PUBLIC VERSION

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

FINDINGS AND RECOMMENDATIONS

Matter: **Protest of Enterprise Engineering Services, LLC**
Under Solicitation No. DTFACT-09-R-00007

Docket No.: 09-ODRA-00490

Appearances:

For the Protester, Enterprise Engineering Services, LLC:	Patricia H. Wittie, Esq.; Karla J. Letsche, Esq.; and Kathryn E. Swisher, Esq.; of Oldaker, Belair & Wittie, LLC
For the FAA Program Office:	William R. Sheehan, Esq., and Jay M. Fox, Esq.
For the Intervenor, Arctic Slope Regional Corp, Research and Development Solutions:	Marc F. Efron, Esq.; Amy L. O'Sullivan, Esq.; John E. McCarthy, Jr., Esq.; and Puja Satiani, Esq., of Crowell & Moring LLP

I. Introduction

On May 27, 2009 Enterprise Engineering Services, LLC ("EES") filed a post-award protest ("Initial Protest") with the Federal Aviation Administration ("FAA") Office of Dispute Resolution for Acquisition ("ODRA"). On June 26, 2009, EES filed a Supplemental Protest ("Supplemental Protest")[1] based on materials provided by the

[1] **Short Citation Formats**. In the interest of clarity and ease of reference, Appendix A summarizes the short citations used in these Findings and Recommendations.

FAA's William J. Hughes Technical Center ("Center") as part of the Agency Response ("AR") to the Initial Protest.

The Initial Protest and the Supplemental Protest (collectively referenced as "the Protests") challenge the award of a Socially and Economically Disadvantaged Business ("SEDB") set-aside contract to Arctic Slope Regional Corp, Research and Development Solutions ("ARTS") under Solicitation DTFACT-09-R-00007 ("SIR"). The contract, commonly known as the "SOS-7" contract, is the seventh "Service Operations Support" ("SOS") contract in a series of contracts[2] that provide second-level maintenance services in support of the National Airspace System (NAS). *See AR* Tab 1, Attachment J-1, § 1.2. ARTS has intervened in the Protests.

The Initial Protest asserts a wide-range of grounds, including that:

1) ARTS is not a SEDB for the purpose of this procurement;
2) The evaluators improperly downgraded EES's proposal for a lack of detail even though the FAA imposed a page limit;
3) several items in EES's proposal were evaluated in comparison to the ARTS proposal rather than according to the evaluation criteria in the SIR;
4) The FAA deviated from the evaluation criteria when it "standardized" the evaluation of the number of full time employees ("FTE") on the past performance references;
5) The evaluators improperly gave ARTS higher past performance ratings for less relevant contracts; and,
6) The evaluation was unreasonable in finding that EES's proposed Program Manager was "unacceptable."

ESS asserts that it was prejudiced by these alleged errors because they resulted in an improper cost/technical tradeoff determination. *Initial Protest*, at 20-21.

The Supplemental Protest, purportedly filed "out of an abundance of caution," (*Supplemental Protest*, at 1) asserts the following related grounds:

7) The Technical Evaluation Team ("TET") failed to evaluate the ARTS Program Manager in accordance with the terms of the SIR;
8) The TET ignored SIR requirements that benefitted the awardee;

[2] Prior SOS contracts use the similar short-form designations, *e.g.*, SOS-5.

9) The TET's evaluation of offerors was unequal regarding the understanding of the Statement of Work ("SOW"), competitive employee benefits, subcontractor transparency, duplication of effort and other miscellaneous weaknesses; and,
10) The TET failed to evaluate in accordance with the SIR with regards to the "Earned Value Management System" ("EVMS"); management of the SOS-7 work, integrating subcontractors, and employee benefits.

EES asserts that it was prejudiced by these alleged errors because but for the allegedly improper evaluation, it "would have received a more favorable technical evaluation …." *Supplemental Protest*, at 21.

The Center "submits that EES's arguments are completely baseless, both factually and legally, and that the protest should be denied." *AR*, at 1. ARTS supports the Center's position, and provided supplementation and elaboration on several points. *ARTS Dismissal Req. & Comments*, at 12. The Center, again with ARTS support, similarly denied the allegations in the Supplemental Protest. *Supplemental Response*, at 10; *ARTS Supplemental Comments*, at 16.

In further response to the Protests, ARTS filed a "Request for Dismissal of the Protest" ("ARTS Request for Dismissal"), arguing that EES does not qualify as an SEDB because it is affiliated for size purposes with the larger Client Network Services, Inc. ("CNSI"). *See generally, ARTS Dismissal Request & Comments*. EES opposes the request, and at the direction of the ODRA, filed an SBA Form 355 with supporting documentation to show that it meets the standards of an SEDB. The Center supports the ARTS request to dismiss the Protests. *Center's Dismissal Response*, at 1.

As discussed below, the ODRA recommends that the ARTS Request for Dismissal be denied. The ODRA also recommends that the EES Protest be: (1) sustained in part with respect to the grounds challenging the assignment of strengths for understanding the Statement of Work, and the evaluation of the web-based tool called "Enterprise Contract Organizer" ("ECO"); and (2) denied in part as to all remaining grounds of the Protests.

II. Findings of Fact

A. The SIR

1. On December 15, 2008, the Center issued Solicitation Number DTFACT-09-R-0007, entitled "Service Operations Support (SOS) – 7," ("S0S-7"). *AR* Tab 1, SIR, § A. The anticipated contract would be a Time and Materials ("T&M"), Indefinite Delivery, Indefinite Quantity ("IDIQ") contract performed under delivery orders issued by the Contracting Officer. *AR* Tab 1, §§ L.2 and G.6; *AR* Tab 4, at 1.

2. The Statement of Work ("SOW") required the awardee to provide second-level maintenance engineering on many systems/subsystems that are part of the National Airspace System ("NAS"). "The NAS is comprised of radar target, weather detection, flight data and supporting processing systems, air traffic processing and display systems within the EnRoute, Oceanic, flight service and terminal air traffic control environments, communications systems, flight plan data information systems, and NAS maintenance and support systems." *AR* Tab 1, Attachment J-1, §1.2, at 1.

3. The SIR described "Second-level maintenance" as typically providing:

> a. Restoration assistance, remotely or on-site when requested to support first level personnel.
> b. Development, testing, and production of engineering solutions in response to NAS problem reports and approved case files.
> c. Engineering studies and alternative analysis solutions.
> d. Configuration and documentation maintenance, release and control.
> e. Assurance of the supportability of new systems before they become deployed into the NAS."

AR Tab 1, Attachment J-1, §1.2, at 1.

4. The SOW also required the awardee to provide program planning, contract transition, and contract management. *AR* Tab 1, Attachment J-1, § 3.1, at 10.

5. The competition was conducted as a 100% competitive set-aside for "socially and economically disadvantaged businesses." More specifically, the SIR stated:

> This Screening Information Request (SIR) is a 100% Competitive Set-Aside among Socially and Economically Disadvantaged Businesses (SEDBs). The North American Industry Classification (NAIC) Code is 541519 (Other Computer Related Services) with a size standard of $25M. Each firm claiming they are an SEDB is required to provide a copy of their Small Business Administration (SBA) 8(a) certification letter, along with the Business Declaration form (located in Section J) to the Contracting Officer at the time of proposal submission as evidence of eligibility (see Section L for complete submission requirements). This SIR will result in an award of a time and materials (T&M) contract to a qualified SEDB firm with fully burdened labor rates. The minimum ordering obligation is $129K. The maximum ordering obligation is 2,533,473 hours. The minimum ordering obligation will be issued concurrently with contract award. The contract shall have a base period of one year, with six 1-year option periods. See Section M for award criteria.

AR, Tab 1, § B.1, at 2.

6. Section L of the SIR contained instructions for the offerors. Section L.7 directed offerors to provide three volumes, *i.e.*, a technical proposal ("Volume I"), a price proposal ("Volume II"), and a compact disc containing "the entire technical and price submission" ("Volume III"). *AR* Tab 1, § L.7. Offerors were advised:

> An elaborate proposal is not required. The proposal should be simple and provide straightforward, concise delineation of your capabilities for the subject requirement. You shall provide sufficient detail in response to the technical evaluation criteria contained in Part IV – Section M.

AR Tab 1, at § L.7, at 62.

7. In pertinent part, Section L.7 also stated:

> (a) Volume 1 - Technical Proposal - Original and five (5) copies to include all data **and information required for evaluation based on the factors identified in Section M.4,** and must exclude any reference to the pricing aspects of the offer. E-mail or faxed submissions are prohibited.

> The technical proposal must be specific and in sufficient detail to enable an evaluation team to make a thorough evaluation **to determine if the offeror fully understands the requirement, and that the offeror can meet all the requirements of the SOW.** Offerors are advised to submit a proposal that is clear and comprehensive without additional explanation or information.
>
> **Additional information may be requested from offerors whose proposals are considered the most likely to receive award;** however, the Government reserves the right to award a contract based on initial offers received, without discussions or negotiations.
>
> Any proposal that does not explicitly comply with proposal instructions and SIR requirements **may** be considered non responsive and may not be further considered for contract award.
>
> If subcontracts are proposed, proposal must clearly indicate which services the prime contractor will provide and which the subcontractor will provide.

AR Tab 1, § L.7, at 62 (emphasis added).

8. The submittal instructions also included express page limitations that referenced further limitations found in section M of the SIR (pertaining to the individual evaluation factors):

> **L.8 PAGE LIMITATIONS AND INSTRUCTIONS FOR SUBMITTAL**
>
> Page limitation for the Volume 1 (Technical Proposal) is set forth in Section M; however, offerors are encouraged to submit only the minimum required information. Size of the pages must be uniform; however, limited foldout charts or diagrams may be used and count against the page limits set forth. Foldout charts and diagrams may be furnished in Times New Roman with a font size no less than 8 point and do count against the page limits.
>
> There is no page limit for the Volume 2 (Price Proposal).

AR 1, § L.8, at 63.

9. Section M.2 of the SIR explained that the award would be made to the offeror "whose proposal provides the best value to the Government." Section M.2 stated:

> **M.2 BASIS FOR AWARD**
> The Government intends to evaluate proposals and award one contract in response to this SIR to the responsive/responsible offeror whose proposal provides the best value to the Government using the evaluation criteria identified below. Technical is more important than price, therefore, the successful offeror may not be the lowest priced proposal. However, price will become more important as the difference between competing technical scores decrease.
>
> The burden of providing thorough and complete information rests with the offeror. Only information supplied in full text in the proposal will be evaluated. Offerors are cautioned that failure to provide all the required information may result in elimination of the offeror from further consideration for award.
>
> The Government reserves the right to award a contract immediately following conclusion of all the evaluations, and may or may not require communications or negotiations with the successful offeror. Therefore, it is critical that each offer be fully responsive to this SIR and its provisions. Additionally, the Government reserves the right to conduct communications and negotiations with any competing offeror, or all competing offerors as the situation warrants.
>
> No contractual obligation or liability on the part of the Government shall exist unless and until the contract is awarded. Therefore, no offeror should begin work on the services and other requirements called for by this SIR until after formal notice of contract the Government has issued award [sic].

AR Tab 1, §M.2, at 64.

10. The technical proposals were to be evaluated in accordance with the four factors stated in § M.4. Recognizing that EES has challenged the evaluations conducted under factors 1 through 3, the entire clause is quoted in full:

> **M.4 TECHNICAL EVALUATION**
> The Technical Evaluation grading will be based on the following factors, listed in descending order of importance. Factors 1, 2, & 3 will be graded; and Factor 4 will be graded as Pass or Fail.
>
> **Factor 1: Program Management Plan**
>
> The Program Management Plan must describe the offeror's plans for managing the support services to be provided in accordance with the statement of work. The submission for Factor 1 must comply with the

following format: 10 page limit, font size 12, one-inch margins, singlespaced on letter-sized paper (8.5”X11”).

The offeror must address the following areas, at a minimum:

Program Management Approach

Identify the program manager’s duties, responsibilities, authority and their [sic] relationship to corporate management. The offeror must discuss any management approaches that would be taken to ensure that individual support personnel affiliation with either prime or subcontractor would be transparent to the FAA, contract management, and the individual employee.

If you intend to subcontract or “team”, the details of the integration of subcontracting or teaming efforts should be provided. Discuss how your firm will ensure performance and cost efficiencies rather than separate reporting requirements and duplication of functions. Additionally, discuss any management approaches that would be taken to ensure that individual support personnel affiliation with either prime or subcontractor would be transparent to FAA, contract management, and the individual employee.

Employee/Subcontractor Recruitment/Retention

Offeror must document/demonstrate successful recruitment capabilities and competitive employee benefits in order to recruit and retain a highly educated and skilled workforce. Documentation may include, but not limited to recruitment plan, company health plan, sick/annual leave benefits, 401K, and life/health insurance. Provide a narrative explaining past and planned approaches for recruiting personnel to meet the requirements in the SOW.

Provide a narrative describing employee retention over the last 5 years. Explain instances where employees left prior to the completion of the contract. Include retention of subcontractor companies on past contracts, if applicable.

Employee Training/Educational Benefits

At the start of the contract, and throughout the life cycle of the contract, the contractor must have the required skilled personnel to support the contract requirements. The contractor must be responsible to maintain the proper skill mix through individual initiative, continuing education programs, or other company sponsored training programs.

Provide a narrative explaining employee training and educational benefits. Explain planned approaches to technical refresher/currency training.

Provide a narrative explaining training approaches necessary for keeping personnel abreast of industry advances and for maintaining proficiency on equipment, computer languages, and office automation tools that are available on the commercial market.

Factor 2: Corporate Experience/Past Performance

In this section you must describe the company's experience in providing similar work in size (Hours/FTEs) and scope (type of effort) as that described in the SOW to show the competency to succeed on this effort. The submission for Factor 2 must comply with the following format: 7 page limit, font size 12, one-inch margins, single-spaced on letter-sized paper (8.5”X11”), excluding Contract Performance Information forms identified in Section J.

In the event of a joint venture as defined in 13 CFR 121.103 and 13 CFR 124.513 (as applicable), the FAA will evaluate the experience of both components of the joint venture and the experience of the joint venture itself.

The corporate experience of any subcontractors will be considered in reviewing the corporate experience; however, greater weight will be accorded to the corporate experience of the prime. For subcontractor’s corporate experience, their experience in performing as a prime or subcontractor will be considered equally.

The information provided must describe the relevance of the referenced contract to the proposed contract. In addition, the overall technical, schedule, administrative and cost performance of each must be summarized. This information should indicate the competency the FAA can expect from the offeror performing on this effort.

The offeror must identify work which is currently ongoing or which has been performed within the last five years. This past performance information must include:

Contract #
Prime or Subcontractor
Name of the company or government agency
Total value of the work performed by the offeror
Type of contract – i.e., Time and Materials or Cost Plus Fixed Fee

Offeror's period of performance
The percent of work performed by the offeror over the total life of the contract
Reference, including personnel name, telephone number, and email address
Brief synopsis of the work performed by offeror

Two contracts and/or subcontracts must be submitted to be considered responsive to this requirement.

The offeror will be evaluated under this factor based primarily on the extent and quality of its own corporate past performance as a prime or subcontractor. Government computer systems maintenance experience as a prime or subcontractor is preferred. Proposed subcontractor's past performance history will be considered, but is less significant. Experience of key personnel will not be considered for this factor.

Past Performance References: Offers must request from the Government agency/companies identified in response to Factor 2 that they complete the Contractor Performance Information form located in Section J. Two completed "Contractor Performance Information" forms must be submitted to receive the full benefit for Factor 2. It is exclusively the offeror's responsibility to ensure that the references they have identified in response to factor 2 complete and sign the form and that it is submitted with the offerer's [sic] proposal package. Past performance information, which cannot be readily confirmed, may not be considered.

Factor 3: Key Personnel

A resume must be provided for the labor category that demonstrates the person's expertise relevant to the SOW. In addition, the person must satisfy the appropriate labor skill requirement. The resume must comply with the following format: two (2) page limit (excluding the letter of intent), font size 12, one inch margins, single-spaced on letter-sized paper (8.5"X11").

The offeror must provide a resume for the following key personnel (reference AMS 3.8.2-17 (Key Personnel and Facilities)):

Labor Category	Skill Level	Number of Resumes
Program Manager	1	1

The resume should include the following:

> Education: Include, in reverse chronological order, colleges and/or technical schools attended (with dates), degree(s)/certification(s) received, major field(s) of study, and approximate number of total class hours in non-degreed/non-certified areas of study. Include Military education, if applicable.
>
> Experience: Include in reverse chronological order, relevant work experience, company and title of position, approximate starting and ending dates (month/year), specific experience on projects of similar size/ scope/ complexity/ functionality, and specific experience related to the SOW. Include Military experience, if applicable.
>
> Certification: Certify the information contained in the resume is correct and accurate (including signature of the person and if not currently employed by the offeror, an accompanying signed letter of intent to be employed with the offeror). The letter of intent must be dated after the issuance of the SIR.
>
> **Factor 4: Transition Plan**
>
> The Technical Evaluation will grade this factor as Pass or Fail.
>
> The planned transition period shall not exceed 90 days.
>
> Provide a narrative describing a successful 100% transition to the new contract with no degradation to the level of service the FAA has been receiving and with no disruptions to FAA operations. The submission for Factor 4 must comply with the following format: 2 page limit, font size 12, one-inch margins, single-spaced on letter-sized paper (8.5”X11”).
>
> Provide a detailed plan which clearly illustrates the steps that will be taken to begin work on this contract and within what time frame. Provide an optimal time frame for 100% transition of this proposed contract including lead-time for full staffing. Detail how an increased workload will be handled.
>
> Detail how work will be assigned, how performance and quality will be managed and how contract requirements are met. Discuss proposed method of transitioning on-going work requirements.

AR Tab 1, §M.4, at 65-68.

11. As is shown in Finding of Fact (“FF”) 10, above, Evaluation Factor 3 (Key Personnel) only required evaluation of the proposed Program Manager. SOW

section 3.1.3 referenced attachment J-2 for the descriptions and requirements for positions, including the Program Manager. Attachment J-2 described the Program Manager's position as:

> Responsible for overall assignment of work, management of personnel, financial, operations and technical programs. Ensures responsiveness and negotiates submitted proposals with the CO/COTR. Ensures that projects are fully controlled, that goals and objectives are set, program responsibility assigned and results documented. Possesses general knowledge of all technical and management areas of the contract. Must be employed by the prime contractor.

AR Tab 1, Attachment J-2, at 1. It described the minimum education and experience as:

> From a college or university accredited by an accrediting body recognized by the U.S. Department of Education:
>
> Bachelors Degree with minimum of twenty (20) years related experience in program management
>
> or
>
> Masters Degree with minimum of fifteen (15) years related experience in program management[.]

Id.

12. The evaluation criteria stated in SIR §M.4 were also stated in the Evaluation Plan. *AR* Tab 2, at 4-8. The Evaluation Plan indicated that the first three factors would be graded on the following grading scheme:

> **Excellent:** A proposal that meets or exceeds all of the Government's requirements, contains extensive detail, demonstrates a thorough understanding of the requirements, is highly feasible (low risk) and offers numerous significant strengths which are not offset by weaknesses.
>
> **Good:** A proposal that meets or exceeds all of the Government's requirements, contains at least adequate detail, demonstrates at least an understanding of the requirements, is at least feasible (low to moderate

> risk) and offers some significant strengths or numerous strengths which are not offset by weaknesses.
>
> **Satisfactory:** A proposal that at least meets all of the Government's requirements, contains at least minimal detail, demonstrates at least a minimal understanding of the requirements, and is at least minimally feasible (moderate to high risk). No deficiencies exist and any combination of weaknesses is not a risk to successful contract performance.
>
> **Unacceptable:** A response that does not meet the requirements of the SIR as measured by the stated evaluation criteria and is not acceptable because of some significant weakness. This weakness is a risk to successful contract performance. Deficiencies exist.

AR Tab 2, at 8-9. The fourth evaluation factor, "Transition Plan," was graded on a pass / fail basis but is not at issue in these Protests.

13. The evaluation plan also defined terms that were used in the grading scheme:

> **Strength:** Any aspect of a proposal when judged against a stated evaluation criterion, which enhances the merit of the proposal or increases the probability of successful performance of the contract. A significant strength appreciably enhances the merit of a proposal or appreciably increases the probability of successful contract performance.
>
> **Weakness:** A weakness is "a flaw that increases the risk of unsuccessful contract performance." A significant weakness is "a flaw that appreciably increases the risk of unsuccessful contract performance."
>
> **Deficiency:** A deficiency is "a material failure of a proposal to meet a government requirement or a combination of significant weaknesses in a proposal that increases the risk of unsuccessful contract performance to an unacceptable level"

AR Tab 2, at 8.

14. The price evaluation was to be based on the total price offered for the base service period and the six, one-year options. *AR* Tab 1, at §M.5.

15. The Center issued four amendments to the SIR, but none changed the closing date of January 28, 2009. *AR* Tab 1, Amendments 0001 to 0004. The topics addressed in these amendments that relate to the present Protests included the SEDB standards, page limitations, and the evaluation of the Program Manager. *Id.*

16. The amendments addressed several questions regarding how the Center would make a determination of which offerors were eligible SEDBs. The extensive questions, answers, and other information on this point that were contained in the first three amendments, found in *AR* Tab 1, are as follows:

> **Amendment 0001:**
>
> **Question No. 1:** We have serious reservations concerning the inclusion of this provision in the solicitation, and believe that the recognition of a Joint Venture in this opportunity seriously undermines the spirit and intent of the Socially and Economically Disadvantaged Business (SEDB) 8(a) Set-Aside Program.
>
> Factor 2 of the solicitation states, "...In the event of a joint venture as defined in 13 CFR 121.103 and 13 CFR 124.513 (as applicable), the FAA will evaluate the experience of both components of the joint venture and the experience of the joint venture itself..."
>
> **Answer to Question No. 1:**
>
> The Contracting Officer believes that the question confuses two different aspects of the cited regulation, (13 CFR 123.103.) This procurement has not been designated or set aside for the "Mentor-Protégé" program, Section 123.103(b)(6). Rather, the SIR referred to "Joint Ventures" as defined in Section 123.103 (h). Under that provision, an offer under a set-aside solicitation such as this may be accepted so long as each individual partner in the joint venture qualifies under the applicable NAIC standard, which in this case is $25M. The referenced paragraph in the SIR merely noted the point that, in the case of such a joint proposal, the Contracting Officer will evaluate the corporate experience of both the venture and its component members.
>
> The Contracting Officer, in conjunction with the acquisition team, adopted this standard after careful review of this requirement. Given both the history and size of the

procurement, together with the results of the market survey previously conducted, the CO has determined that it is not appropriate for the "Mentor-Protégé" program. We believe that the structure we have chosen will maximize both competition and the overall goals of the FAA's Small Business program. Accordingly, offers will be subject to the applicable standards of subcontracting and joint venturing applicable to SEDB 8(a).

Amendment 0002:

Question #4: An SBA-approved 8(a) Joint Venture between a mentor and its protégé is considered small, per 13 CFR 124.513(b)(3), provided the protégé qualifies as small for the size standard corresponding to the NAICS code. Question: Will the FAA allow this type of Joint Venture to compete?

Answer to #4: The FAA will not allow this type of joint venture unless the mentor is a small business in accordance with the NAICS code of this SIR. The FAA has not set this procurement aside for the "mentor protégé' program." Market surveys were conducted on 01/25/2007 and 12/20/2007 and the FAA concluded from the results that adequate competition existed among 8(a) and small businesses. The FAA has considered and rejected the use of the mentor protégé' program as it would be detrimental to the small business goals and small business community. Therefore, the answer to question #1 in Amendment 0001, outlines the criteria for an approved joint venture under this acquisition.

Amendment 0003:

b. Reference Part IV-Section L.7 (Submission of Proposals), paragraph (b), regarding the submission of the Business Declaration. ADD the following:

"For a traditional prime/subcontractor arrangement, a Business Declaration is only needed from the prime. For a joint venture (JV), a Business Declaration is required by each component of the JV."

…

f. The FAA's answer to question #1 in Amendment 0001 (dated 12/18/08) incorrectly cited 13 CFR 123.103 when defining the

mentor protégé program and joint ventures. The correct citation should have been 13 CFR 121.103.

…

Question #28: The SIR is not definitive with respect to the submission of Business Declarations for subcontractors. Please clarify if Business Declarations (Attachment J-4) are required for all subcontractors upon proposal submission.

Answer to #28: For a traditional prime/subcontractor arrangement, a Business Declaration is only needed for the prime contractor. For a joint venture (JV), a Business Declaration is required by each component of the JV.

Question #29: The Government states that each component of the JV must individually meet the $25M size standard. But, the Government also states that it will be applying the principals [sic] of 121.103 in deciding affiliation issues. 121.103 (a) (6) states that once it is decided that firms are affiliated, size is determined by counting the receipts of all the affiliates. 121.103 (h) (2) states that concerns submitting offers on a particular procurement as joint venturers, are affiliated. Our interpretation is that the sum total of all receipts of all of the JV components must meet the $25M size standard.

Answer to #29: In accordance with 121.103(h)(3), the FAA will accept offers from a joint venture comprised of at least one 8(a) business and one or more small businesses so long as each member of joint venture meets the NAIC code, irrespective of the aggregate net worth of the companies. We decided on this approach after conducting multiple surveys that indicated there was adequate competition and technical competence to retain the work strictly among small business concerns. At the same time, we recognize that the total requirement is very large, and thus a competition that permits multiple small businesses to participate as joint ventures or subcontractors would provide the greatest benefit for the small business community, and best implement the FAA's Small Business goals.

AR Tab 1.

17. Amendments 0002 to 0004 all included information regarding the page limits imposed on the technical proposals:

Amendment 0002:

…

Question #2: Will the FAA consider allowing a two page Introduction/Executive summary that is excluded from the Technical Volume page count so that bidders may introduce their proposed team and summarize their proposed approach?

Answer to #2: A two page executive summary will not be evaluated and therefore should not be submitted.

Question #3: Section L.8 indicates that foldouts charts and diagrams may be furnished in Times New Roman with a font size no less than 8 point font and do count against the page limit. Do foldouts count as one page or two pages against the page limitation?

Answer to #3: Foldouts will count as one page, not to exceed 8.5" X 14"

…

Question #6: The SIR, page 66, the first paragraph under Factor 2: Corporate Experience/Past Performance states that there is a 7 page limit for this factor. Is that limit inclusive of all past performance references submitted, or is the limit per past performance reference?

Answer to #6: The page limit is inclusive of all past performance references. The contract performance information forms identified in Section J do not count against the 7 page limit.

Question #7: Is it permitted to include attachments/appendices to Volume I, Technical that would not count against the total page limit for the document in much the same fashion that the Letter of Commitment is excluded in the first paragraph under M.4, Factor 3: Key Personnel?

Answer to #7: Attachments/Appendices to Volume I – Technical, that are in excess of the page limitation are not permitted.

Amendment 0003:

c. Reference Part IV – Section L.8 (Page Limitations and Instructions for Submittal), 1st paragraph, ADD the following:

"Foldout charts or diagrams up to 8.5"x11" count as one (1) page. Foldout charts or diagrams up to 11"x17" count as two (2) pages."

d. Reference Part IV – Section M.4, Factor 3 (Key Personnel). The two (2) page resume limit is increased to three (3) pages.

…

Question #3: L.8 Page Limitations – Does a fold-out chart or diagram count as one page or two?

Answer to #3: Fold-out charts or diagrams up to 8.5" X 11" count as one (1) page. Fold-out charts or diagrams up to 11" X 17" count as two (2) pages.

…

Question #5: M.4 Technical Evaluation, Factor 3: Key Personnel allows for a 2 page resume. Would the FAA consider increasing it to 3 pages?

Answer to #5: Yes. See amendment language above.

…

Question #16: The answer to Amendment 002, Question #3 states "Foldouts will count as one page, not to exceed 8.5" X 14". Foldouts are typically sized at 11"x17" in order to accommodate charts and diagrams in a landscape mode and make diagram development and subsequent reviewing much easier. An 8.5" x14" sheet folds down and causes aesthetic issues as well as interfering with Volume binding. Would the FAA please consider allowing a foldout to be oriented in landscape mode with a size limitation of 11"x17"? Alternatively, would the FAA allow the use of an 11"x17" foldout that would count as two pages?

Answer to #16: See answer to question #3 above.

Question #17: Can proposals be submitted on 81/2 by 11 landscape?

Answer to #17: No.

…

Amendment 0004:

> a. Amendment 0003 stated that foldout charts or diagrams up to 8.5" X 11" count as one page. This is hereby revised to allow for the submission of foldout charts and diagrams up to 8.5" X 14" to count as one page. As a result, Section L.8 (Page Limitations and Instructions for Submittal), 1st paragraph of the SIR, is revised to read the following:
>
> > "Foldout charts or diagrams up to 8.5"x14" count as one (1) page. Foldout charts or diagrams larger than 8.5" X 14" count as two (2) pages. Under no circumstance shall foldout charts or diagrams exceed 11" X 17"."

AR Tab 1.

18. Amendments 0002 made a change relating to the past performance evaluation criteria:

Amendment 0002

> b. Part IV – Section M.4, Factor 2 (Corporate Experience/Past Experience), 3rd paragraph, ADD the following as the 1st sentence:
>
> > "Greater weight will be accorded for experience gained as a prime contractor compared with similar experience gained as a subcontractor."

AR Tab 1.

19. Amendment 0003 contained information pertaining to the requirement that the awardee designate a Program Manager for the contract. This information included changes to the evaluation criteria, the position title, and the letter of intent to accept employment:

Amendment 0003:

> e. Reference Attachment J-1 (SOW), paragraph 3.2.1 (Program/Project Management), 2nd paragraph, REMOVE title of "Project Manager" and REPLACE with "Program Manager."

…

> **Question #12:** The attachment J6-SOS7, is that for a separate Program Manager and admin support on top of the Project manager and other labor categories?
>
> > **Answer to #12:** Paragraph 3.2.1 (Program/Project Management) of the Statement of Work states that "the contractor must designate a single Project Manager…". This is a typographical error and has been replaced with the term "Program Manager." See amended paragraph above in block 14e.
>
> …
>
> **Question #14:** In the Screening Information Request (SIR), Part IV - Section M Evaluation Factors for Award, M.4 Technical Evaluation, Factor 3: Key Personnel (page 67) it states:
>
> > "Certification: Certify the information contained in the resume is correct and accurate (including signature of the person and if not currently employed by the offeror, an accompanying signed letter of intent to be employed with the offeror). The letter of intent must be dated after the issuance of the SIR."
>
> In Attachment J-2 Labor Category (page 1) under Description for Program Manager Level 1 it states:
>
> > "Responsible for overall assignment of work, … Must be employed by the prime contractor."
>
> Is it necessary for the Program Manager to be employed by the prime contractor prior to the award of the contract?
>
> > **Answer to #14:** No. A letter of intent is required as stated above. After award, the Program Manager must be employed by the prime contractor.

AR Tab 1.

B. Proposals Received

20. The Center received timely proposals from nine offerors, including EES and ARTS. *AR* Tab 4, at 3.

21. ARTS proposed [DELETED] as its SOS-7 Program Manager. *AR* Tab 12, Vol. 1, § 3, at 1.

22. When ARTS submitted its proposal, [DELETED] was employed by ARTS's parent company, ASRC Federal Holding Company. *Id.*, at 2. *See also Supplemental Protest*, Exhibit 3 (containing an email from [DELETED] with "asrcfedera.com" as the domain for his email address).

23. ARTS included [DELETED] certified resume in its proposal. *AR* Tab 12, Vol. 1, § 3, at 3. ARTS, however, did not submit with the offer a letter from [DELETED] showing that he intended to be employed by ARTS, the subsidiary of ASRC Federal Holding Company. *Id.*

24. In response to Evaluation Factor 1, with regard to employee benefits, ARTS provided a narrative that included the statement, "[DELETED]. This policy is applied by all teammates." *AR* 12, Section 1.3, at 9 (emphasis in the original). The proposal also provided referenced the following chart:

    [DELETED]

    Id.

25. ARTS proposed using [DELETED] subcontractors: [DELETED]. *AR* Tab 12, Vol. 1, Sec. 1, at 7.

26. ARTS is a wholly owned subsidiary of ASRC Federal ("ASRC") (*AR* Tab 12, Vol. II, at 1), which in turn is a wholly owned subsidiary of the Arctic Slope Regional Corporation ("ASRC") (*Initial Protest*, Exhibit 4). In 2008, ASRC had revenues of approximately $2.3 billion. *Id.*, at Exhibit 3. ASRC is an Alaska Native Corporation (ANC) pursuant to the Alaska Native Claims Settlement Act ("ANCSA"). *Id.*

27. ARTS cited six examples of past performance in response to the SIR. The following table summarizes the examples:

ARTS's Examples of Past Performance (AR Tab 12, Vol. 1, Sec. 2)			
Project	**Performing Company**	**Role in the Project**	**Scope of Effort (as described in proposal)**
[DELETED]	ASRC	Prime	[DELETED]
[DELETED]	ARTS (for second contract cited)	Prime	[DELETED]
[DELETED]	[DELETED]	Prime	[DELETED]
[DELETED]	[DELETED]	Subcontractor	[DELETED]
[DELETED]	[DELETED]	Subcontractor	[DELETED]
[DELETED]	[DELETED]	Prime	[DELETED]

28. ARTS provided a facially sufficient Business Declaration and an appropriate letter from the SBA indicating acceptance into the 8(a) program. *See AR* Tab 12, at Vol. II, at 13 - 14.

29. As part of its Technical Proposal, EES discussed the use of its web-based tool called "Enterprise Contract Organizer" ("ECO"). ECO was referenced in figure 2-3 of the Technical Proposal. AR Tab 11, Vol. I., at 5. ECO also was addressed in the text (set out in the these Findings and Recommendations at Section III.B.3.g., *infra*.).

30. EES's proposal contained a resume for [DELETED], EES's proposed Program Manager. *AR* Tab 11, Vol. I, § 3, at 1-3. [DELETED] did not certify and sign this resume. *Id*. [DELETED] did sign a letter of commitment, but EES included this in Volume II (pricing), rather than the Volume I (technical proposal) that the TET reviewed. *AR* Tab 11, Vol. II, at 7 (an unnumbered page).

31. In response to Factor 1, with regard to employee benefits, EES provided a short narrative that relied primarily on the following chart:

[DELETED]

32. EES proposed using [DELETED] subcontractors: [DELETED]. *AR* Tab 11, EES Vol. 1, Sec. 1, at 1.

33. EES cited six examples of past performance in response to the SIR. Each example had a chart stating that work under the contract included documentation support, process improvement, engineering, configuration management, testing, quality assurance and logistics. *See e.g.*, AR Tab 11, Vol. 1, fig. 1-2. The following table summarizes the examples:

EES's Examples of Past Performance (AR Tab 11, Vol. 1, Sec. 2)			
Project	**Performing Company**	**Role in the Project**	**Scope of Effort (as described in proposal)**
[DELETED]	EES	Subcontractor to [DELETED]	[DELETED]
[DELETED]	[DELETED]	Prime	[DELETED]
[DELETED]	[DELETED]	Subcontractor to [DELETED]	[DELETED]
[DELETED]	[DELETED]	Subcontractor	[DELETED]
[DELETED]	[DELETED]	Prime	[DELETED]
[DELETED]	[DELETED]	Prime	[DELETED]

34. As required by the SIR, at § B.1, EES's Price Proposal (Vol. II), contained a facially acceptable Business Declaration form and a similarly acceptable letter from the SBA, dated April 13, 2007, certifying EES as an 8(a) program participant and as a Small Disadvantaged Business. AR Tab 11, Vol. II.

C. The Technical Evaluation

35. The technical evaluation team ("TET") began the evaluation of the technical proposals on February 3, 2009. *AR* 10, *TET Decl*. at ¶ 3. Each member of the four-person TET reviewed every technical proposal multiple times. *Id.*, at ¶ 4. Each member graded each proposal separately. After reviewing all proposals, the TET discussed differences and reached consensus scores for each proposal and evaluation criteria. *Id.*, at ¶ 5. After reaching initial consensus, each member revaluated the proposals, and then the TET reevaluated the consensus grades previously reached. *Id.* at ¶¶ 6 and 7. Prior to preparing their final report, the Team reviewed the proposals for a third time, and then drafted their report. *Id.*, at 8 and 9. The four members of the TET believe they spent "at least 500 hours" of combined time evaluating the technical proposals. *Id.*, at ¶ 10.

36. As part of its evaluation process for Factor 2, "Past Performance," the TET used a formula it had developed to determine the number of Full Time Employees required to perform the past contracts described in each proposal. The TET's Final Report describes the calculation used:

> … To determine whether an offeror's past contracts were of similar size, the TET devised a standard formula. Each contract's value and period of performance were used to determine an average yearly contract value. Then, a standard $75 per hour rate was used to determine average hours per year. Finally, a rate of 1860 hours per year was used to calculate Full-Time Equivalents (FTEs). …

AR Tab 3, at 1. This procedure was not stated in either the SIR or the Technical Evaluation Plan. *See AR* Tabs 1 and 2.

37. The TET's evaluation results were summarized (alphabetically by offeror names, which mostly have been omitted in these Findings and Recommendations) in their Final Report (*AR* Tab 3, at 3) as follows:

Summary of Findings

	Factor 1 Grade Program Management Approach	Factor 2 Grade Corporate Experience/ Past Performance	Factor 3 Grade Key Personnel	Factor 4 Grade Transition Plan
Offeror A	Satisfactory	Satisfactory	Satisfactory	Fail
ASRC RTS	Excellent	Excellent	Excellent	Pass
Offeror B	Satisfactory	Excellent	Unacceptable	Pass
Offeror C	Good	Satisfactory	Excellent	Pass
EES	Satisfactory	Satisfactory	Unacceptable	Pass
Offeror D	Satisfactory	Unacceptable	Unacceptable	Pass
Offeror E	Satisfactory	Excellent	Unacceptable	Pass
Offeror F	Unacceptable	Unacceptable	Satisfactory	Fail
Offeror G	Good	Good	Unacceptable	Pass

38. The TET explained its scores for the ARTS proposal for Factors 1 through 3 as follows:

> ***FACTOR 1: Program Management Approach***
>
> ASRC RTS was given a grade of "**Excellent**" for their program management approach.
>
> ASRC RTS demonstrated a clear understanding of the Statement of Work (SOW) and presented a well detailed description of their plan to manage the support services to be provided. They substantiate their claim to be able to manage the SOS-7 work with clearly defined processes and supporting examples of past successes. The scope of the program manager's authority and his relationship to corporate management was well detailed [DELETED] (page 6)

ASRC RTS also provided a well detailed subcontractor integration plan, allowing flexibility [DELETED] (page 7). In the area of competitive employee benefits, ASRC RTS stated [DELETED] (page 9) This incentive increases the likelihood of success for recruitment and retention. Additionally, ASRC RTS provided [DELETED] (Figure 1-6) that demonstrates a clear understanding of FAA operations. These were considered significant strengths.

ASRC RTS provided [DELETED] (page 1). They provided a well detailed approach for transparency to the FAA; they stated, [DELETED] (page 7). ASRC RTS provided a detailed approach to provide [DELETED]. ASRC RTS provided a well detailed recruitment approach and training plan. ASRC RTS provided detail of employee benefits [DELETED]. ASRC RTS indicates [DELETED]. These were also considered strengths.

FACTOR 2: Corporate Experience/Past Performance

ASRC RTS was given a grade of "**Excellent**" for their Corporate Experience/Past Performance.

ASRC RTS presented information on two large contracts where they indicated they performed as the prime contractor, two contracts where their subcontractors performed as the prime contractor, and two contracts where their subcontractors performed as the subcontractor.

The first contract cited was [DELETED], which was a very large support effort for the [DELETED]. After clarification with the Contracting Officer's Technical Representative (COTR), [DELETED], it was determined that although the scope of work was very similar to the SOS 7 effort, [DELETED], the team determined that it would focus on ASRC RTS's prime performance under the other referenced contract.

The second referenced vehicle was [DELETED], and its "follow-on," [DELETED]. The proposal states, [DELETED] (page 3). Based on this statement, the team focused strictly on the follow-on contract, [DELETED], where ASRC RTS, was the prime. Contractor Performance Information (CPI) forms were completed for [DELETED], each with excellent comments.

That contractual effort, [DELETED], where they performed as prime, was similar in size (greater than 60 calculated Full Time Equivalents (FTE)) to SOS-7. The TET noted that the proposal indicated [DELETED] (page 3). Further, ASRC RTS's work as the prime included engineering, maintenance and operations, and support of [DELETED]. This type of work is directly relevant to the full scope of

the SOS-7 SOW, and demonstrates the ability to manage a contract of SOS-7's size and complexity. This experience by itself warrants a grade of "Excellent."

ASRC RTS's subcontractors each contribute extensive contractual experience that is similar in size, complexity, and relevance to SOS-7. (One greater than 300 calculated FTEs) Taken as a whole, the subcontractors themselves demonstrated complete lifecycle support for [DELETED] which would eliminate any risk in performance. When combined with the ASRC RTS's prime experience from [DELETED], the proposal fully warrants the grade of "Excellent."

FACTOR 3: Key Personnel

ASRC RTS was given a grade of "**Excellent**" for their Key Personnel.

The key person, [DELETED], has an MBA, an MS degree in Aerospace Systems, and a BA degree in Applied Mathematics. [DELETED] fully demonstrated 15 years of program management experience. His work with the U.S. Navy and NASA systems demonstrated specific experience managing contracts, personnel, and activities directly relevant to the SOW. These were considered significant strengths.

[DELETED] resume was certified.

AR Tab 3, at 7-9.

39. The TET explained its scores for the EES's proposal for Factors 1 through 3 as follows:

FACTOR 1: Program Management Approach

EES was given a grade of "**Satisfactory**" for their program management approach.

The scope of the program manager's authority and his relationship to corporate management was detailed and provided the key elements of the Program Manager (PM) being a single point of contact with the FAA for all work performed, and having complete authority on matters concerning the SOS-7 contract; [DELETED] (page 2)

EES further provided a clear rationale [DELETED] with Figure 3-1 [DELETED] and Figure 3-2 [DELETED] EES indicated the similar employee benefits would be provided across their

subcontractors, which facilitates transparency. These were considered strengths.

EES demonstrated a clear understanding of the Statement of Work (SOW) and provided a sufficiently detailed [DELETED]. These were considered to meet requirements.

EES presented a sufficiently detailed description of their plan to manage the support services to be provided, however they did not substantiate their claim to be able to manage the SOS-7 work with clearly defined processes and supporting examples of past successes. In regard to project management, EES states [DELETED] (page 2) Phase 3 of Figure 2-3 "*Program Management System Process Flow*" appears to be the Delivery Order (DO) execution phase, however it is high level and a detailed DO execution process can not be identified from this figure and its associated description (page 5). Also, EES states that they have [DELETED] (page 3) It is unclear at what point a [DELETED] becomes eligible. The following sentence states, [DELETED] It is unclear how these [DELETED] would fit into the program management plan.

As to subcontracting, sufficient detail was not provided on integrating subcontractors. EES presents that [DELETED] (page 3) This oversimplifies the activities necessary for integrating subcontractors. Figure 2-2, "*Value Propositions*" includes "*Integration of Prime and Subcontractor Resources*"; however, all bullets lack detail. Sufficient detail was not provided on subcontractor transparency, and eliminating duplication of effort; [DELETED] (page 3). It is unclear how this will be accomplished, as there is no substance following this text to support the statement.

In regard to transparency, cost efficiencies and eliminating duplication of effort, EES states these will be addressed using [DELETED] (page 4). Detail to support this statement is not provided. EES states [DELETED] (page 7) It is unclear what tool will be used for EVM and how it will be integrated into their DO management process. In addition, EES states [DELETED] (page 1) This paragraph is unclear as to how the first sentence results in efficiencies referenced in the second sentence. There is no substance following this paragraph to support the statements. Sufficient detail of employee benefits, such as cost to employee or contribution percentages, was not provided to demonstrate the benefits were competitive. These were considered weaknesses.

FACTOR 2: Corporate Experience/Past Performance

EES was given a grade of "**Satisfactory**" for their Corporate Experience/Past Performance.

EES presented information on one past performance contract where they performed as the prime contractor, one contract where they performed as the subcontractor, two where their subcontractor performed as the prime contractor, and two where their subcontractor performed as a subcontractor. Contractor Performance Information (CPI) forms were completed for all contracts presented. Comments on the CPI forms regarding the subcontractors were positive. One additional CPI form was completed regarding contract [DELETED] which was not referenced in the proposal and thus was not reviewed.

The size of EES's previous contract where they performed as the prime contractor, [DELETED], was substantially smaller (fewer than [DELETED] calculated Full-Time Equivalents (FTEs)) than the size of SOS-7. The type of work for the[DELETED] included development and support activities for Oracle applications, which is relevant to only a portion of the SOW. These were considered weaknesses.

The size of EES's previous contract where they performed as the subcontractor, [DELETED], was calculated to be less than [DELETED] FTEs. The Technical Evaluation Team (TET) noted that the proposal stated, "*EES initiated support for SOS-5 with* [DELETED] *staff members …expaned [sic] its staffing level to* [DELETED] *current FTEs*." (page 2-3). Their work for [DELETED] with Logical Access Authorization Control Service (LAACS) included design and implementation of a security system and development of a test lab. They developed an Air Traffic Monitor (ATM) but utilization by FAA is only in the planning stages. The scope of this contract is relevant to only a portion of the SOW.

EES, standing alone, did not fully demonstrate the competency to manage the work of SOS-7 due to the weaknesses in size and scope when performing as prime.

The size of the subcontractor's previous contracts, however, was similar (one greater than [DELETED] calculated FTEs) to the size of SOS-7. Further, EES's subcontractor's work included the complete lifecycle support for FAA systems across "*all major ATC domain areas*" (page 2-3) and is relevant to the full scope of the

SOW. These were considered strengths, and when combined with EES's own experience, warrants the grade of "Satisfactory.".

FACTOR 3: Key Personnel

EES was given a grade of "**Unacceptable**" for their Key Personnel.

The key person, [DELETED], has a MS degree in Aviation Management and BS degree in Business Administration. His work with the FAA systems demonstrated specific experience managing contracts, personnel, and activities directly relevant to the SOW. [DELETED] fully demonstrated with [DELETED] and [DELETED] seven years of program management experience. These were considered strengths.

After evaluation of [DELETED] program manager position with [DELETED] from October 1984 – March 2002, the TET determined the detail of work performed includes subcontractor program manager duties, technical area lead duties and technical specialist duties. However, the number of years that [DELETED] performed as program manager could not be determined. The proposal stated, "[DELETED] *served as a fully integrated support subcontractor program manager on the SOS-3 contract*." (page 2) The SOS-3 contract, 96-C-00009, period of performance was March 29th 1996 through December 25th 2002. Even allowing six years for the SOS-3 contract period as a "subcontractor program manager," [DELETED] total years of program manager experience would total 13 years. The TET determined that the work performed as Technical Area Lead and Technical Specialist was not "program management" as [DELETED] responsibilities did not include managing an entire program with budget authority and management of personnel, including official performance evaluations.

[DELETED] does not demonstrate the minimum 15 years of program manager experience required with a Masters Degree. This was considered a deficiency.

[DELETED] resume was not certified and a letter of intent was not provided.

AR Tab 3, at 17-19.

40. With regard to the evaluation of EES under Factor 1, the TET's Supplemental Declaration states that EES's ECO only appeared as a sidebar to Figure 2-3 of EES's Technical Proposal, but erroneously believed that nothing in the accompanying text discussed the reference to ECO. *AR* Tab 13, *TET Supplemental Decl*., at ¶¶ 30-32.

41. The introductory remarks at the beginning of the TET's Final Report, signed on March 27, 2009, stated for Factor 3, Key Personnel, "The resume certification and letter of intent were reviewed, but the absence of either was not used to change the grade for the factor." *AR* Tab 3, at 1. *See also AR* 13, *Supplemental Decl. of TET*, at ¶ 21.

42. The TET awarded strengths or significant strengths to Offerors B, C, D and G under Evaluation Factor 1 for having a "clear understanding of the Statement of Work." *AR* 3, at 10 (Offeror B), 14 (Offeror C), 21 (Offeror D), 29 (Offeror G). Although the EES proposal demonstrated a clear understanding of the statement of work, EES was not awarded a strength. AR 3, at 17.

D. The Award Decision

43. On or about March 31, 2009, Contracting Specialist Charles Ross telephoned ARTS's President to request [DELETED]'s letter of intent. *Supplemental Protest*, Exhibit 3. [DELETED] responded directly to Mr. Ross via an email that included a letter of intent on ARTS letterhead. [DELETED]'s email address, however, uses "asrcfederal.com" as the domain. *Id.*

44. The proposed costs were reviewed separately from the technical evaluations. The proposals ranked as follows, from lowest to highest:

Offeror	Price Ranking
Offeror E	Lowest
EES	**Second Lowest**
Offeror A	Third Lowest
ARTS	**Fourth Lowest**
Offeror B	Fifth Lowest
Offeror D	Forth Highest
Offeror C	Third Highest
Offeror G	Second Highest
Offeror F	Highest

AR Tab 4, at 4.

45. The Contracting Officer performed a cost/price realism analysis to "ensure that the proposed labor rates were 'realistic' in terms of being able to recruit and retain the necessary personnel, and also to ensure that the rates were 'balanced' across labor categories." *AR* Tab 4, at 8. The description of the analysis in the business clearance memorandum (*AR* Tab 4) shows that the ARTS proposal was compared specifically with Offeror E's proposal. Offeror E had higher technical ratings than EES, and the lowest proposed price. *See FF* 37 and 44. Further, the highly rated ARTS proposal was priced less than the only other fully successful (*i.e.*, no ratings of "unacceptable" or "fail") proposal from Offeror C. *Id.* The analysis indicated that in 48 labor categories in the SIR, Offeror E's rates were lower by at least one standard deviation than the average rate in 25 on-site and 28 off-site labor categories. This caused the government to "assume a large amount of risk should Offeror E not be able to retain those individuals throughout the life of the contract." *AR* Tab 8, at 10. By comparison, ARTS only had one labor category in which there was a deviation of greater than one. The ARTS proposal, for these and other reasons, was deemed "very competitive and reasonable, both from their ability to retain qualified employees and from a cost perspective to the government." *Id.,* at 10.

46. The Contracting officer determined that the ARTS proposal was the best value to the Government. As permitted by §M.2 of the SIR, award was made to ARTS

without further communications or negotiations. *AR* Tab 4, 13-15. The Contract was awarded to ARTS on April 30, 2009. *Initial Protest*, at 1; *Agency Response*, at 3.

47. Prior to the award, the Contracting Officer verified the current status of ARTS with the SBA, and learned that it was still in good standing under the SBA's 8(a) Program. *AR* Tab 7.

E. The Protest Proceedings

48. EES received a post-award debriefing on May 19, 2009. *AR* Tab 5, *Decl. of Ross and Ferrante*, at ¶ 11; *Initial Protest*, at 1. EES filed a timely protest with the ODRA on May 27, 2009.

49. On May 28, 2009, ARTS intervened in the Protest.

50. As part of the adjudicative process, the Center provided discovery responses to the Protester on June 17, 2009. On the seventh business day thereafter, June 26, 2009, EES filed a supplemental protest. *Supplemental Protest*, at 1.

51. On July 1, 2009, ARTS filed its Comments on the Agency Response, and included a Request for Dismissal of the Protest for lack of standing. *See generally, ARTS Dismissal Req. & Comments.*

52. After the parties complied with the briefing schedule established by the ODRA in the Conference Memorandum dated July 6, 2009, the ODRA closed the record on July 27, 2009.

53. On July 31, 2009, the ODRA directed the Center to provide the complete ARTS proposal as part of the Agency Response. The Center complied on August 3, 2009.

III. Discussion

The Protests raise two broad categories of issues. The first category raises matters of first impression regarding the size of both the awardee, ARTS, and the protester, EES. EES challenges ARTS's eligibility for award of this SEDB set aside contract by pointing out definitional differences between certain terms in the FAA's Acquisition Management System ("AMS") and the regulations issued by the Small Business Administration ("SBA"). According to EES, ARTS, as a second-tier subsidiary of an Alaska Native Corporation ("ANC"), cannot be considered an SEDB under the AMS even though it could be considered such under the SBA's regulations. ARTS, on the other hand, has requested for dismissal of the Protest, claiming that EES is too large to qualify as an SEDB under the SBA's rules, and thus lacks standing to maintain these Protests.

The second broad category of issues concerns challenges to the TET's evaluation of the proposals. EES's general theme in these Protests is that the TET considered the ARTS proposal to be a so clear a winner that "they did not actually spend a lot of time evaluating the other proposals, including the EES proposal." *Initial Protest*, at 2. In this vein, EES asserts that proposals from offerors were evaluated "against the ARTS proposal and not against the stated evaluation criteria." *Id*., at 10. The Center responds that the Protests are contrived, "prepackaged arguments that were thrown at the Product and Technical Team from the very start of the debriefing," and are based on "outright lies." *AR* at 4. Even so, the crux of the Protests is the overarching allegation that "the agency failed to conduct its evaluation of EES's proposal in a manner consistent with the SIR's stated evaluation criteria." *Initial Protest*, at 20; *see also Supplemental Protest*, at 21. The net result, according to EES, is that a proper best value determination could not be made. *Id.*

The following discussion first addresses the size issues found in the ARTS Request for Dismissal and then addresses the merits of EES's size challenge. The discussion then moves to EES's challenge to the evaluation process itself. The discussion of each evaluation factor will address the specific issues raised in both Protests.

A. The ARTS Request for Dismissal

ARTS, in its Request for Dismissal ("Request"), argues that EES is not an "interested party" that has standing to protest the award. According to ARTS:

> … the record establishes unequivocally that EES, and not ARTS, is ineligible for award of the SOS-7 contract. Through the application of not one, but several tests established by the U.S. Small Business Administration ("SBA") and accepted by the FAA, EES is "affiliated" with its large business subcontractor – [DELETED] – for purposes of this procurement, thereby destroying its small business status. As a large business, EES does not constitute an interested party with standing to protest the award to ARTS.

ARTS Dismissal Req. & Comments, at 2. More specifically, ARTS posits that EES and [DELETED] were affiliated entities under the SBA's "Newly Organized Concern Rule," and the "ostensible subcontractor" test. *Id.*, at 12. ARTS supported its Request with materials outside those filed with the protest, including excerpts from EES's website, and reports from the Central Contractor Registration.

The ODRA's Procedural Regulation allows a "party" to file a request for dismissal for lack of "standing" "at any time." 14 C.F.R. §17.19(1)(a). Consistent with the ODRA's direction, EES's response ("EES's Dismissal Response") to the ARTS Request includes arguments, an SBA form 355, several declarations, and supporting documentation. *See generally EES's Dismissal Response*. EES contends that it satisfies the requirement of being an interested, SEDB for this procurement. *Id.* The Center filed a response ("Center's Dismissal Response") supporting the Request for Dismissal, and included declarations from current FAA employees who worked for [DELETED] when EES was created. *See generally Center's Dismissal Response.*

Under the ODRA Procedural Regulations, EES's standing as an interested party depends on whether its "... direct economic interest has been or would be affected by the award …." *See* 14 C.F.R. § 17.3(k). EES points out that during the course of this procurement, the Contracting Officer did not question whether EES satisfied the applicable size

standards,[3] and there is no evidence in the record to suggest that she should have done so.[4] *EES's Dismissal Response*, at 2. Furthermore, as required by the SIR at § B.1, EES's Price Proposal (Vol. II) contained a facially acceptable Business Declaration form and a similarly acceptable letter from the SBA, dated April 13, 2007, certifying EES as an 8(a) program participant and as a Small Disadvantaged Business. *FF* 34. The Center respondes by merely stating that the "… Contracting Officer [now] has strong reason to believe that [DELETED] and EES are in fact 'affiliated' under one or more SBA guidelines, and that EES was therefore not eligible to participate in this acquisition." *Center's Dismissal Response*, at 3. The Center did not, however, provide evidence indicating that the Contracting Officer actually has disqualified EES from the competition.

Lacking a size determination from the Contracting Officer, ARTS would have the ODRA weigh *de novo* the evidence pertaining to its challenge of the size and affiliation of EES. The ODRA, however, exercises its protest jurisdiction based on the familiar principle that it will not substitute its judgment for the properly exercised judgment of authorized procurement officials. *See e.g., Protest of Ribeiro Construction Company, Inc.*, 08-TSA-031, *citing Protest of PCS,* 01-ODRA-00184. The Contracting Officer's justifiable inaction regarding EES's size, therefore, means that EES at the time of award and of the Protests had a direct economic interest that is no different on this point than that of any other disqualified offeror. Without the benefit of either a contracting officer's size disqualification regarding EES (which notably could then be protested), or undisputed facts in the record, *e.g.*, an admission from EES, EES must be viewed on this record as an eligible bidder. Thus, the ODRA finds that EES remains an interested party in these Protests. This conclusion is in accord with the ODRA's decision in *Protest of Communications Technologies, Inc. (COMTek),* 03-ODRA-00257, wherein the contracting officer had made a size determination prior to the protest. *COMTek*, at 13. It

[3] The FAA retains such authority. *See AMS Guidance*, at T3.6.1.A.6.a.

[4] The ODRA has no reason to question the Contracting Officer's inaction regarding EES's size. Considering that ARTS was the apparent awardee, the Contracting Officer rationally verified only ARTS's 8(a) status with the SBA. *Agency Response*, Tab 7.

also aligns with the Government Accountability Office's ("GAO") decisions in *Priority One Services Inc.*, B-288836.5, 2002 CPD ¶ 191, and *Four Winds Services, Inc.* B-280714, 98-2 CPD ¶ 57. In *Priority On*e, the GAO relied on an intervening determination by the SBA Office of Hearings and Appeals. In *Four Winds Services*, the protester admitted that it was too large for the size standard identified in the SIR.

The approach adopted herein also serves the principle of judicial economy. The collected submissions by all parties on the Request for Dismissal contain extensive argument, many exhibits, and declarations from six witnesses. By design, the ODRA's Procedural Regulations establish an efficient process to adjudicate protests. Permitting a trial-within-a-trial in order to resolve motions on standing that, in essence, are really reverse-size appeals, would be antithetical to this end. The legally proper and better course of action is for the ODRA to review actual determinations regarding size and affiliation rendered by contracting officers during the evaluation process. *Accord, Protest of International Services, Inc*., 02-ODRA-00224 (dismissal for lack of standing after Contracting Officer properly disqualified the protester for failing to submit a required business declaration). The ARTS Request for Dismissal therefore should be denied.

B. The Merits of the Protests

The EES challenges to ARTS's size and to the evaluation of the proposals are discussed below.

1) Standard of Review

As the ODRA recently reiterated,

> In accordance with the ODRA Procedural Regulations, 14 C.F.R. Part 17, and the FAA's Acquisition Management System ("AMS"), the ODRA will not recommend that a post-award protest be sustained where a contract award decision lacks a rational basis, is arbitrary, capricious, or an abuse of discretion and is not supported by substantial evidence. *Protest of Ribeiro Construction Company, Inc.*, 08-TSA-031. In "best value" procurements such as this one, the ODRA will not substitute its judgment for that of the designated evaluation and selection officials as long as the record demonstrates that their decisions satisfy the above test, were consistent with the

> AMS and the evaluation and the award criteria set forth in the underlying solicitation. *Id., citing Protest of PCS,* 01-ODRA-00184. Notably, 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. *Id., citing Protest of En Route Computer Solutions,* 02-ODRA-00220. The Protester bears the burden of proof by substantial evidence that the award decision lacked a rational basis or was otherwise improper. 14 C.F.R. §17.37(j). In addition, a protester such as Carahsoft/Avue must demonstrate a reasonable possibility of prejudice; specifically, Carahsoft/Avue must show that but for the TSA's improper actions that are alleged here, it would have had a substantial chance of receiving the award. *Id, citing Protest of Optical Scientific Incorporated,* 06-ODRA-00365.

Protest of Carahsoft Technologies Corporation and Avue Technologies Corporation, 08-TSA-034.

2) ARTS Can be a Small SEDB Under the AMS Definitions

Relying significantly on publically available information from ARTS, EES asserts that ARTS does not meet the AMS's definitions of a "small business" or of a "Socially and Economically Disadvantaged Business." Pointing to differences between the AMS and the SBA's regulations, EES charges that the Contracting Officer improperly interpreted the Contract and the AMS to justify the award to ARTS, a second-tier subsidiary of the $2 billion Alaska Slope Regional Corporation (ASRC). *FF* 26. More specifically, EES makes two fundamental arguments. First, it asserts that ARTS is not an SEDB within the meaning of the AMS because it does not satisfy the ownership criteria found in Appendix C of the AMS. Second, EES asserts that due to its affiliation with the ASRC, ARTS "far exceeds" the definition of a "small business" also found in Appendix C of the AMS. The Center and ARTS each contend, however, that the challenge is untimely and that the award complied with the SIR. The Center concedes that there are "textual discrepancies" between the AMS and the SBA regulations, but relies on declarations from two FAA employees to argue that there was no intent to establish substantive differences between the AMS and the SBA's regulations in this regard. *See AR,* at 7; *ARTS Dismissal Req. and Comments,* at 13.

Preliminarily, the ODRA rejects the Center's timeliness defense. This protest issue addresses the manner in which the Center interpreted the AMS vis-à-vis another offeror's proposal during the evaluation period, not a challenge to a patently erroneous or ambiguous SIR. Further, it would not have been apparent prior to bid that issues existed concerning an Alaska Native Corporation. Accordingly, EES was not obligated to file these Protests prior to the closing date of the SIR. *Protest of Maximus, Inc.*, 04-TSA-009; *Protest of B&M Lawn Maintenance, Inc*., 03-ODRA-00271

The issues that EES raises are matters of first impression at the ODRA, and require an analysis of the SIR, the AMS, the FAA's special procurement authority, and the Alaska Native Claims Settlement Act (ANCSA). Such an analysis shows that EES's arguments do not properly construe the AMS in a manner consistent with fundamental statutory requirements. To the contrary, a proper construction of the AMS policy results in a definition of a "small SEDB" that can include a company like ARTS.

a. ARTS Can Meet the Ownership Criteria for an SEDB under the AMS

EES focuses one of its arguments on the ownership requirements found in the AMS Policy's definition of a "Small Socially and Economically Disadvantaged Business." That definition states in pertinent part with regard to Indian Tribes (including Alaska Native Corporations)[5]:

> … This term also means a small business concern that is at least 51 percent *unconditionally owned* by an economically disadvantaged Indian tribe or Native Hawaiian Organization, … or a publicly owned business …

AMS Policy, Appendix C (emphasis added). EES asserts that ARTS, as a second-tier subsidiary of an ANC, does not qualify because it is not *directly* owned by an Alaska Native Corporation. *Initial Protest,* at 5.[6] ARTS has not challenged EES's assertion that

[5] EES correctly acknowledges that the term "Indian Tribes" include Alaska Native Corporations. *Initial Protest,* at 4, fn. 3. *See also AMS Policy,* Appendix C.

[6] EES further argues that ARTS cannot meet the second alternative standard found in the definition because it is not either publically held, nor managed and controlled by Alaskan Natives. The ODRA does not need to reach this issue since it holds against EES under the first standard.

ARTS is a wholly owned, second-tier subsidiary of ASRC. *See FF* 26. Reduced to its essence, EES asks the ODRA to interpret the term "unconditionally owned" to mean first-tier subsidiary status only. This interpretation, EES asserts, is logical because the AMS definition does not contain language similar to the SBA's regulations. In particular, EES points out that the SBA's regulation at 13 C.F.R.§124.109(c)(2)(iii) expressly contains language that permits SEDB status for small business concerns that are owned by "… a wholly owned business entity of such tribe…." *Initial Protest*, at 6.

In the ODRA's view, while the SBA regulations are certainly more detailed than the definitions in the AMS Policy, it does not follow necessarily that the absence of specificity in the AMS means that a general term like "unconditionally owned" must be narrowly restricted to first-tier subsidiaries. Indeed, under the Alaska Native Claims Settlement Act ("ANCSA"), codified in relevant part at 43 U.S.C. § 1626(e)(2), the opposite is true.

Alaska Native Corporations like ASRC enjoy a special status in Federal law by virtue of the ANCSA. As one Senate report explained,[7] the ANSCA extinguished all land rights

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[7] The introduction to the Senate Report explains:

> [The ANCSA] extinguished all claims of the Alaska Native people to the ownership of land and hunting and fishing rights based upon aboriginal use and occupancy, including the Prudhoe Bay oil field, the Trans-Alaska Pipeline corridor, and much of the land which had previously been selected by the State of Alaska pursuant to the Alaska Statehood Act.
>
> In exchange for the extinguishment of Native claims to these valuable lands, ANCSA authorized Alaska Natives to select and be conveyed 44 million acres of other public land in Alaska and to be paid $962.5 million in settlement of their claims.
>
> Alaska was divided into 12 geographic regions and Natives living in each region were authorized to organize a for-profit business corporation under the laws of the State of Alaska. Natives living in Native villages, and several urban towns, in each region were authorized to organize either a for-profit or a nonprofit corporation. Every village organized a for-profit corporation.
>
> The Act required the Secretary of the Interior to prepare a roll of Alaska Natives who were alive on December 18, 1971, the date NACSA was enacted into law; 80,239 Alaska Natives were placed on the roll. Each Native on the roll was then issued 100 shares of stock in the Regional Corporation representing the region and, if he or she so elected, 100 shares of stock in the village or Urban Corporation representing the village in which he or she resided.

S. Rep. No. 100-201, 19-20, 1987 U.S.C.C.A.N. 3269, 3269 – 3270.

claims of the Alaska Native people in exchange for specific property, cash and shares in Alaska Native Corporations. S. Rep. No. 100-201, 19-20, 1987 U.S.C.C.A.N. 3269, 3269-3270. Over the years, Congress amended the ANSCA several times to correct problems encountered in the implementation of this legislative settlement. In 1987, Congress indicated that distributions of stock and other benefits under the ANCSA had caused people to lose several federal benefits like food stamps, social security, other federal programs and other federally assisted programs. *See* 1987 U.S.C.C.A.N. 3299, 3313-3314. Similarly, the ANCs, created to benefit a particular minority, faced unanticipated controversies regarding the Civil Rights Act of 1964, and the minority status of their businesses. To remedy these problems, Congress amended 43 U.S.C. § 1626 to included language that broadly reconciles the special nature of ANCs with several other provisions of Federal law. *See* Alaska Native Claims Settlement Act Amendments of 1987, P.L. 100-241, § 15. In 1992, Congress again amended 46 U.S.C. § 1626 to ensure that ANCs and their subsidiaries are considered economically disadvantaged business enterprises "for the purposes of qualifying for participation in federal contracting and subcontracting *programs*, the largest of which include the SBA 8(a) program and the Department of Defense Small and Disadvantaged Business Program." H. Rep. No. 102-673, 19, 1992 U.S.C.C.A.N. 1450, 1456 (emphasis added). The resulting codification in 46 U.S.C. § 1626, stated (and still states) in relevant part:

> e) Minority status
>
> (1) ***For all purposes of Federal law***, a Native Corporation shall be considered to be a corporation owned and controlled by Natives and a minority and economically disadvantaged business enterprise if the Settlement Common Stock of the corporation and other stock of the corporation held by holders of Settlement Common Stock and by Natives and descendants of Natives, represents a majority of both the total equity of the corporation and the total voting power of the corporation for the purposes of electing directors.
>
> (2) ***For all purposes of Federal law***, ***direct and indirect subsidiary*** corporations, joint ventures, and partnerships of a Native Corporation qualifying pursuant to paragraph (1) shall be considered to be entities owned and controlled by Natives and a minority and economically disadvantaged business enterprise if the shares of stock or other units of ownership interest in any such

> entity held by such Native Corporation and by the holders of its Settlement Common Stock represent a majority of both—
>
> > (A) the total equity of the subsidiary corporation, joint venture, or partnership; and
> >
> > (B) the total voting power of the subsidiary corporation, joint venture, or partnership for the purpose of electing directors, the general partner, or principal officers.
>
> (3) ***No provision of this subsection shall—***
>
> > ***(A) preclude a Federal agency or instrumentality from applying standards for determining minority ownership (or control) less restrictive than those described in paragraphs (1) and (2), or***
> >
> > (B) supersede any such less restrictive standards in existence on February 3, 1988.

43 U.S.C. § 1626 (emphasis added). For reasons discussed below, the emphasized portions of the Statute have a direct bearing on how the AMS definitions should be interpreted in these Protests. This statutory section clarified all Federal law with regards to the relationship of ANCs, their subsidiaries, and federal programs that benefit minority and economically disadvantaged businesses. This Statute was in force in 1995, when Congress directed the Administrator of the FAA to create the AMS, and exempted the FAA from the many acquisition statutes and regulations applicable to other agencies in the Executive Branch.[8] In particular, Congress exempted the FAA from the Small Business Act, but nevertheless required the FAA to provide all reasonable opportunities to "small business concerns owned and controlled by socially and economically disadvantaged individuals." 49 U.S.C. § 40110(d)(2)(D). Congress did not, however, expressly or implicitly exempt the FAA from the ANCSA's statutory clarification that "indirect subsidiaries" of ANCs are considered economically disadvantaged businesses owned and controlled by Natives and minorities. It necessarily follows that the legal terms used in § 49 U.S.C. § 40110(d)(2)(D) must be construed in a manner consistent the ANSCA's language found in 43 U.S.C. § 1626(e)(2).

[8] *See* PL 104-50, at §348(a), 109 Stat 436, 460-461, currently codified at 49 U.S.C. §40110(d).

In rendering an interpretation of the AMS, the ODRA will favor interpretations that are consistent with applicable statutes, give meaning to all parts, and harmonize separate sections into a coherent policy statement. To answer the specific question regarding the definition of the phrase "unconditionally owned," as found in the AMS definition of an SEDB (quoted above), the ANSCA mandates a broader interpretation than what EES asserts. In fact, the language in the Statute referring to "all purposes of Federal law," leaves no doubt that the Statute does not apply only to programs involving the SBA. Second, the reference to "direct and indirect subsidiaries" removes any question that second-tier subsidiaries of ANCs can be SEDBs so long as the first-tier subsidiary of the ANC retains a majority of the equity and voting power. Third, agencies may use *less* restrictive criteria than permitted by the statute, but the canons of statutory construction conclusively imply that the unstated alternatives – *i.e*., more restrictive criteria such as that proposed by EES – would be excluded. Accordingly, the ODRA interprets the ownership requirements within the AMS Policy definition of "Small Socially and Economically Disadvantaged Business" to permit small business entities that are second-tier subsidiaries owned and controlled by an ANC to be considered SEDBs.

b. ARTS Also Can Qualify as a "Small Business" Under the AMS

Even if ARTS is socially and economically disadvantaged business, it still must qualify as a "small business" to be eligible as a "Small Socially and Economically Disadvantaged Business." Quoting part of the AMS Policy's definition of a "small business" and redirecting attention to the definition of "affiliated business," EES asserts:

> The AMS defines a "small business" as follows:
>
> > …a business, **including its affiliates**, that is independently owned and operated and not dominant….
>
> AMS App. C (emphasis added [by EES]). The size standard for this procurement is $25 million. ASRC's 2008 Annual Report shows that it had more than $2.2 billion in revenues in 2008; that it has a large and diverse portfolio of operations ….

Initial Protest, at 5; *see also EES Comments on Center's Response*, at 2 (containing a similarly truncated quote of the AMS definition of "small business"). EES then leaps to the AMS definition of "affiliate business,"[9] to argue that the AMS does not contain the SBA's explicit exceptions to the affiliation rules that apply to Alaska Native Corporations. *Id.* According to EES, the absence of such an exception in the AMS for ANCs means that the value of ARTS's parent corporations – valued at over $2 billion – must be included in the eligibility determination for this award. If correct, this would mean that ARTS exceeds the $25 million ceiling established in the Contract. *See FF* 5.

EES's argument falters, however, by failing to consider the *complete* definition of a "small business" under the AMS Policy. The complete definition states:

> **Small business** is a business, including its affiliates, that is independently owned and operated and not dominant in producing the products or performing the services being purchased, and one that qualifies as a small business under the federal government's criteria and North American Industry System Classification Codes size standards.

AMS Policy, Appendix C (underline added). The ODRA must give meaning to the underlined phrase and concludes that, "one that qualifies as a small business under the federal government's criteria," refers to the criteria set forth in the SBA's regulations. This interpretation is based in part on the fact that the SBA is indeed the principal agency within the Federal Government responsible for establishing such criteria. This is true regardless of the fact that the FAA is exempt from the Small Business Act itself. *See* 49 U.S.C. 40110((d)(2)(D). This reading finds further support in the fact that other relevant sections of the AMS Policy (*see e.g.*, AMS Policy §§ 3.6.1.3.4 and 3.6.1.3.5) reference and rely upon the SBA's "8(a)" program to determine eligibility for set-asides. Even

[9] The AMS Policy' definition is:

> **Affiliate business** is a business that controls or has the power to control another business, or a third party that controls or has the power to control another business (contractual relationships must be considered).

AMS Policy, Appendix C. Notably, this language is nearly identical in all material aspects to the SBA's language in 13 C.F.R. § 121.103(a). As EES points out, exceptions to the general affiliation definition for ANCs are found in subsection 121.103(b) of the SBA regulations, but no similar language is expressly contained in the AMS.

EES acknowledges that the FAA may incorporate SBA standards into its procurement system. *Initial Protest*, at 8. Thus, it is appropriate under the AMS Policy to look to, and rely upon, the SBA's criteria and determinations with regards to a firm's status as a "small business." The question then becomes whether the SBA's criteria, as referenced by the AMS, contains the exception for ANCs like the ARTS parent companies.

The SBA's criteria for determining small business status are found in 13 C.F.R. Part 121. That Part, at Section 121.103(b)(2), contains the ANC exceptions to the affiliation rules that EES argues are not present within the AMS. *See Initial Protest*, at 7. The reference by the AMS to the SBA's criteria compels the ODRA to reject EES's overly restrictive interpretation of the AMS that relies only on the definition of "affiliate business." Unlike EES, the ODRA cannot ignore the *complete* definition of "small business," which encompasses the SBA's criteria and its affiliation exceptions for ANCs. The ODRA concludes, therefore, it is proper to determine small business status under the AMS using the SBA's criteria found in 13 C.F.R. Part 121, which includes the exceptions that benefit ANCs.[10]

In so holding, the ODRA is mindful of its prior decision in *L. Washington & Associates*, 02-ODRA-00228, wherein it determined that the SBA's HUBZone Program was not part of the AMS, and therefore did not require the FAA to provide the protester in that case a ten percent price evaluation preference. Unlike the present Protests, the issues in *L. Washington* did not require the ODRA to examine a specific section of the AMS Policy to determine if specific SBA criteria were adopted. Instead, the ODRA determined that the HUBZone Program found in 13 C.F.R. Part 126 was not applicable at all to the FAA.

[10] In reaching this conclusion, the ODRA does not need to and does not rely on the declarations from the FAA Small Business Unitization Office or the Acquisition Policy Division. Those declarations were offered to establish the intent of the drafters of the AMS language in question, but they do not introduce or otherwise reference contemporaneous documentation that can establish a convincing history of the policy. The ODRA, therefore, has given them no weight.

c. The Contracting Officer Had a Rational Basis to Conclude that ARTS was an Eligible SEDB

The interpretations of "small business" and "small socially and economically disadvantaged business," as rendered above, do not conflict with the SIR, and therefore do not cause the ODRA to question the eligibility criteria used by the Contracting Officer, and stated in section B.1. The record establishes that ARTS provided the relevant SBA letters and business declarations as required by the SIR. *FF* 28. Further, the contracting officer verified the current status of ARTS with the SBA prior to award, and learned that it was still in good standing under the SBA's 8(a) program. *FF* 47. AR Tab 7. The ODRA finds no basis to question the Contracting Officer's determinations or actions on these points. This protest ground, therefore, should be denied.

3) Evaluation Factor Number One: Program Management Approach

Evaluation Factor 1, "Program Management Approach" required each proposal to address, "at a minimum," "…the offeror's plans for managing the support services to be provided in accordance with the statement of work." *FF* 10 (*see* this Finding of Fact for the full text of this evaluation factor). EES, like all offerors, was advised that it had the burden to show how it planned to fulfill the contract management requirements found in this factor. *FF* 6, 8, and 9.

EES challenges several aspects of the evaluation conducted under Factor 1. EES charges that the TET erroneously determined that the EES proposal lacked sufficient detail (*Initial Protest*, at 8-10); improperly compared the EES and ARTS proposals (*Id*., at 10-13); failed to assign a strength for understanding the SOW (*Id*., at 13-14); did not properly analyze employee retention (*Supplemental Protest*, at 9-11), employee benefits (*Id*., at 14-17), and subcontractor transparency (*Id*., at 17-18); and made disparate assignment of "weaknesses" (*Id.*, at 19-20). Each of these issues is discussed below.

a. Page Limitations and Downgrading for Lack of Detail

EES complains that it was improperly downgraded three times[11] for failing to provide sufficient detail relating to Factor 1. EES asserts that downgrading for lack of detail is improper because the SIR had page limits and discouraged elaborate proposals. EES further argues through its three examples that the evaluators failed to give credit for the details that were actually provided in various pages of its technical proposal. *Initial Protest*, at 9. The Center responds by asserting that a challenge to the page limits is an issue that must be raised prior to closing of the SIR. *AR* at 8. The Center also provides a declaration from the TET explaining the process it used to review the proposals, and addressing each point raised by the Protester. *See generally AR* Tab 10, *TET Decl*.

The Center is correct that challenges to the terms found in the SIR must be filed prior to the receipt of initial proposals. 14 C.F.R. § 17.15(a)(1) and (2); *Protest of Aviation Research Group/U.S., Inc.*, 99-ODRA-00141. To the extent EES asserts that it was unable to provide more detail because of unreasonable page limitations, that issue should have been the subject of questions[12] or a protest filed prior to the deadline for submitting proposals.

Regardless of its challenge to the page limitation, EES assert that the TET "… apparently failed to read the detail that was there … and … failed to give EES credit for those details." *Initial Protest*, at 9, fn. 7. There is no evidence, however, that the TET failed to read the proposal or failed in general to give credit for details. The evidence, rather, shows that the four-member TET spent at least 500 hours of combined time reading and evaluating the submissions from all of the offerors. *FF* 35. The ODRA, therefore, rejects the contention that the TET failed to read the proposals. The ODRA also rejects the general unsupported contention that the TET failed to give credit for

[11] EES uses bullets in a footnote to list its three examples rather than discussing them at length. They pertain to employee benefits, subcontractor transparency, and delivery order execution. *Initial Protest*, at 9, fn. 7. Each of these issues is discussed in greater depth in other sections of these Recommendations and Findings.

[12] Indeed, FF 17 shows that several questions were posed regarding the page limitations.

details. EES drafted its protest using terms like "great deal of detail," and "in detail." *Initial Protest*, at 9, fn. 7. The consensus of the TET, as stated in the Technical Evaluation for SOS-7, FINAL Report, on the other hand, indicates "there is not substance following this text," or "sufficient detail … was not provided." *See AR* Tab 3, TET Final Report, at 17-18. For the most part, these different characterizations of the same proposal merely represent general disagreement with the TET's evaluation, and do not provide a basis for sustaining the protest. *See Protest of Engineering and Information Technology, Inc.*, 06-ODRA-00386 at 17, *citing, Protest of Universal Systems & Technology, Inc.*, 01-ODRA-00179.[13]

b. Alleged Failure to Use Evaluation Criteria; Improper Comparison with ARTS

EES continues its attack of the Factor 1 rating by generally alleging that its proposal was evaluated against the ARTS proposal rather than against the evaluation criteria found in the SIR. *See generally Initial Protest*, at 10. EES provides four specific issues as examples pertaining to Evaluation Factor 1, "Program Management Plan," but relies mostly on the first issue regarding the "earned value management" ("EVM") "tool." *Initial Protest*, at 11-13.

EES asserts that the TET improperly downgraded EES for not identifying the EVM tool it would use. *See Initial Protest*, at 11; *EES Initial Comments*, at 14-16. Section 3.2.1 of the Statement of Work stated,

> Work is ordered and managed under the SOS-7 by DO [*i.e.*, Delivery Order]. DOs break down the contract scope and cost into specific, manageable elements of the overall contract SOW requirement. The Operations Support Team identifies and defines all requirements within DOs and that guides the contractor efforts. The contractor must provide earned value reporting that is expressed as a percentage of DO (work performed) by budget expenditure for each DO.

AR Tab 1, Attachment J-1, § 3.2.1. EES indicated in its technical proposal, "MS Project schedule data and QuickBooks cost data will be regularly imported into an industry-

[13] In reviewing the record in these Protests, the ODRA has found that the TET failed to consider significant details in EES's proposal as it pertained to its web-based management tool. *See* Section III.B.2.g., *infra.*

standard Earned Value Management (EVM) tool to produce detailed analysis and reports." *AR* Tab 12, Volume I, at p. 6 (underline added). EES further promised that "EES will integrate ANSVEIS-748-A, Earned Value Management into our DO management process based on our team's current experience supporting this standard in a SOS environment." *Id.*, at p. 8. The TET quoted both of these statements in its Final Report, but determined that it is "unclear what tool will be used for EVM and how it will be integrated into their DO management process." *AR* Tab 3, TET Final Report, at 18.

While EES may assert that a non-specific phrase like "industry standard EVMS tool" constitutes a "detailed explanation" (*see Initial Protest*, at 11), the ODRA cannot fault the TET for concluding that the method for achieving the EVM requirements in the SOW was "unclear." Indeed, the proposal statements quoted above, which the TET's Final Report and EES's Initial Protest both cite, demonstrate nothing more than EES's acknowledgment of the EVM requirements in the SOW and a promise to comply. A determination that the proposal lacked detail is rational in this regard. Moreover, nothing in this record supports EES's broader assertion that the TET compared EES's proposal to ARTS's proposal.

The other three examples of alleged comparison of EES to ARTS found in the Initial Protest were based on conjecture of events,[14] prior to obtaining discovery. These issues pertain to the ability to manage work, integration of subcontractors, and assessments of employee benefits. After discovery in the Initial Protest, EES did not further address these allegations as issues of comparison of ARTS to EES, but instead raised more specific issues in the Supplemental Protest. *See EES Initial Comments*, at 16. Similar to EES's approach, each of these issues is discussed in detail in other sections of these Findings and Recommendations, and the ODRA finds that there is not substantial evidence in the record to support the assertion that the TET evaluated EES's proposal in comparison to ARTS rather than pursuant to the Evaluation Criteria.

[14] For each issue, EES set forth the issue and offered explanations based on what to EES "appears" to have happened. *Initial Protest*, at 11-13.

c. Employee Retention Rates

EES asserts that the SIR required offerors to provide the employee retention rates of its subcontractors. According to EES, the TET improperly ignored the fact that ARTS failed to supply such information. Further, EES claims that the TET failed to properly give a "strength" to EES for providing such information. *See Supplemental Protest,* at 9 to 11.

As both the Center and ARTS point out, the SIR did not require offerors to provide information regarding the employee retention rates for its proposed subcontractors. Instead, Section M.4 plainly addresses the ability to retain the subcontractor *companies* themselves. It states in relevant part:

> Employee/Subcontractor Recruitment/Retention
> …
>
> Provide a narrative describing employee retention over the last 5 years. Explain instances where employees left prior to the completion of the contract. Include *retention of subcontractor companies* on past contracts, if applicable.

AR Tab 1, at § M.4 (emphasis added; quoted in full in *FF* 10). The plain language in the emphasized portion of the quote leads to the conclusion that the TET did not err as EES asserts because there was no requirement to describe the *employee* retention rates for subcontractors. This ground of the Protests, therefore, should be denied.

d. Competitive Employee Benefits

EES acknowledges that its proposal had less detail than the ARTS proposal regarding employee benefits (*Supplemental Protest*, at 16), but nevertheless asserts that it should have received a "strength" like ARTS rather than a "weakness" because it offers very similar benefits and because of its 94% employee retention rate. *Supplemental Protest*, at 17. To support its argument, EES reveals for the first time in footnote 14 to its Supplemental Protest that like ARTS, it contributes a percentage of salary to 401(k) retirement accounts, and offers various types of insurance coverage to its employees at no

cost. EES claims that if the Center had conducted discussions, it could have learned these details. *EES's Supplemental Comments*, at 13.

As stated above, the ODRA will not substitute its judgment for that of the evaluation officials so long as the evaluation was rational, supported by the record, and consistent with the AMS and the SIR. It is clear from the record that ARTS's proposal was far more detailed in many aspects than EES's proposal, and therefore, supports the TET's assignments of strengths and weaknesses. *Compare FF* 24 and 31. Consistent with the SIR, it was incumbent upon EES to submit the very best initial proposal it could, especially given that offerors were advised that award could be made without further communications. *FF* 6,8, and, 9. EES's proposal, quite simply, failed to contain the important details now contained in its Protests that might have justified a "strength." Accordingly, the ODRA recommends this ground of the Protests be denied.

e. Disparate Assignment of "Weaknesses"

EES asserts that the TET assigned a weakness to EES's Project Management Professional (PMP) certification process. *Supplemental Protest*, at 19. It also asserts that the TET assigned weaknesses for bulleted information that lacked detail. *Id.*, at 20. As the Center and ARTS both point out, the TET's evaluation report discussed a lack of detail regarding both of these matters, but contrary to EES's assertion in the Supplemental Protest, the TET did not assign a weakness for these issues. Instead, the pertinent paragraph simply states:

> As to subcontracting, sufficient detail [DELETED] (page 3) This oversimplifies the activities necessary for integrating subcontractors. Figure 2-2, "*Value Propositions*" includes "*Integration of Prime and Subcontractor Resources*"; however, all bullets lack detail. Sufficient detail was not provided on subcontractor transparency, and eliminating duplication of effort; [DELETED] (page 3). It is unclear how this will be accomplished, as there is no substance following this text to support the statement.

AR Tab 3, at 17-18 (*see FF* 39 for the a quote of the full evaluation). EES did not comment on the Agency's Response on this point. Without assignment of a weakness,

the premise of this ground in the Protests must fail, and the ground therefore should be denied.

f. Assignments of Strength for Understanding the SOW

EES claims disparate treatment in the way the TET awarded "strengths" and "significant strengths" for understanding the SOW. According to EES, six other offerors that had a "clear understanding of the Statement of Work," received a "strength" or a "significant strength." EES, which also demonstrated a "clear understanding," was determined to only "meet requirements." *Supplemental Protest*, at 14.

The Center and ARTS respond that EES ignores significant amounts of text and analysis that lie between the statement of "understanding" and the conclusions of "strength." According to the Center, the TET did not assign strengths merely for having a "clear understanding" of the SOW. The strengths instead were purportedly based on the other matters discussed in the text that EES omitted. *See Supplemental Response*, at 6-7. The language in the TET's report belies these assertions.

For most of the offerors, the second or third paragraph of the evaluation for factor 1 begins with a statement regarding a "clear understanding," which is then followed by statements describing details of the management plan, the rationale behind selections of subcontractors, the ability to manage the work process, etc. The paragraphs conclude with a statement like, "These were considered strengths." *See, e.g., AR* 3, at 10 (Offeror B), 14 (Offeror C), 21 (Offeror D), 29 (Offeror G).[15] The use of the word "these" in this

[15] For example, the TET reported for Offeror B, with regard to factor 1:

> **Offeror B demonstrated a clear understanding of the Statement of Work (SOW).** The Program Manager (PM) has access to corporate resources; the PM "*reports directly to the CEO, and is supported by the resources in the [Offeror B] and SOS-7 Program Organization.*" (page 3) [Offeror B] provided a clear rationale for choosing subcontractors, noting that "*[Offeror B] Team members are already supporting NAS operations. Our Team brings verifiable past performance demonstrating competence to perform across all SOW systems and functional areas.*" (page 1); "*[Offeror B] selected subcontractor teammates based on technical performance with the FAA, business ethics, goals, and sound reputations.*" (page 5) [Offeror B] provided a well detailed recruitment approach. **These were considered strengths**.

context might, or might not mean that these contractors received a strength for their clear understanding.

The text regarding EES is different. As shown in Finding of Fact 39, the second paragraph in the evaluation of Factor 2 considered the "detailed" description of the program manager's authority. The third paragraph identified strengths regarding the "clear rationale" for [DELETED], "well detailed" [DELETED] approach, and the similarity of benefits amongst their employees. But unlike the other offerors, these strengths did not begin with the general statement that the offeror had a clear understanding of the SOW. Instead, set out as its own paragraph, is the statement:

> EES demonstrated a clear understanding of the Statement of Work (SOW) and provided *a* [DELETED]. *These* were considered to meet requirements.

AR Tab 3, at 17 (emphasis added). The emphasized words demonstrate that the TET treated "understanding the Statement of Work" as a separate consideration that was subject to evaluation. But, unlike the other offerors that had a "clear understanding," EES did not receive a strength. Nor was any rationale provided for not awarding it a "strength." On its face, this evaluation of offerors resulted in treating EES differently than the other offerors.

The ODRA also notes that even if the TET did not actually treat EES differently than the other offerors, the textual discrepancy is sufficient to conclude that the TET failed in its obligation to sufficiently document the evaluation. *See AMS Policy* § 3.2.2.3.1.2.3. A properly documented evaluation report is necessary in a best value procurement to demonstrate that the award is consistent with the AMS and the specified evaluation/award criteria. *Protest of Raytheon Technical Services Corp.*, 02-ODRA-00210.

The question of whether this disparate treatment caused prejudice under Factor 1 is discussed below in section III.B.6. of these Findings and Recommendations.

AR Tab 3, at 10 (boldface added).

g. Subcontractor Integration and Transparency

EES believes the TET did not evaluate and treat EES's web-based tool called "Enterprise Contract Organizer" ("ECO") in the same way as those of two other unsuccessful offerors that received strengths for their web-based management tools. *Supplemental Protest*, at 17-18. The Center asserts, however, that the "ECO appears only as a sidebar to Figure 2-3," and states further that "… nothing in the accompanying text clarified the issue." *AR* Tab 13, TET Decl. at ¶ 30; see also *Supplemental Response*, at 8. The Center argues, therefore, awarding a strength to Offeror C and to Offeror G was proper because they purportedly "did a much better job of explaining how those tools integrated with their proposed Management Plans." *Supplemental Response*, at 8.

As EES points out, the Center is incorrect regarding the amount of information about ECO provided in the EES proposal. Based on paragraphs 28 through 34 of the TET's Supplemental Declaration, the ODRA finds (*FF* 40) that the TET failed to consider the following information in EES's proposal the language preceding figure 2-3 of the proposal, which states:

> To streamline reporting requirements and eliminate duplication of functions, **EES will use Enterprise Contract Organizer (ECO),** …
>
> [DELETED]

AR Tab 11, Vol. 1, at 4 (emphasis added). The TET further failed to consider the language explaining ECO that appears on the page following figure 2-3:

[DELETED]

Id., at 6 (emphasis added). The ODRA observes that this information was contained in a logical order within the technical proposal, and nothing else in the format of the proposal provides a ready explanation for the TET's failure to consider this information.

The question of whether this failure caused prejudice under Factor 1 is discussed below in section III.B.6. of these Findings and Recommendations.

4) Evaluation Factor 2, Corporate Experience / Past Performance

EES asserts that the TET improperly used a formula to standardize and evaluate the size of the contracts that offerors cited as examples of past performance. *Initial Protest*, at 14-16; *Supplemental Protest*, at 9-11. EES also alleges that the TET erroneously failed to conclude that EES's experience is more relevant than ARTS's experience. *Supplemental Protest*, at 16-17. Both of these arguments fail.

a. Improper Standardizations of FTEs

To analyze the offers for the second evaluation factor, "Factor 2, Corporate Experience/Past Performance," the TET explained:

> … the TET evaluated whether past contracts were of a similar size to SOS-7 and relevant in scope to the SOW to demonstrate the offeror's competency and capability to manage this contract. Past contracts of the offeror were given greater weight for similarities in size and relevance in scope than past contracts of their subcontractors. To determine whether an offeror's past contracts were of similar size, the TET devised a standard formula. Each contract's value and period of performance were used to determine an average yearly contract value. Then, a standard $75 per hour rate was used to determine average hours per year. Finally, a rate of 1860 hours per year was used to calculate Full-Time Equivalents (FTEs). When the offeror or subcontractor performed as the prime, consideration was given for the total FTEs of the contract and not just the percentage of work performed. The calculation was used as a tool to normalize contract data provided and to assist in indicating a level of competency that reduces the risk of managing this effort.

AR Tab 3, at 1 (emphasis added). EES asserts that the standardization procedure described by the underlined text was not in accordance with the evaluation criteria. EES asserts prejudice under the theory that efficient contractors have lower hourly rates, and that using a higher hourly rate in the calculation unrealistically reduces the estimated hours of work under the contracts. In EES's particular case – according to EES – dividing the value of its past contracts by hourly rate of $75, rather than the "actual"

figure of $[DELETED],[16] resulted in an improper [DELETED]% reduction in the scope of work for EES's past contracts. *See Initial Protest*, at 15-16. EES further alleges that this method reduced one past effort "by more than half" from a current figure of [DELETED] FTEs to less than [DELETED].[17] *Id.* This impropriety allegedly caused EES to receive merely a "satisfactory" score for "Factor 2, Corporate Experience/Past Performance." *AR* Tab 3, at 18.

The standardization process was not set out in either the SIR or the evaluation plan. *See* AR Tab 1, at § M.4, and AR Tab 2. The Center focuses its argument on whether the methodology actually prejudiced EES. The Center makes two points. First, noting that the $75 standard figure was used to evaluate all offerors, the Center claims that [DELETED][18] [DELETED] *AR*, at 10 (emphasis in the original). More importantly, the Center's second argument is that regardless of the actual FTEs for EES's past performance -- whether [DELETED] for the subcontract EES cites – those contracts were "absolutely tiny compared to SOS-7." *AR*, at 11.

The ODRA recognizes that:

> … the evaluation of past performance is a matter within the discretion of the contracting authority, and the ODRA will not substitute its judgment for a reasonably based past performance rating. [citation omitted] However, we are required to and will examine the evaluation to ensure that the evaluation was reasonable and consistent with the stated evaluation criteria.

[16] EES calculates $[DELETED] per hour as the average rate used in its Offer to the solicitation at issue, DTFACT-09-R-00007. *See Initial Protest*, at fn. 12. This figure is calculated by taking the EES's total offered price for labor and dividing by the number of estimated hours found in the price attachment J-3 in the SIR. The result is $[DELETED] / 2,533,473 hours = $[DELETED] per hr ≈ $[DELETED] per hr. EES does not explain why it uses in this argument the hourly rate from the offer at issue rather than an actual rate for the past contracts.

[17] While EES's proposal explained that its [DELETED] subcontract under [DELETED] has "expand[ed] … to [DELETED] current FTEs," the same page also indicates that the subcontract began with only [DELETED] FTEs. *See* AR Tab 12, Vol. 1, Section 2, at p. 3. A calculated figure like [DELETED] (see AR Tab 14, at ¶ 14), which lies near the middle of the extremes of [DELETED] to [DELETED], is not shocking when put into context.

[18] Using the EES formula, the ODRA calculates the ARTS rate to be $[DELETED] / 2,533,473 = $[DELETED] per hr. ≈ $[DELETED] per hr.

Protest of Information Systems & Networks Corporation, 98-ODRA-00095. Additionally, consistent with other protest theories, protests of technical errors in the evaluation process will not be sustained unless the protester can demonstrate prejudice. *Id.*

The evaluation criteria for Factor 2 stated that offerors were to "describe the company's experience in providing similar work in size (Hours/FTEs) and scope (type of effort) as that described in the SOW to show the competency to succeed on this effort." *FF* 10. Neither the SOW nor the evaluation plan, however, contains any stated methodology for determining the size similarity between the SOS-7 work and the past efforts. The contracting specialists explained, "We realized that FTEs fluctuate over the life of a contract, and calculating average FTEs is important to determining the validity of claimed FTEs on a contract or subcontract." *AR* Tab 14, *Ross and Ferrante Decl.*, at ¶ 7. The purpose of the calculation was to "intelligently and accurately" evaluate the number of FTEs. *Id*., at ¶ 16.

To succeed in its Protests on this point, EES must demonstrate that it was prejudiced by the use of the arbitrary hourly rate. EES relies on its labor rate for the present SIR, however, rather than the rate used in the contracts it cited in its proposal. But if the goal is to measure accurately the FTEs on the cited *historic contracts*, using an average rate of $[DELETED] in EES's *current offer* in this context is just as arbitrary as using the $75 rate. Moreover, [DELETED].[19] Finally, it is apparent that [DELETED].[20] Accordingly,

[19] The ODRA has also examined EES's suggestion that the TET calculated ARTS's [DELETED] contract incorrectly, yielding [DELETED] FTEs instead of [DELETED]. *See EES's Initial Comments*, at 18; EES's *Supplemental Comments*, at 10. The ODRA concludes that the TET had a rational basis to credit the full [DELETED] FTE's on the contract because ARTS was serving as a prime contractor. The lesser figure is merely a subset of FTEs that are exclusively ARTS employees. The TET's approach was consistent with the evaluation criteria that afforded greater weight for prime contracts than for subcontracts. Further, the approach rationally recognizes that the prime contractor bears responsibility for the actions of its subcontractors.

[20] In particular, for EES's past performance as a prime contractor on its [DELETED] contract, EES reported merely [DELETED] FTEs (*FF* 33), whereas the TET's analysis cited "[DELETED] Full-Time Equivalents (FTEs)." *FF* 39. Similarly, as discussed in the preceding footnote, the calculation yields [DELETED] FTEs for ARTS's employees working on the [DELETED] contract, whereas ARTS reported [DELETED] in its proposal. *FF* 27. *See also* fn 17, *supra*., discussing the application of the calculation when EES provided ranges of staffing levels that changed over time.

the ODRA concludes that EES has failed to meet its burden to demonstrate any reasonable possibility of prejudice related to this issue.

b. Alleged Failure to Properly Weigh the Relevance of the Past Performance

The second point that EES raises under Factor 2 pertains to the credit given for the scope of the work in the cited contracts. EES charges that its own experience on SOS-5 and the experience of its subcontractors on SOS and other FAA procurements should have been given higher ratings as work relevant to most of SOS-7. *Initial Protest*, at 16-17. EES argues that the TET treated size as a more important aspect of past performance than relevance of the work performed. *Initial Protest*, at 17.

The EES argument fails to recognize the relative importance of an offeror's work as a prime contractor, its work as a subcontractor, or the experience of the proposed subcontractors. The evaluation criteria, on the other hand, provide that the evaluation was to be conducted based primarily on the extent and quality of the offeror's own corporate past performance. *FF* 10. The evaluation criteria provided that the TET was to give greater weight to an offeror's experience as a prime contractor than as a subcontractor. *FF* 10 and 18. Further, greater weight was to be afforded to the experience of an offeror, than to the experience of a proposed subcontractor. *FF* 10. A proposed subcontractor's experience as either a prime or as a subcontractor was treated equally. *Id*. The criteria indicated a preference for "Government computer systems maintenance experience." *Id.*

The record reveals that both EES and ARTS cited to one contract each for prime contractor experience, and several other examples contained the experience of their proposed subcontractors. *FF* 27 and 39. Both sets of subcontractors included one example of a very large contract valued in excess of $200M and requiring the services of over 200 FTEs (*compare* [DELETED] contract with [DELETED] contract). *Id.* The TET credited the subcontractor experience in a similar manner for both offers by pointing to combined experience that was similar to SOS-7. AR Tab 3, at 8 and 19. Despite these

similarities, ARTS received a score of "Excellent" for the past performance factor, while EES merely scored "satisfactory."

The difference in the scores lies in how the TET treated the prime contract experience of both ARTS and EES. Regarding ARTS's [DELETED] contract, the TET reported:

> That contractual effort, [DELETED], where they performed as prime, was similar in size (greater than 60 calculated Full Time Equivalents (FTE)) to SOS-7. The TET noted that the proposal indicated "[DELETED] ..." (page 3). Further, ASRC RTS's work as the prime included engineering, maintenance and operations, and [DELETED]. This type of work is directly relevant to the full scope of the SOS-7 SOW, and demonstrates the ability to manage a contract of SOS-7's size and complexity. This experience by itself warrants a grade of "Excellent."

AR Tab 3, at 8. In contrast, the TET found EES's [DELETED] contract with only [DELETED] FTEs to be a "weakness." The TET wrote:

> The size of EES's previous contract where they performed as the prime contractor, [DELETED], was substantially smaller (fewer than [DELETED] calculated Full-Time Equivalents (FTEs)) than the size of SOS-7. The type of work for the Drug Enforcement Agency (DEA) included development and support activities for Oracle applications, which is relevant to only a portion of the SOW. These were considered weaknesses.

AR Tab 3, at 18. This contemporaneous statement shows the TET's consideration of both size *and* scope, finding that EES's work as a prime was too small, *and* only partially relevant in scope. ARTS's work, as it turned out, was a larger effort, and covered more areas relating to Government computer systems maintenance experience. *AR* Tab 3, at 8 and 19; Tab 10, *TET Decl*. at ¶¶ 35 and 36. EES's experience as a subcontractor to [DELETED] on [DELETED], according to the TET, did not make up for these deficiencies because the [DELETED] subcontract, with less than [DELETED] FTEs calculated, was small and relevant only to a portion of the work. *Id.* Thus, having considered both size and scope as required, the TET wrote, "EES, standing alone, did not fully demonstrate the competency to manage the work of the SOS-7 due to the

weaknesses in size and scope when performing as prime." *AR* Tab 3, at 19. The ODRA cannot find that this analysis was irrational.

Nor does the ODRA find irrational the TET's treatment of the experience of EES's proposed subcontractors. While the experience of its proposed subcontractors on [DELETED] and [DELETED] may be significant, the contribution in the weighting scheme is secondary for the simple reason that the experience was not gained as a prime contractor. Indeed, EES was fortunate that the TET recognized that the combined experience of the subcontractor's efforts "included the complete lifecycle support for FAA systems across "all major ATC domain areas … and is relevant to the full scope of the SOW." *AR* Tab 3, at 19. The TET awarded a "strength" for the subcontractor's experience that compensated for EES's weak experience as a prime, and justified the rating of a "satisfactory."[21] The ODRA therefore holds that the TET properly weighed the proposals under the evaluation criteria stated in the SIR.

For the foregoing reasons, the ODRA finds the TET's conclusions rational with regard to the Center's evaluation under Factor 2, Past Performance.

5) Evaluation Factor 3: Key Personnel

EES's Protests raise several issues under "Factor 3, Key Personnel." The Initial Protest charges that the TET's conclusion was unreasonable, arbitrary, and ignored information in the Center's possession. *Initial Protest*, at 17-20. EES also charges that the evaluation was not conducted in accordance with the SIR (*Supplemental Protest*, at 2-3), and that the evaluation was unequal among offerors. (*Id.*, at 3-9). Finally, EES questions communications that occurred between ARTS and the Center regarding ARTS's failure to include a letter demonstrating that its proposed Program Manager would accept employment with ARTS.

[21] The evaluation scheme would not permit a higher rating of "good" for EES's past performance factor. To achieve "good," strengths like the subcontractor's past performance could not be "offset by weaknesses." *FF* 12. In this case, the record supports the TET's conclusion that EES's limited prime contractor experience in both size and scope constituted a weakness.

a. The Evaluation of EES was Consistent with the SIR

The TET concluded that EES's proposed Program Manager, [DELETED], was "unacceptable." *FF* 37 and 39. As defined in the evaluation plan, "unacceptable" means:

> **Unacceptable:** A response that does not meet the requirements of the SIR as measured by the stated evaluation criteria and is not acceptable because of some significant weakness. This weakness is a risk to successful contract performance. Deficiencies exist.

FF 12. This definition requires, therefore, three conditions for a proposal to be "unacceptable": 1) failing to meet the requirements of the SIR, 2) an unacceptable "significant weakness," and 3) "deficiencies." The terms, "significant weakness," and "deficiencies" are further defined in the evaluation plan:

> **Weakness:** A weakness is "a flaw that increases the risk of unsuccessful contract performance." A significant weakness is "a flaw that appreciably increases the risk of unsuccessful contract performance."
>
> **Deficiency:** A deficiency is "a material failure of a proposal to meet a government requirement or a combination of significant weaknesses in a proposal that increases the risk of unsuccessful contract performance to an unacceptable level"

FF 13. *AR* Tab 2, at 8 (underline added).

The TET's Final Report explains how the TET concluded that EES's proposal was "unacceptable" under this factor. The TET wrote,

> EES was given a grade of "**Unacceptable**" for their Key Personnel.
>
> The key person, [DELETED], has a MS degree in Aviation Management and BS degree in Business Administration. [DELETED] work with the FAA systems demonstrated specific experience managing contracts, personnel, and activities directly relevant to the SOW. [DELETED] fully demonstrated with [DELETED] and [DELETED] seven years of program management experience. **These were considered strengths.**

> After evaluation of [DELETED] program manager position with [DELETED] from October 1984 – March 2002, the TET determined the detail of work performed includes subcontractor program manager duties, technical area lead duties and technical specialist duties. However, the number of years that [DELETED] performed as program manager could not be determined. The proposal stated, "[DELETED] *served as a fully integrated support subcontractor program manager on the SOS-3 contract*." (page 2) The SOS-3 contract, 96-C-00009, period of performance was March 29th 1996 through December 25th 2002. Even allowing six years for the SOS-3 contract period as a "subcontractor program manager," [DELETED] total years of program manager experience would total 13 years. The TET determined that the work performed as Technical Area Lead and Technical Specialist was not "program management" as [DELETED] responsibilities did not include managing an entire program with budget authority and management of personnel, including official performance evaluations.
>
> [DELETED] **does not demonstrate the minimum 15 years** of program manager experience required with a Masters Degree. This was considered a **deficiency**.
>
> [DELETED] resume was not certified and a letter of intent was not provided.

AR Tab 3, at 19 (emphasis added). As portions of the emphasized language show, it is clear that the TET found that [DELETED] failed to meet the requirement for 15 years of experience related to program management, which also constitutes a deficiency.[22]

Offerors have an obligation under the SIR to plainly and clearly show that their proposal complies with the requirements of the SIR. *FF* 6, 8, and 9. Assuming the TET correctly credited six years of experience to [DELETED] for [DELETED] work at [DELETED], the question in this appeal focuses on his experience cited in one "lump" section of [DELETED] resume from October 1984 to March of 2002 (approximately 17.5 years), wherein [DELETED] work for three companies is collected and described. The TET stated that it could not determine the dates that [DELETED] served as a program manager, and its analysis gave the benefit of the doubt by crediting six years of

[22] The TET did not expressly discuss the need to find a "significant weakness," and EES has not raised this as a point of protest. Recognizing that a significant weakness is "a flaw that appreciably increases the risk of unsuccessful contract performance," any failure to provide a Program Manager who meets the experience requirement would be a *per se* significant weakness. EES, accordingly, correctly focuses its argument on whether [DELETED] actually meets the requirement for 15 years of experience.

experience relating to the period of performance for SOS-3. *AR* Tab 3, at 19 (quoted above in full). The ODRA has reviewed EES's argument and its proposal regarding this 17.5 year period in [DELETED] career, and does not find irrational the TET's interpretation of the proposal. If any actual errors were committed, they are due to EES's failure to clearly and plainly set forth the full "fifteen (15) years of related experience in program management."

b. The TET was not Obligated to Consider Alleged SOS-2 Experience

Despite EES's obligation to provide a simple, concise, and complete proposal, it argues that the ODRA should adopt the GAO's "too close at hand" approach discussed in *Axiom Res. Mgmt., Inc.*, B-298870.3, 2007 WL 2141694, which EES asserts would require the TET to have considered [DELETED] alleged five years of experience as a subcontractor's program manager under SOS-2. EES made this assertion "based on information and belief" that the TET knew of [DELETED] experience under SOS-2. The ODRA need not consider the GAO's approach in *Axiom* at this time. EES's proposal does not mention the SOS-2 experience, and EES has not established that the TET members had actual knowledge of [DELETED] alleged involvement with SOS-2. *AR* Tab 11, at Vol. I., Sec. 3; Tab 10, *TET Decl*. at ¶ 52 (TET did not have such knowledge). In fact, nothing from EES other than the argument of its counsel demonstrates that [DELETED] actually was involved with SOS-2. In this case, EES, not the TET, was in the best position to highlight this decades-old experience, but it failed to do so.

c. Disparate Evaluation has not been Shown

EES also challenges the award of "excellent" to ARTS for this factor, claiming it reflects disparate application of the evaluation criteria among different offerors. In making this claim, it constructs a definition of "relating to program management" as meaning "experience with and knowledge of FAA systems." *Supplemental Protest*, at 2. EES erroneously builds its argument upon this foundation, stating that other offerors whose Program Managers had FAA experience were given "satisfactory" scores, whereas

ARTS's received an "excellent" even though its program manager lacked FAA experience. *Id.*

A plain reading of the SIR, including the evaluation criteria and language in Attachment J-2 does not require that the individual program manager's experience be with FAA systems. Instead, to meet the criteria, Attachment J-2 requires the Program Manager to "Possess[] general knowledge of all technical and management areas of the contract." *FF* 11. It is rational for the TET to consider experience with the FAA or other agencies that conduct flight operations as a strength that "enhances the merit of the proposal or increases the probability of successful performance of the contract." *FF* 13. Equally, lacking such experience could rationally be considered a weakness that "increases the risk of unsuccessful contract performance." *Id.*

The ODRA has reviewed the evaluation plan and its application by the TET to Offeror F, Offeror A, and ARTS, the examples which EES argues demonstrate disparate treatment. *See Supplemental Protest*, at 3. Both Offerors A and F received satisfactory scores. *FF* 37. Offeror F received a strength for proposing a Program Manager whose Master of Sciences degree was in information systems and whose Bachelor of Arts degree in "Operations Research and Information Systems," but received a weakness because his experience was related to human resources databases rather than the kind of systems to be serviced under SOS-7. *See AR* Tab 3, at 27. Similarly, Offeror A's proposed program manager met the SIR, but his lack of FAA experience resulted in a weakness. *Id*., at 5. In contrast, [DELETED] had experience with United States Navy and NASA aeronautical systems that the TET considered "demonstrated specific experience managing contracts, personnel, and activities directly relevant to the SOW." This conclusion is supported by the resume. *AR* Tab 12, Vol. II., Section 3, at 2-3. The ODRA further notes, aside from EES's argument, that EES and Offeror C were also awarded a strength under Factor 3 for experience with SOS-5. *AR* Tab 3, at 15 and 19. Based on this record, the ODRA finds no disparity in the application of the evaluation scheme for Factor 3. Where strengths were off-set by weaknesses, the offerors who met the requirements received a "satisfactory" score, but offerors like ARTS and Offeror C

received higher scores when there were no off-setting weaknesses. This is consistent with the scoring criteria found in the evaluation plan. *FF* 10.

d. Communication Regarding the Letter of Intent

The undisputed facts show that the ARTS technical proposal did not contain the required letter of commitment from its proposed Program Manager, [DELETED]. *FF* 23. Nevertheless, the TET did not find that ARTS was technically unacceptable or otherwise non-responsive on this ground, but instead stated that the absence of letters of intent or resume certifications "was not used to change the grade" for Factor 3 for any offeror. *FF* 23. To rectify the problem with ARTS proposal, the parties also do not dispute that the Center's contract specialist telephoned ARTS to obtain a responsive letter of intent to add to the ARTS proposal. *FF* 43. [DELETED] provided such a letter on the same day. *Id.*

EES makes two arguments regarding the missing letter of intent. First, EES charges that the TET's actions with regards to the missing letter of commitment from [DELETED] constituted an improper, secret waiver of the evaluation criteria. *Supplemental Protest*, at 12-13. Second, EES asserts that the Contracting Specialist overstepped the bounds of permissible communication found in AMS Policy § 3.2.2.3.1.2.2, which gave an unfair competitive advantage to ARTS. *Id.*, at 13.

Regarding the first allegation, the TET and the Contracting Specialist did not *waive* the requirement to have the letter of intent. To the contrary, the apparent purpose of the communication was to ensure that the ARTS proposal complied with the requirement to include a letter of intent. Furthermore, Section L demonstrated that the Center had discretion to find the proposal non-responsive, but it was not obligated by the evaluation criteria or other sections of the SIR to reach this conclusion. *See FF* 7; *AR* 1, SIR, at § L.7(a), at 62 ("Any proposal that does not explicitly comply … *may* be considered non-responsive …).

The second charge pertains to the Contracting Specialist's request for [DELETED] letter of intent after the closure of the SIR. The AMS permits communications with individual offerors "…to ensure there are mutual understandings between the FAA and the offerors about all aspects of the procurement, including the offerors' submittals/ proposals." *AMS Policy* § 3.2.2.3.1.2.2. This authority, however, is not without limits. Contracting Officers must ensure that "such communications do not afford any offeror an unfair competitive advantage," and do not result in "technical leveling." *Id.* The AMS Policy defines technical leveling as:

> … the act of helping an offeror to bring its proposal/offer up to the level of other proposals/offers through successive rounds of communication, such as by pointing out weaknesses resulting from the offeror's lack of diligence, competence, or inventiveness in preparing his proposal.

AMS Policy, Appendix C. The AMS policy states, "Information disclosed as a result of oral or written communication with an offeror may be considered in the evaluation of an offeror's submittal(s)."

The record herein does not support a conclusion that the request for [DELETED] letter of intent conferred an unfair advantage or constituted technical leveling. Both EES and ARTS failed in submitting letters of intent in accordance with the SIR. *FF* 23 and 30. The TET did not make an adverse determination against EES on these grounds (*FF* 39 and 41), nor did it ignore the requirement to ARTS's exclusive benefit. Moreover, this did not constitute technical leveling under the AMS definition because the communication did not bring the proposal "up to the level of other proposals/offers" (or *down* to the level of EES's), nor were there "successive rounds of communication." *See* AMS Policy, Appendix C (quoted above).

6) Prejudice

This procurement was conducted on a "best value to the Government" basis, wherein the quality of the technical proposal was more important than price. *FF* 9. Further, technical

evaluation criteria were listed in descending order of importance, meaning that the greatest weight was placed on "Evaluation Factor 1: Program Management." *FF* 10.

As determined in the preceding sections, the ODRA has found two errors in the technical evaluation under Factor 1 regarding how the TET awarded strengths for having a "clear understanding of the SOW," and for its apparent failure to consider the textual explanation of EES's ECO software. But for these errors, EES's score for Factor 1 of "satisfactory" (*FF* 37 and 39) might very well have received more strengths, and therefore might have yielded a higher score. In particular, the criteria for the next higher score, "good," states:

> **Good:** A proposal that meets or exceeds all of the Government's requirements, contains at least adequate detail, demonstrates at least an understanding of the requirements, is at least feasible (low to moderate risk) and offers some significant strengths or *numerous strengths which are not offset by weaknesses.*

FF 12 (emphasis added). Thus, if the TET reevaluates and concludes that EES's understanding of the statement of work and its ECO justify strengths, EES's overall score for Factor 1 could be raised potentially to a "good."

Even if the TET raised EES's score on Factor 1, the question remains as to whether the Source Selection Official could determine that EES's proposal represented the best value to the Government. The ODRA will not sustain a protest unless the protester can demonstrate that but for the agency's inappropriate action or inaction, the protester would have had a substantial chance of receiving the award. *See e.g., Protest of Optical Scientific Inc*., 06-ODRA-00365*; Protest of Enroute Computer Solutions*, 02-ODRA-00220. As described in Finding of Fact 45, the TET conducted its best value analysis by comparing ARTS proposal Offeror E. If there had been no prejudicial errors by the TET, that analysis would have been rational given that Offeror E had a lower price than EES and higher score for factor 2, as shown in the following table:

Offeror E and ARTS were considered in the Best Value Comparison

Offeror	Factor 1	Factor 2	Factor 3	Factor 4	Price
Offeror E	Satisfactory	Excellent	Unacceptable	Pass	Lowest
EES	***Satisfactory***	Satisfactory	Unacceptable	Pass	2nd Lowest
ARTS	Excellent	Excellent	Excellent	Pass	4th Lowest

The possibility, however, that EES could receive a higher revised score than Offeror E on the heavily weighted Factor 1, renders the existing best value analysis insufficient. In these circumstances, the Source Selection Official could determine that the technical cost/technical tradeoff offered by EES justified a down-select decision or further communications that ultimately could result in an award to EES.

IV. CONCLUSION

The ODRA recommends denial of the ARTS Request for Dismissal on the grounds that there has been no determination that EES does not qualify as an eligible SEDB, and for the other reasons discussed in Section III.A. of these Findings and Recommendations. On the merits of the protest, the ODRA recommends denial of all grounds of protest with the exception that it finds that the award of a strength for having a "clear understanding of the SOW" to some offerors, while not awarding such a strength to EES constituted improper, disparate treatment. Further, the ODRA finds that the Center improperly failed to consider EES's complete proposal with regards to EES's ECO software. Recognizing that both of these issues may have resulted in a higher technical score for the most important technical factor, and further recognizing the relative rankings of the offerors, the ODRA finds that these two errors were prejudicial to EES and therefore sustains the Protests on these two grounds.

Accordingly, given that AMS Policy § 3.9.3.2.2.4 and the ODRA Procedural Regulation give "broad discretion" to the ODRA to recommend remedies, the ODRA recommends that the Center be directed to: (1) reevaluate EES's technical proposal under Evaluation Factor 1 in a manner consistent with these Recommendations and Findings; and (2) upon

completion of this task, if the Center determines that the technical score for Factor 1 should be increased, the Center should conduct any further communications or down-selects it deems necessary in accordance with the AMS, and complete a new best value analysis. If EES is eligible for award and its proposal is found to represent the best value to the Government, the Center should take appropriate action to terminate the ACTS contract for convenience and award the contract to EES.[23] Finally, the Center should be directed to complete the above in a reasonable period and to report back to the Administrator through the ODRA on the outcome of the recommended action.

_____/s/_____
John A. Dietrich
Dispute Resolution Officer
FAA Office of Dispute Resolution for Acquisition

APPROVED:

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

[23] Nothing in these Findings and Recommendations precludes the Center from exercising its independent authority and responsibility to consider and act on information concerning the eligibility of any party for award under the SIR.

APPENDIX A – TABLE OF SHORT CITATIONS

In the interest of clarity, the following table lists relevant documents by formal title, and provides the short citation used in the foregoing Findings and Recommendations.

General Subject or Category	Formal Title and Date	Short Citation
EES's Initial Protest, Dated May 27, 2009	*Protest of Enterprise Engineering Services, LLC,* dated May 27, 2009.	*Initial Protest*
	Agency Report, dated June 22, 2009	*AR*
	ARTS's Request for Dismissal and Comments on the Agency Report, dated July 1, 2009	*ARTS Dismissal Req. & Comments*
	EES's Comments on the Agency Response	*EES's Initial Comments*
EES's Supplemental Protest, dated June 26, 2009	*Supplemental Grounds of Protest*, dated June 26, 2009	*Supplemental Protest*
	Agency Response to EES Supplemental Protest of June 26, 2009	*Supplemental Response*
	Protester's Comments on the Agency's Response to Intervenor's Motion to Dismiss and Supplemental Agency Report	*EES's Supplemental Comments*
	ARTS Reply in Support of Request for Dismissal and Comments on Supplemental Agency Report	*ARTS Supplemental Comments*
Documents Solely Related to ARTS's Request for Dismissal	*Agency Response to the Intervenor's Motion to Dismiss*, dated July 10, 2009	*Center's Dismissal Response*
	Protester's Response to Intervenor's Request for Dismissal, dated July 13, 2009	*EES's Dismissal Response*

Notes:

1. At the direction of the ODRA, the briefing on ARTS's Request for Dismissal was incorporated into the schedule for response and comments to the Supplemental Protest to the extent possible.

2. The Center's *Supplemental Response* contained additional tabs (designated 13 to 19) that continued the numbering system used for the attachments to the *Agency Report*. For consistency with the pleadings filed by the parties, references in these Findings and Recommends to those attachments provided by the Center use the "*AR* Tab ##" format.

3. With the permission of the ODRA and cooperation from the other parties, EES filed an Errata Version of the Supplemental Protest, with exhibits, which corrected erroneous citations in the Supplemental Protest of June 26, 2000. The ODRA has relied exclusively on the this Errata Version, and all citations to the Supplemental Protest refer to that Errata Version.