” *Supplemental Protest dated June 19, 2007* (“*Supplemental Protest No. 1*”). For the reasons explained below, the ODRA recommends that the Protest be denied.

II. FINDINGS OF FACT

1. The FAA's Center for Management and Executive Leadership ("CMEL") is part of the FAA Academy—and is located in Palm Coast, Florida.¹ The primary purpose of the CMEL is to provide non-technical training for managers, team leaders, and executives in the FAA. *See Center Response, ("CR")* at 1-2.
2. In addition to classrooms and training areas, the CMEL facility provides "residential accommodations" (private rooms with private bath), cafeteria meals, and housekeeping services for up to 200 visiting students and guests. *Id.* at 2.²
3. For the past twenty years, the FAA has leased the CMEL facility from Embry-Riddle Aeronautical University ("ERAU") pursuant to a lease agreement that is scheduled to expire on August 1, 2007. *See CR* at 2. Pursuant to the lease agreement's terms, ERAU has been providing the CMEL support services at issue in this Protest. *Id.* The Center, through the FAA Academy, is charged with oversight of the CMEL and its acquisition needs. *See generally CR, Exhibit No. 2, Contracting Officer's Statement of Facts ("CO Statement")* at 1-2.
4. The FAA is currently in the process of negotiating a new lease with ERAU so that it can continue to house the CMEL in the Palm Coast facility. On January 31, 2007, in anticipation of the new leasing negotiations, ERAU contacted the Contracting Officer and advised that it "would like the . . . Central Desk, Maid & Linens [and] Food Services . . . removed on the new lease to avoid . . . problems" with the United States Department of Treasury's Internal Revenue Service. *See CR, Exhibit No. 9, Contracting Officer's Memo for Record ("CO Memo")*.

¹ The FAA Academy is housed in Oklahoma City.

² *See* CMEL description located on the FAA website at:

www.faa.gov/about/office_org/headquarters_offices/arc/programs/academy/cmhel/services/history.cfm.

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5. After receiving ERAU's request to procure the support services separately from the facility lease, the Contracting Officer and her supervisor—the Center's Acquisition Division Manager ("Acquisition Manager")—concluded that there it was possible that the requirement could be conducted as a small business or 8(a) set-aside. *Id.* As a result, on February 9, 2007, the Acquisition Manager sent an e-mail to the ERAU representative "to make sure that [ERAU] understood the implications of market research and the possibility of small business set-asides" if the Center agreed to remove the Support Services from the proposed lease. *Id.* The Acquisition Manager's e-mail further advised that "ERAU may not even get to bid on the services if they are set-aside." *Id.* On February 13, 2007, ERAU advised the Acquisition Manager and the Contracting Officer that it "understood the implications of small business set-asides and that ERAU [was] prepared to lease the [Palm Coast] facility to the [FAA] under whatever determination the [Center's] market analysis indicates is prudent." *Id.*
6. On February 28, 2007, the Contracting Officer posted separate market survey requests—one soliciting expressions of interest in the Food Services and one soliciting interest in the Central Desk Management Services—on both the Federal Business Opportunities ("FBO") website and the General Services Administration E-Buy ("GSA E-Buy") websites. *See CR* at 2 and *CR, Exhibit No. 5, Market Research Report: CMEL Support Services ("Market Research Report")* at 1. On March 7, 2007, the Contracting Officer posted a third market survey request for the needed Maid & Linen Services on both the FBO and GSA websites. *Id.*
7. Each market survey advised that contractor responses would be used to "support market research obtained from multiple sources," and would be "utilized for planning purposes only." *See CR, Exhibit No. 6, Market Surveys.* The market surveys explained that all submitted "information [would] assist in establishing an acquisition strategy," and that the "results of the survey could result in [a] restricted Solicitation process when the Request for Offers is issued." *Id.* Each market survey also contained the same instructions—which directed prospective

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contractors to complete a “Business Declaration” form—which requested a description of their “Staffing Plan and Management approach;” “quality control plan and implementation;” “potential pricing arrangements for the services described” and any “established Federal Schedules” (GSA or other Federal Schedules). *Id.* Interested contractors also were asked to identify any “Corporate market share . . . certifications, and/or affiliations within the Service Industry,” and to provide “three references for [any] contract performed for [the] same or similar work during the last 5 years,” including a description of the “service arrangements provided for each.” *Id.* All responses to each survey were due by March 16, 2007. *Id.*

8. The Center reports that it did not receive any expressions of interest in response to the three market surveys posted on the GSA E-buy website. However, as a result of the FBO posting, one 8(a) concern expressed interest in performing the Food Services; another 8(a) concern expressed interest in the Central Desk Services, and a third 8(a) concern expressed interest in providing not only these two services but also the third advertised requirement—Maid & Linen Services. *See CO Statement* at 3; *see also CR, Exhibit No. 5, Market Research Report* at 1.
9. The FBO posting also produced responses from two large businesses: a JWOD³ concern interest in providing the Food Services—and ERAU, which expressed interest in performing all three services but advised that it would subcontract the Food Services work to another contractor. *Id.*
10. The Contracting Officer reports that she was concerned by the lack of “an abundant number of responses” she had anticipated from the two federal website postings, and “thought that additional sources could be obtained” to warrant some type of small business set-aside. *CO Statement* at 4. As a result, the Contracting Officer

³ JWOD is the acronym for the Javits-Wagner-O’Day Act program, a unique Federal procurement initiative that generates employment and training opportunities for people who are blind or have other severe disabilities. *See* www.JWOD.com. Under certain circumstances not present here, *see AMS Procurement Guidance* § T.3.8.4, the FAA must rely on JWOD as a mandatory source for products or services.

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researched the Central Contractor Registry (“CCR”)—which is a recognized database recommended by the United States Small Business Administration (“SBA”) and used by federal contracting officials as the chief source to perform market research, and to collect and verify standard contractor business information including size status. *See Protest of Mechanical Retrofit Solutions Incorporated*, 07-ODRA-00402 (citing *FAA Acquisition System Toolset (“AMS Procurement Guidance”)*, § T3.3.1, *Contract Funding, Financing & Payment* at ¶ 8, and the *Central Contractor Registration Handbook* published at <http://www.ccr.gov>).

11. The Contracting Officer’s CCR research began with a query using the North American Industry Classification System (“NAICS”) code for “Facilities Management Services,” (NAICS Code No. 561720) to locate eligible SEDB and 8(a) firms and Service Disabled Veteran Owned firms located in either Palm Coast—the site of the CMEL facility—or in any of the four local geographic areas surrounding Palm Coast. *See CO Statement* at 4. This inquiry identified two eligible 8(a) concerns—both of which were located in Palm Coast. *Id.* The Contracting Officer subsequently contacted each firm—but was advised that one firm’s “line of business was not consistent with [the] proposed acquisition,” and that the second firm was “not interested in pursuing the FAA’s acquisition.” *Id.*
12. The Contracting Officer next performed a second CCR query using four alternate NAICS codes⁴ as search terms to locate “small business firms located throughout Florida.” While “several records were found as a result of this query and [she] personally called 50+ companies,” these companies’ “lines of business did not include services similar to those” required by the CMEL. *Id.*
13. On Thursday, March 22, 2007, “in a further effort not to give up on possible small business interest,” the Contracting Officer contacted the Business Development

⁴ The second query used the following four NAICS Codes: (1) 722110, Full Service Restaurants; (2) 722211, Limited Service Restaurants; (3) 722212, Cafeterias; and (4) 722310, Food Service Contractors. *Id.*; *see also*, *CR, Exhibit No. 5, Market Research Report (and copies of the Contracting Officer’s CCR search criteria and printed results appended thereto)*.

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Specialist located in the North Florida District Office of the SBA (“SBA Specialist”) and “requested his assistance in identifying additional small business sources that would be interested in performing the subject support services;” that same day, she also e-mailed him copies of each service’s market survey. *Id*; see *CR, Exhibit No. 5c, SBA Specialist’s March 26, 2007 8:47 a.m. E-mail to the Contracting Officer* at 2-3 (“*SBA Specialist’s 8:47 a.m. E-mail dated March 26, 2007*”). The record indicates that while the Contracting Officer gave the SBA Specialist “a short period (cut off) time” to identify eligible firms, see *CR, Exhibit No. 5c, SBA Specialist’s June 22, 2007 E-Mail* at 2 (“*SBA Specialist’s E-Mail dated June 22, 2007*”)(responding to Contracting Officer’s post-protest “follow up question” about whether the Specialist’s canvassing efforts had included contacting Caribe), and that the SBA Specialist “and the [SBA] South District Florida [Office]” issued “about 20 to 30 notices”, see *SBA Specialist’s 8:47 a.m. E-mail dated March 26, 2007*, which advised “all 8(a)s and Small Businesses who had an interest and could possibly benefit, including ‘CARIBE’ [sic] to which” the SBA Specialist advised “[he] personally furnished notice.” See *SBA Specialist’s E-mail dated June 22, 2007*.

14. On Monday March 26, 2007, the SBA Specialist advised the Contracting Officer that he would not “hold up” the procurement “any longer”—and that while he had canvassed the small business and 8(a) community, he had only “received two [responses] back.” See *SBA Specialist’s 8:47 a.m. E-mail dated March 26, 2007*. Along with identifying the two identified firms—both 8(a) concerns—the SBA Specialist advised the Contracting Officer that he had expected to “get a lot more hits than this” *Id*.
15. Later that same day, the SBA Specialist advised the Contracting Officer of a third 8(a) concern which had advised him that while the firm was “having problems with the [Food Services] portion capabilities and other part of the synopsis dealing with Facilities Support,” if the firm “could be considered for some of the project, which [it] can do, then [the 8(a)] would like to be considered.” See *CR, Exhibit No. 5c*,

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SBA Specialist's March 26, 2007 1:49 p.m. E-mail (SBA Specialist's 1:49 p.m. E-mail dated March 26, 2007").

16. In addition to the Contracting Officer's request for assistance from the SBA Specialist, the record shows that on April 6, 2007, the Center's designated FAA Small Business Development Program Manager ("SBD Program Manager") also sent an e-mail to the same SBA Specialist requesting assistance with locating eligible small business firms. *CR, Exhibit No. 5c, SDB Program Manager's E-mail dated April 6, 2007 ("SDB Program Manager's E-mail")*. Specifically, the SBD Program Manager's e-mail asked the SBA Specialist to "go out to all the 8(a) and [s]mall businesses in the South Florida District" to solicit their interest in the "3 required services." *Id.* The SBD Program Manager's e-mail further advised that the "associated NAICS Codes" for this procurement were: Facilities Management Services (NAICS Code 561720); Food Service Contractors (NAICS Code 72310); and Office Administrative Services (NAICS Code 561110)." *Id.* The SBD Program Manager's e-mail also advised that:

I know there must be qualified 8(a) or Small Businesses in the State of Florida or surrounding areas that can provide these services. Also, the services may be combined, so we need to have the firms think about possible teaming arrangements . . . I do not want to see any of the Florida 8(a) or small businesses miss out on [a] golden opportunity that may not come around again until 2012.

Id.

17. The Contracting Officer reports that as a result of the Center's requests, the SBA Specialist "advised [her] that ninety-four small business firms in the Florida area were contacted [by the SBA Florida District Office] regarding potential interest in the CMEL acquisition." *CO Statement* at 4. Ultimately, as a result of the earlier market surveys; the Contracting Officer's research; and the SBA Specialist's assistance, a total of two 8(a) concerns were identified as prospective contractors for all of the required support services. Three additional 8(a) concerns were

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identified as prospective contractors for a portion of the services. The results are reflected in the following chart:

Contractor	Food Services	Central Desk Services	Maid & Linen Services
8(a) Concern No. 1	X	X	X
8(a) Concern No. 2	X	X	X
8(a) Concern No. 3	X		
8(a) Concern No. 4		X	
8(a) Concern No. 5			X

See Market Research Report at 1-2.

18. The Contracting Officer concluded based on the above results that she “had no other choice but to solicit this acquisition” on an unrestricted basis. *See CO Statement at 5.*

19. On May 2, 2007, the Center issued a Solicitation which sought proposals on an unrestricted basis to perform all three Support Services under one contract for a base year and four 1-year option periods. *See CR, Exhibit No. 4, Solicitation.* The description of services set forth in the Solicitation’s Performance Work Statement (“PWS”) essentially duplicates each service description set forth in the earlier market surveys. In addition, the Solicitation was assigned an NAICS Code for “Facilities Management Services,” (Code No. 561720). *Id.*, ¶ K.1 at 42.

20. On May 11, 2007, the Contracting Officer conducted a “Pre-Proposal Conference and Site Visit” for prospective offerors at the CMEL. *See CR, Exhibit No. 5b, CMEL Support Services Pre-Proposal Conference and Site Visit Minutes (“Pre-Proposal/Site Visit Minutes.”)*. While the two of the three 8(a) concerns identified by the SBA Specialist attended this event, “none of these firms elected to submit a proposal for this acquisition.” *See CO’s Statement at 4.*

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21. On May 31, 2007, the Center issued Amendment No. 1 to the Solicitation which set forth answers to contractor questions that had been submitted at the Pre-Proposal/Site Visit conference. *See CR, Exhibit No. 4a, Amendment No 0001 (“Amendment No. 1”)*. Amendment No. 1 also extended the original solicitation closing date from June 1, 2007 to June 13, 2007. *Id.*
22. On June 11, 2007, the Center issued Amendment No. 2 which appended a copy of the Pre-Proposal Conference minutes to the SIR, and extended the closing date to June 18, 2007. *See CR, Exhibit No. 4b, Amendment No. 0002 (“Amendment No. 2”)*.
23. On June 13, 2007, the Center issued Amendment No. 3, which added a “Catered Refreshment Service” to the list of Food Services requirements, and extended the Solicitation’s closing date a third time to June 18, 2007. *See CR, Exhibit No. 4c, Amendment No. 0003 (“Amendment No. 3”)*.
24. On June 14, 2007—prior to the Solicitation’s scheduled closing date—Caribe filed its initial Protest at the ODRA, contending that the acquisition should be conducted as a small business set-aside. *See Protest* at 1. Later that same day, in response to the Protest, the Center contacted Caribe and invited it to submit a proposal. *See CR, Exhibit No. 8, Center Counsel’s E-mail to Caribe dated June 18, 2007*. The Protester responded that it could not respond by the 3:30 p.m. (Central Time) closing deadline. *Id.* Caribe is an 8(a) concern. *See Protest* at 1.
25. On June 19, 2007, the Center issued Amendment No. 4, which “correct[ed]” the Solicitation’s “Price Analysis” provisions, and extending the closing date to June 25, 2007. *CR* at 8; *Amendment No. 0004 (“Amendment No. 4”)*. That same day, the Protester filed a supplemental challenge at the ODRA in which it elaborated on its original challenge against the procurement’s unrestricted status by contending that the “market survey was misleading and confusing.” *Supplemental Protest No. 1*

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at 1. Caribe also challenged the three Support Services being “bundled into one” acquisition, largely because small businesses “needed more time to team with each other . . . to effectively compete.” *Id.* at 2.

26. On June 25, 2007⁵, the ODRA conducted an initial status conference, as required by the ODRA Procedural Regulations. *See* 14 C.F.R. § 17.13(d); *ODRA Status Conference Memorandum dated June 25, 2007*. Later that afternoon, following its receipt of the ODRA’s Status Conference Memorandum, the Protester filed an additional challenge (“*Supplemental Protest No. 2*”) against the unrestricted procurement contending that because “there were no NAICS codes” specified in the market surveys, small businesses and 8(a) companies were “prevented . . . from seeing the solicitation.” *See Supplemental Protest No. 2* at 1. Caribe also contended that the market surveys were misleading because by announcing the required services separately, the small business community was left “without notice that [the three services] were bundled into one contract [thereby] preventing 8(a) companies from having this opportunity” to form competitive teaming arrangements. *Id.*

27. By close of business that same day (June 25, 2007), the Center received two proposals—one from a small business concern. *CR* at 8. On July 12, 2007, in response to a question by the ODRA, *see ODRA Correspondence dated July 11, 2007*, the Center advised that the total acquisition value for this procurement was [DELETED] and that the Center was still evaluating the submitted proposals. *See Center Memorandum to the ODRA dated July 12, 2007 (“Center Memo”)*. Caribe did not submit a proposal. *CR* at 10.

28. In accordance with the ODRA Procedural Regulations, *see* 14 C.F.R. § 17.17(e), the Center filed its response (“*Center Response*”) to the Protest on July 11, 2007.

⁵ The status conference was originally scheduled to occur on Friday, June 22, 2007; however, because the Protester was unavailable, the conference was rescheduled for and held at 11:00 a.m. the following Monday, June 25, 2007.

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Caribe filed Comments on July 11, 2007 (“*First Comments*”) and on July 12, 2007 (“*Second Comments*”).

29. On July 23, the ODRA issued “Questions for the Record”; the Center filed its Supplemental Response (“CSR”) on July 25, 2007.

30. Caribe was given an opportunity to file Supplemental Comments to the CSR, but did not do so. On July 30, 2007, the Center advised that its evaluation had resulted in the selection of a small business for award. Thereafter the record closed.

III. THE PARTIES’ POSITIONS

A. The Protester’s Argument

Caribe contends that the identified support services should have been procured as a small business-aside because “[t]here are hundreds of capable small businesses and 8(a) compan[ies] in the State of Florida who could fulfill this contract.” *See Protest* at 1. According to Caribe, the Center’s conclusion that an insufficient number of interested, qualified small businesses existed to support a set-aside was unreasonably based on a defective market survey—which Caribe characterizes as “misleading and confusing.” *Supplemental Protest No. 1* at 2. First, because none of the surveys set forth any NAICS codes, Caribe contends that small businesses were improperly prevented from “seeing” or identifying this procurement because the missing codes are used by “small businesses, SDB and 8(a) companies” to search and identify federal contracting opportunities for which they are eligible. Caribe also contends that because each service was individually announced and “identified [as] 3 separate functions,” the market surveys prevented the small business community from fair “notice” that the “three component services” actually “were bundled into one contract.” *Id*; *see also Supplemental Protest No. 2* at 2. According to Caribe, the Center’s consolidation of these services into one acquisition “causes a further complication” because small business firms reportedly “needed more time to team with each other . . . to effectively fulfill the requirements of the solicitation.” *Id*. Caribe emphasizes that it only “found out about this contract by word of mouth,” after the unrestricted solicitation for bundled services “had already closed.” *See Protest*

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at 1; *Supplemental Protest No. 1* at 2; *Supplemental Protest No. 2* at 1. While the record shows that the Center has extended the Solicitation closing date several times, Caribe maintains that it still “cannot compete” for this contract because the unrestricted, bundled approach used in this procurement creates an “uneven playing field” that improperly favors ERAU’s twenty years of experience in performing the Support Services as part of its lease agreement with the FAA. *See Supplemental Protest* at 2.

B. The Center’s Response

The Center emphasizes that despite the Protester’s objections, the AMS does not require that NAICS codes be included in a market survey. *CR* at 5-6. The Center also disputes Caribe’s contention that the market surveys’ lack of any NAICS codes prevented Caribe—and the rest of the small business and 8(a) community—from identifying, expressing interest in or competing for the required services since the market surveys were published on two federal websites using synopses that clearly described each required service. In addition, the Center reports that because the Solicitation for this procurement was posted on the FBO website, “from May 2, 2007 through June 25, 2007,” and otherwise “clearly specified” NAICS code 561210, “Facility Support Services,” *see Solicitation*, ¶ K.1.” *NAICSS CODE AND SMALL BUSINESS SIZE STANDARD*,” at 42, the market surveys did not prevent Caribe from having a reasonable opportunity to identify and compete for this acquisition.

The Center also asserts that even if the NAICS codes could have improved its market survey effort, this approach was only one component of the contracting officer’s complete market research analysis—which the Center contends was reasonably conducted and otherwise confirms that there was no rational basis for concluding that this acquisition could be procured using a small business set-aside. *See CR* at 7. The Center also reports that “[w]hile the services were combined into a single” acquisition, this consolidation does not constitute a “bundling” because these “Support Services are all residential-related, hotel-type activities that seem rational to be combined.” *Id.* at 9. In addition, the Center emphasizes that the “additional administrative cost, additional management cost, duplication of staff and administrative efforts” that would be involved

in “dealing with three contractors” for these related Support Services “would not be in the best interest of the Agency”. *Id.*

IV. DISCUSSION

A. Standard of Review

The ODRA has established that, in reviewing Agency procurement actions, it will not recommend that the actions be overturned, so long as the actions do not constitute an abuse of discretion, are not arbitrary or capricious, have a rational basis and are supported by substantial evidence. *See Protest of Communication Technologies, Inc. (COMTEK)*, 03-ODRA-0007. Where the protested action meets this standard, the ODRA will not substitute its judgment for the properly exercised judgment of the Program Office. *See Protest of Four Winds Services, Inc.*, 02-ODRA-00219. It further is well established that the Protester bears the burden of proof. *See Protest of Kinematica, Inc.*, 05-ODRA-00361. Here, the issue presented for resolution is whether the Center’s decision to procure the identified Food, Central Desk and Maid/Linen Services as an unrestricted, consolidated acquisition is consistent with the AMS requirements, and otherwise satisfies the above-referenced rational basis test.

B. Challenge Against The Procurement’s Unrestricted Status

1. The AMS Small Business Set-Aside Framework

The FAA is exempt from federal procurement laws and regulations, including the Small Business Act and its set-aside rules. *See Protest of Four Winds, supra*. The Department of Transportation and Related Agencies Appropriations Act of 1996 authorized these exemptions—and directed the FAA to create its own “unique” Acquisition Management System (“AMS”)—to facilitate the FAA’s faster acquisition of higher quality, more affordable products and services. *See Public Law No. 104-50*, § 348, 109 Stat. 436, 460 (1995). Congress reiterated the FAA’s exemption from the Small Business Act in the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, enacted on April 5, 2000. *See Public Law 106-181*, Title VII, § 704, 114 Stat. 157 (*codified at* 49 U.S.C. § 40110(d)(2)(D)(2002)). The FAA adheres to small business rules and policy

specified in the AMS—which contemplates the mandatory use of a small business set-aside when an acquisition is valued at more than \$10,000 but no less than \$100,000. *See AMS* § 3.6. Such procurements must be “automatically [and] exclusively reserved” for “Socially and Economically Disadvantaged Businesses”—which the AMS refers to as “(SEDB)(8a)” concerns—unless “the contracting officer, with the review of the cognizant [FAA] Small Disadvantaged Utilization Specialist determines that there is not a reasonable expectation of obtaining offers from responsible SEDB concerns that are competitive in terms of market prices, quality and delivery.” *See AMS* § 3.6.1.3.4. Since this acquisition’s estimated value is [DELETED], *see FF No. 27*, the cited automatic 8(a) set-aside rule is inapplicable. *Id.*

The AMS encourages Program Offices to use small business-set asides “when appropriate.” *See* § 3.6.1.3.2. The AMS Procurement Guidance—which supplements, expands, and illustrates the acquisition requirements set forth in the AMS, *see AMS Procurement Guidance, “Policy v. Guidance,”* ¶ 1, “Definitions of AMS Policy and Guidance,”⁶—does not establish criteria for evaluating whether a small business set-aside is “appropriate,” but it does provide that a

procurement may not be set-aside if: there is no reasonable expectation of obtaining offers from two or more responsible SEDB(8(a)) concerns, small business concerns, very small business concerns or service-disabled veteran owned small business concerns that are competitive in terms of market prices, quality and delivery.

See AMS Procurement Guidance § 3.6.1.3.4.

2. The Market Surveys

Caribe first contends that if the Center’s market surveys had included the NAICS manufacturing codes associated with each service’s industries, and if the market surveys had announced a consolidated acquisition, “hundreds” of qualified small businesses and 8(a) concerns would have responded. *See Protest* at 1. In this regard, the SBA relies on these codes—which are promulgated by the Office of Management and Budget—to

⁶ Published at: <http://fast.faa.gov/toolsets/policy.htm>.

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establish size standards governing which entities qualify as small businesses for preferences or eligibility under federal procurements and programs. *See generally SBA Regulations*, 13 C.F.R. §§ 121.101-121.402.

While the AMS Guidance does recommend that after a small business set-aside determination is made, the subsequent public solicitation announcement “should” contain the applicable NAICS code to “ensure” that “small business eligibility requirements are timely known,” *see AMS Procurement Guidance*, § TB.6.1(b)(5), this provision does not apply where, as here, the Agency is in the “procurement planning” or “market analysis” phase that precedes the issuance of an actual solicitation. *See AMS* § 3.2.1.2.1, “*Market Analysis*”⁷. This is because during this preliminary phase, the Program Office is not necessarily in a position to know how to best procure the required goods and services until it has collected whatever information is necessary to enable it to adequately determine the procurement’s size classification and design the other core solicitation criteria. *Id.*

Consistent with this policy, the ODRA has long recognized that the AMS does not “contain a hard and fast requirement for a market analysis” to be performed. *See Protest of Wilcox Electric, TNC and Rockwell International and Lockheed Martin Federal Systems v. Federal Aviation Administration and Hughes Aircraft Company*, 96-ODRA-0001. Instead, the AMS accords the FAA and its contracting officials with significant discretion over the procurement planning process—specifying only that “the magnitude and degree of formality of the market analysis should be proportionate to the contemplated procurement.” *See AMS* § 3.2.1.2.1, “*Market Analysis*.” The AMS further explains that a market analysis—“may be as simple as a telephone call or as formal as a market survey advertisement to learn of industry capabilities.” *Id.* The Guidance implementing the AMS procurement planning provisions similarly defines “market analysis” as “any method used to survey industry to obtain information and comments,

⁷ The AMS emphasizes that the purpose of a market analysis effort is to “initiate industry involvement, develop and refine the procurement strategy, obtain price information, determine whether commercial items exist, determine the level of competition, identify market practices, or obtain comments on requirements.” *See AMS* § 3.2.1.2.1, “*Market Analysis*.”

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and to determine competition, capabilities, and estimate costs.” *See AMS Procurement Guidance*, § T.3.2.1.2, “*Market Analysis*.”

Of relevance to this ground of Caribe’s protest, the AMS Procurement Guidance defines a “market survey” as one of twelve “suggested techniques for market research,” *see AMS Procurement Guidance* § T3.2.1.2(c), which the guidance further “refers to as any method used to survey industry to obtain information and context, and to determine competition, capabilities, and estimate costs.” *Id.*, § T3.2.1.2(e). While the use of a market survey is encouraged by the AMS, it is not mandatory—and neither the AMS nor its implementing Procurement Guidance prescribe any mandatory criteria—such as NAICS codes—for the market survey “technique.” *See generally, AMS* § 3.2.1.2.1 and *AMS Procurement Guidance* § T.3.2.1.2.

Since the FAA is not subject to the Small Business Act requirements, and since the AMS does not otherwise mandate that NAICS codes be included in a market survey, the Protester only can prevail on this ground of its challenge against the Center’s decision not to procure the services as a small business set-aside if the absence of NAICS codes in the market surveys prevented Caribe and the small business community from identifying and expressing interest in these support services. While the inclusion of NAICS codes associated with the various service industries might have improved the market surveys, as explained below, it has not been demonstrated that the absence of these codes prevented small companies from having a reasonable opportunity to express interest in, or to compete for the contract. As noted above, a small business won the competition for the Contract. *See Finding of Fact (“FF”) 30.*

The record shows that even without NAICS codes, each market survey set forth a synopsis which clearly described each required service. For example, the “Food Services” market survey advised that the “contractor will be responsible for providing cafeteria food services for guests and staff at the training facility” using government-furnished kitchen space and equipment adjacent cafeteria space that accommodates approximately 200 people.” *See CR, Exhibit No. 6, Market Survey for Food Services* at 1

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(“*Food Services Market Survey*”). This synopsis further specified the types of required meal plans and other details such as the required hours for cafeteria operation. *Id.* The market survey for the Central Desk Services was similarly specific, advising that the contractor would be required to perform at least twenty-three listed tasks—*e.g.*, “providing registration and room assignments,” “coordinating shuttle services,” and other “lodging support” services for a CMEL population of approximately 20,000 guests annually. *See CR, Exhibit No. 6, Market Survey for Central Desk Services* at 1 (“*Central Desk Services Market Survey*”). The market survey describing the “Maid and Linen Services” explained that this requirement was to be provided to “each resident requiring room accommodations” including “linen services for the exercise room and pool.” *See CR, Exhibit No. 6, Market Survey for Maid & Linen Services* (“*Maid & Linen Services Market Survey*”). The accompanying synopsis also made clear that the Maid & Linen Services required the contractor to “furnish supplies as necessary . . . includ[ing] toiletry items . . . bath towels . . . and bed linens and comforters for students and guests in residence.” *Id.* The three market surveys also advised that the purpose of each posting was “to identify qualified and capable sources” and to “support market research obtained from multiple sources” that would be used by the Center “for planning purposes only” and to “assist in establishing [an] acquisition strategy.” *See Market Survey for Food Services, Market Survey for Central Desk Services, and Market Survey for Maid & Linen Services.*

As noted above, the record shows that each market survey and accompanying synopsis was posted on federal procurement websites—including the Federal Business Opportunities (“FBO”) website, *see FF No. 6*, which is the “single government point-of-entry” for federal government procurement opportunities over \$25,000. *See FBO website at: <http://www.FedBizOpps.gov>.* The FBO website has been long recognized as a reasonable—and primary—Government-wide vehicle on which procuring agencies—including the FAA—publicize business opportunities from which prospective government contractors can then search, monitor, and identify potential contracting opportunities. *See e.g., Information Sciences Corp. v. U.S.*, 73 Fed.Cl. 70 (2006).

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Notwithstanding the Protester's argument that these support service opportunities could not be located without their associated NAICS codes, the FBO website does not limit a contractor's search options to this code. Rather, while the FBO offers a "Search by NAICS Code" option as well as a "Search by Set-Aside Code" option, the website also prominently displays the following other query options: a "Full Text" search; a "Search By Agency," and a "Search by Procurement Classification Code"—e.g., *Procurement Classification R: Professional, administrative and management support services.* See *FBO Website at www.fedbizopps.gov*. In addition to permitting a contractor to canvass "All" federal procurements, the FBO website also allows a search query to be tailored to more narrow categories of contracting opportunity listings classified as "Presolicitation," "Special Notice," "Combined Synopsis;" "All Synopses," and "Amendment to Combined Synopsis." *Id.* To that end, the ODRA's review of the FBO website's archive confirms that each of the three market surveys was posted on the dates reported by the Center. See *FBO Website Archives at: <http://vsearch.1.fbo.gov/servlet/SearchServlet>*.

Since the record shows that each market survey clearly identified each of the three Support Services, prospective contractors reasonably could have located these opportunities using one of the FBO's non-NAICS searches discussed above. As a result, the ODRA is not persuaded that the absence of NAICS codes precluded Caribe or the small business community from having a reasonable opportunity to identify, express interest in, or otherwise compete for this acquisition. In this regard, the Program Office is not required to ensure that every possible prospective contractor is notified of every contracting opportunity; rather, as noted above, the Agency must afford a reasonable opportunity for interested contractors to access, identify and pursue the FAA's acquisition needs. The Contracting Officer's actions here more than satisfied this requirement.

Furthermore, there is no merit to the Protester's contention that the Center's reliance on separate market survey announcements placed eligible small businesses at a competitive disadvantage. As noted above, a market survey announcement is distinguishable from a solicitation announcement. The survey is but one tool for determining the most

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reasonable approach towards procuring a required product or service. While the protester claims that the Center should have identified these services as a consolidated requirement using one rather than three market surveys, such an approach would have been premature given the Center's uncertainty about the contracting community's interest and eligibility. In any event, each market survey clearly stated that the Center was using the solicited contractor responses for "planning purposes only"—and otherwise clearly stated that contractors' expressions of interest in each survey would be evaluated to determine whether the described service would be procured using a "restricted Solicitation process." *See FF No. 7.* By these terms, the market surveys reasonably conveyed that the Center was evaluating whether any type of small business set-aside for some or all of the required support services was feasible. The ODRA finds no fault with the Contracting Officer's selected approach given the circumstances here.

By relying on separate market survey instruments, the Center cast the widest net possible for identifying, capturing and evaluating small business interest and capabilities. As the results above show, some small businesses indicated that they were only interested in individual set-asides—but two expressed interest in performing all three services. *Id.* These survey responses suggest that if the Center had only announced the required services as a potentially bundled acquisition, small businesses without expertise or eligibility to perform all three services likely would have been discouraged from responding—which would have resulted in an incomplete assessment by the Center of the actual small business market.

There is no basis in the record to support a conclusion that the market surveys impeded any contractor's ability to either locate or respond to the advertised opportunities.⁸ The record shows that the Center's decision to procure the services on an unrestricted basis was corroborated by—and largely based on—other reliable indicators of small business

⁸ While not mentioned in the Center Response, the FAA Contracting Opportunities Website shows that these same three market surveys were posted to that website on the same dates as the GSA-buy and FBO website postings. See <http://faaco.faa.gov>.

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and 8(a) contractor interest that resulted from market research analysis led by the Contracting Officer.

Where, as here, a market analysis is conducted, the AMS Procurement Guidance suggests “techniques” which, in addition to a “formal market survey,” include:

- (1) Contacting knowledgeable individuals in Government and industry about market capabilities;
- (2) Reviewing the results of recent market research into similar or identical requirements;
- (3) Publishing formal requests for information in technical, scientific, business, or Government publications;
- (4) Querying on-line Governmentwide databases of contracts and other procurement instruments intended for use by multiple agencies available at: www.contractdirectory.gov;
- (5) Reviewing Government and commercial databases that provide relevant information;
- (6) Participating in interactive, on-line communication among industry, acquisition personnel, and customers to exchange information about current or planned vendor capabilities as it relates to FAA needs;
- (7) Obtaining source lists of similar items from other contracting activities or agencies, trade associations or other sources;
- (8) Reviewing catalogs and other generally available product literature published by manufacturers, distributors, and dealers or other related information available on-line;
- (9) Reviewing trade journals, directories, newspapers, and other professional publications;
- (10) Presolicitation conferences; [and]

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(11) One-on-one meetings with vendors.

See AMS Procurement Guidance, § T3.2.1.2(c), “Market Analysis.” Consistent with this guidance, the record confirms that the Contracting Officer’s market analysis relied on “no less than ten (10)” of the above-referenced “techniques” as she:

posted formal market survey questionnaires for each of the services to . . . the [FBO] and [GSA e-buy] websites; enlisted the services of the local FAA Small Business Development Liaison . . . queried on-line government and commercial databases . . . obtained source list from other sources, including the U.S. Small Business Administration . . . (“SBA”) . . . North Florida District Office . . . held a Pre-Proposal Conference/Site Visit . . . and, in addition to others, made numerous personal inquiries to prospective businesses, including small businesses.

See CR at 7.

More notably, as indicated above, the record also confirms that throughout the procurement planning process, the Contracting Officer and the SDB Program Manager sought the assistance of an SBA Specialist. *See FF Nos. 13-16.* The ODRA has relied on the SBA’s expertise, particularly with respect to NAICS codes. *See e.g., Protest of Communication Technologies, Inc., 03-ODRA-00257.* Notwithstanding this demonstrated coordination between the Center and the SBA, Caribe’s Comments argue that the SBA Specialist “could not come up with any qualified companies” because he “was not given enough time” by the Contracting Officer “to gather the requested 8(a) information.” *See Second Comments.* In making this argument, the Protester concludes that the SBA Specialist only had from Friday, March 23, 2007 until Monday, March 26, 2007 to canvas the small business and 8(a) community. However, as noted above, the Small Business Specialist was actually contacted for assistance on Thursday, March 25, 2007—and later confirmed that, within the time frame, he was able to issue 20 to 30 notices to potential small business and 8(a) contractors. *See FF No. 13.*

Caribe also questions the Center’s report that the FAA SDB Program Manager concurred in the Contracting Officer’s decision to procure the required services using an unrestricted procurement. In its July 12, 2007 Comments, the Protester advised that Caribe “intend[s] to speak with” the FAA SDB Program Manager “to verify . . . whether

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or not he concurred with the procedure not to have this solicitation set aside for an 8(a) company.” *Second Comments* at 1. However, while the Protester had until July 17, 2007 to supplement and complete its Comments on the Center Response, it has not provided any further information beyond its July 12, 2007 filing. Moreover, the current record sets forth persuasive contemporaneous evidence—specifically, the FAA SDB Program Manager’s April 6, 2007 e-mail to the SBA Specialist—which, combined with the SBA Specialist’s subsequent June, 2007 e-mail correspondence, does not support the Protester’s speculation regarding the SDB Program Manager’s non-concurrence.

The ODRA will not substitute its judgment for that of the procurement officials if the record shows a rational basis for the challenged decision and that the decision was not arbitrary, capricious, or an abuse of discretion. That is true even in cases where the ODRA may have reached a different conclusion had it conducted the procurement. *See Protest of L. Washington & Associates, Inc.*, 02-ODRA-00232; *see also MCMS Management, Inc. v. United States*, 48 Fed.Cl. 506 (2006). In this regard, while particular circumstances may trigger an obligation on the part of the contracting officer to further inquire into a small business’ qualifications and eligibility, there is no applicable law or regulation mandating such a duty in situations such as this one. *See MCMS Management, Inc., supra*. It is well established that an Agency’s assessment of the small business community’s capacity to compete and successfully perform a requirement is highly dependent on the particular circumstances of the acquisition. *Wilcox Electric et al., supra; MCMS Management, Inc., supra*. To that end, a reasonable basis for a procurement action or decision requires only a rational connection between the facts of the situation and the procurement official’s action or decision. *Id.*

Notably, this acquisition represents the first time that these support services have been procured separately from the CMEL facility lease, *see CR* at 9; as a result, there was no reliable historical model for these uniquely “hotel-like” requirements that the Contracting Officer could rely upon. Moreover, the Center sought not just performance of the three support services, but also management and coordination of this work. To that end, the solicitation was ultimately classified under a “Facilities Support Services” NAICS Code

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(No. 561210) *see FF No. 19*, which specifies the use of that Code where, as here, the agency requires integrated management and oversight of at least three separate services. *See U.S. SBA Table of Small Business Size Standards Matched To NAICS Codes, NAICS 561210—Facilities Support Services, n. 12.*⁹ Prior to concluding that a restricted procurement for these services was not feasible, the Contracting Officer diligently employed several established market survey tools including Internet market surveys, extensive CCR research, and direct telephone inquiries to over fifty small businesses. *See FF Nos. 6-12*. These vigorous efforts produced only one prospective 8(a) candidate interested in performing all three of the required support services—and three other 8(a) concerns whose interests were limited to performing only one service each. *See FF No. 8*. The SBA's subsequent research effort was similarly disproportionate; of the ninety-four small businesses reportedly canvassed, only one 8(a) was identified as a candidate for performing all three support services and a total of two different 8(a) firms were identified as prospective contractors for only one service each. *See FF Nos. 14-15 and 17*. On this record, the ODRA finds that the underwhelming results of the Contracting Officer's extensive market research combined with the SBA Specialist's similarly low number of referrals by itself—without further inquiry into the SBA's identified firms—provided a rational basis for the Contracting Officer to reasonably conclude that it was necessary to not restrict the Solicitation to small business in order to ensure adequate competition.

In reaching this conclusion, it is worth noting that during the May 11, 2007 Pre-Proposal Conference and Site Visit, the Contracting Officer invited the attendees to submit questions about the procurement to the Center, and also advised that the solicitation's terms could be subject to amendment. *See Pre-Proposal Conference/ Site Visit Minutes*. While two of the three 8(a) firms identified by the SBA Specialist attended this event, both subsequently advised the Contracting Officer that they would not be submitting a proposal. *See FF 20*.

⁹ Published at: <http://www.census.gov/epcd/naics02/def/ND561210.HTM>.

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While the Protester objects to the Center's conclusions, on this record there is absolutely no basis to question the Contracting Officer's determination that adequate competition could not be expected if the competition were limited to small business. Instead, the sparse number of small businesses that were located as a result of both the Contracting Officer's and the SBA Specialist's extensive research efforts clearly support the acquisition's unrestricted status—and the rationale that led to this selected approach. In this regard, it is well recognized that a small business' expression of interest in a procurement does not guarantee its participation or interest as a prime contractor. *See MMAC supra; see also Specialized Contract Services, Inc., B-257321, 94-2 CPD P 90 (just because small business firms routinely request to be informed of procurements or are otherwise included on a bidder's mailing list does not necessarily reflect any expectation that the identified firms will compete).*

C. The Allegations Against The Bundled Procurement

Caribe also contends that the Center improperly bundled the required services into one acquisition and that interested small businesses and 8(a) concerns cannot provide all three services unless they form teaming arrangements. To that end, Caribe maintains that it was unable to develop an offer based on a teaming arrangement that would be competitive with proposals offered by large businesses because the Solicitation provided insufficient time within which small business and 8(a) concerns could prepare teaming-based proposals. *See* FF 25.

The "Contract Bundling" section of the AMS Procurement Guidance on "*Small Business Development*" discourages the bundling of contractual requirements and instead recommends "[b]reaking up the procurement into smaller discrete procurements to render them suitable for small business set asides." *See AMS Procurement Guidance*, § T.3.6.1, ¶ 7(b). The cited Contracting Bundling Section of the AMS Procurement Guidance "is not applicable to contracts whose total estimated bundling value (including all options) is less than \$10 Million," *see AMS Procurement Guidance* § T3.6.1 ¶2(b). The estimated contract value in this case, including all option years, was approximately [DELETED].

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Thus, the Center's market analysis was not inconsistent with the AMS policy. Rather, consistent with this Section of the AMS Guidance, the contracting officer aggressively searched for enough small businesses to justify a set-aside, and conferred with the local FAA Small Business Office before proceeding with the consolidated procurement. *See FF Nos. 13-16.* The only step of the Contract Bundling Guidance which the Center did not execute was that requiring the FAA Administrator to be notified of the bundled approach and adding a corresponding "written justification [to] the [procurement] file." However, as emphasized above, since this section of the AMS Procurement Guidance was not applicable to this procurement, these steps were not required. *See FF No. 19.*

Although Caribe argues that there was insufficient time under the solicitation to "team" with another contractor, this contention is not supported by the record. As noted above, the Center began its market research efforts in late February of 2007, *see FF No. 6*, and interested contractors were given until March 16, 2007 to advise the Center of their interest in any or all of the announced services. *See FF No. 7.* Moreover, when the solicitation was issued on May 1, 2007, it clearly specified a "Facility Support Services" NAICS code classification. Even more notably, the record shows that the Solicitation's original June 1, 2007 closing date—which would have given the Protester almost four weeks to put together a teaming arrangement and qualifying proposal—was subsequently extended on three separate occasions—until June 25, 2007. *See FF Nos. 21-26.* This series of extensions ultimately provided the entire contracting community with at least seven weeks to prepare a proposal—which is longer than the five weeks the Protester contends it needed to compete. *See Second Comments* at 1. Moreover, as noted above, there was sufficient time for at least one other small business, the ultimate awardee, to successfully compete for the contract.

V. CONCLUSION

For the reasons discussed above, the ODR finds, based on substantial evidence in the record, that the procurement approach of the Center is consistent with the AMS and

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cannot be said to lack a rational basis or to be arbitrary, capricious or an abuse of discretion.

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The ODRA therefore recommends that the Protest be denied.

_____/s/
Behn M. Kelly
Dispute Resolution Officer
Office of Dispute Resolution for Acquisition

APPROVED:

_____/s/
Anthony N. Palladino
Associate Chief Counsel and Director
Office of Dispute Resolution for Acquisition