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

FINDINGS AND RECOMMENDATIONS

Matter: **Protest of Sentel Corporation**
Under Solicitation No. DTFAWA-09-R-00028

Docket No.: 09-ODRA-00512

Appearances:

For the Protester, Sentel Corporation:	John E. Jensen, Esq.; Evan D. Wesser, Esq.; Daniel Herzfeld, Esq.; Nicole Y. Beeler, Esq. of Pillsbury Winthrop Shaw Pittman LLP
For the FAA Program Office:	Jennie M. O'Malley, Esq.; Gregory Carter, Esq.
For the Intervenor, CSSI, Inc.:	J. Scott Hommer, III, Esq.; William L. Walsh, Esq.; Justin J. Wortman, Esq.; Rebecca E. Pearson, Esq.; James Y. Boland, Esq. of Venable LLP; and Michael Veve, Esq. of Lasa Monroig & Veve LLP

I. Introduction

Sentel Corporation ("Sentel") filed the above bid protest ("Protest") on December 30, 2009 against an award of a contract ("Contract") by the Federal Aviation Administration ("FAA") Headquarters ("Product Team") under Solicitation No. DTFAWA-09-R-00028 ("Solicitation"). The awardee of the Contract, CSSI, Inc. ("CSSI"), intervened in this Protest on January 5, 2010. The Solicitation in question was issued to provide

professional support services for the Air Traffic Organization's ("ATO") Safety Management System ("SMS") Office ("Program Office").

As detailed in the following discussion, the ODRA recommends that Sentel's Protest partially be sustained because CSSI misrepresented prior to award the availability of one key person offered in its proposal, and because CSSI was ineligible for award due to its failure to submit a subcontracting plan as part of its proposal. These issues, standing alone, are dispositive of the Protest, but additionally, the ODRA concludes that the evaluation of CSSI's cost proposal lacked a rational basis and was inconsistent with terms of the Solicitation. Finally, the ODRA recommends denying Sentel's challenge to the treatment of CSSI's alleged organizational conflicts of interest ("OCI"). As discussed in more detail below, the ODRA therefore recommends that the Protest be sustained in part, that the contract to CSSI be terminated for the convenience of the Government, and that the Product Team be directed to award a new contract to Sentel.

II. Findings of Fact

A. The Solicitation

1. The Product Team issued Solicitation DFTAWA-09-00028 on April 20, 2009. *Agency Response* ("*AR*") Exh. A. The original closing date for receipt of proposals was June 5, 2009. *Id*. at § L.3.3.

2. The Solicitation indicated that the FAA planned to award a cost plus fixed fee term contract, with one base year and four option years. *AR* Exh. A at §§ B.2.0, F.2, and F.3. Each contract year included eleven Contract Line Item Numbers ("CLIN") corresponding to eleven separate, professional labor categories. *Id.* at § B. 3.0.

3. Section C.1 of the Solicitation – and the resulting contract – generally summarized the scope of work as follows:

C.1 Scope

The purpose of this contract is to provide safety management system and system safety programmatic support. Contractor support is required to assist the Air Traffic Organization's (ATO) Safety Management System (SMS) Office, herein referred to as "Office", [sic] with project planning, database development and maintenance, Office documentation preparation, and configuration control of all documents developed, maintained, and/or controlled by the Office. The Contractor must provide all necessary labor and materials to accomplish these objectives.

AR Exh. A at § C.1.

4. Section C.5 of the Solicitation broke down the work into several broad categories, including "Program Management Support" (*AR* Exh. A at § C.5.1), "Engineering Support" (*Id*. at § C.5.2), "Acquisition and Business Support" (*Id*. at § C.5.3), and "Data Management Support (*Id*. at § C.5.4). These categories, as discussed below, required the successful offeror to provide both administrative support and expert assessments to help the Program Office fulfill its mission.

5. Section C.5.1 stated:

C.5.1 Program Management Support

a. Provide support to the SMS Directorate before and after meetings the Office conducts or supports, including documenting decisions reached, action items assigned, and dissemination of minutes.

b. Support, maintain and upgrade the implementation of a Non-punitive Voluntary Confidential Safety Reporting Legacy System for all ATO employees, including tracking hazards, analyzing issues identified, developing a lessons learned database as a training tool, and supplying metrics to identify areas that need improvement.

c. Support the execution, refinement, and implementation of surveys used to gathered [sic] information on the present state of safety climate and culture within the ATO. Analyze the surveys and develop an ATO safety climate assessment action plan for culture change, including documenting lessons learned, and developing matrices and databases.

d. Support the implementation of a "best practices", [sic] employee suggestions, lessons learned repository, and safety promotion products, including brochures, movies, interactive media, and briefings.

e. Populate and Maintain the Knowledge Shared Network (KSN) website with pertinent SMS documents.

f. Provide instructors and course materials in contractor format for classroom training of SMS courses and supply subject matter expertise in development of online/Computer Based Instruction (CBI) that provide core competencies for Safety and Safety Risk Management professionals.

g. Support SMS coordinators in the development, review, and evolution of training materials based on the SMS manual.

h. Provide tracking of training deliverables, and support the reproduction of materials used in training deliverables.

[i][1]. Assist the Directorate in establishing and writing technical guidance for SMS implementation.

[j]. Assist in the development, design and/or acquire SMS Directorate approved software databases. Populate and manage databases for program use by the SMS Directorate.

[k]. Provide instructional System Design support to projects, programs, and training courses/classes in contractor format for SMS use.

AR Exh. A at § C.5.1, and Exh. B, Amendment 0005.

6. Section C.5.2 stated:

C.5.2 Engineering Support

a. Provide expertise in the assessment of all NAS changes assigned.

b. Provide support and expertise to the Office in the evaluation of safety analyses and assessments, submitted for review to ensure compliance with Office guidance.

[1] Paragraph lettering restarted at "a." on page C-4 of the Solicitation.

c. Maintain a database of all waiver submissions and provide monthly analysis of pending and anticipated waiver submissions.

d. Serve as a subject matter expert in the area of system safety engineering and support, providing recommendations for current/proposed NAS systems and equipment safety issues.

e. Assist in the development of Safety Support tools, techniques and technical documentation to support the AMS process.

f. Provide the necessary programmatic processes, training and policy expertise required to assist with installation and full implementation of SMS throughout the ATO and the Agency.

AR Exh. A at § C.5.2.

7. Section C.5.3 stated:

C.5.3 Acquisition and Business Support

a. Assist in the development of a web-based database Non-Punitive Voluntary Confidential Safety Reporting System for all ATO employees at SMS direction.

b. Provide support and subject matter expertise to the SMS representative(s) as requested on committees, groups and boards in carrying forward SMS business case activities.

c. Provide process expertise on the FAA system safety engineering process in support of the AMS for acquisition of systems in the NAS.

d. Assist in the development of SMS tools, techniques, and technical guidance documents as they pertain to the conduct of safety analysis as it is conveyed in the AMS.

AR Exh. A at § C.5.3.

8. Section C.5.4 stated:

C.5.4 Data Management Support

a. Provide technical support to the automated Safety Risk Management Tracking System (SRMTS) which is a web-based hazard tracking system used to track hazards relating to new

systems acquisitions and operational changes to the NAS. Support policy, procedures, design and development of the SRMTS, including maintenance changes.

b. Assist in the development of integrated safety engineering tools to train safety engineers, system safety engineers, and safety managers on the FAA system safety process for new systems acquisitions and major changes to the existing systems in the NAS.

AR Exh. A at § C.5.4.

9. Section H.11 contained AMS Clause 3.8.2-17, "Key Personnel and Facilities (July 1996)," and identified in paragraph (d) the position of "Air Traffic Control Specialist" as one of the "key personnel" in this Solicitation. *AR* Exh. A at § H.11.

10. Section H.12 contained the full text of AMS Clause 3.8.2-22, "Substitutions of Personnel (October 2006)," including parts completed by the Contracting Officer. It states in pertinent part:

(1) The Contractor must assign only those individuals whose resumes, personnel data, or personnel qualification statements have been submitted and determined by the Contracting Officer to meet the minimum requirements of the contract. The Contractor must not substitute or add personnel except in accordance with this clause.

(2) Substitution of Personnel.

(a) For the first *12 months* of contract performance, the Contractor must not substitute personnel for the individuals whose resumes or other personal qualification were submitted with its offer and that were determined by the Contracting Officer to be acceptable at the time of contract award, unless such substitutions are because of an individual's sudden illness, death, or termination of employment. In any of these events, the Contractor must promptly notify the Contracting Officer and propose substitute personnel as required by paragraph (4) below.

…

> (5) The Contracting Officer may terminate the contract if the Contractor has not made suitable, timely, and reasonably forthcoming replacement of personnel who have been reassigned or terminated or otherwise become unavailable to work under the contract or the resulting loss of productive effort would impair the successful completion of the contract. Alternatively, if the Contracting Officer finds the Contractor to be at fault for the condition, then the Contracting Officer may equitably adjust (downward) the contract price or fixed fee to compensate the Government for any delay, loss or damage as a result of the Contractor's action.

AR Exh. A. at § H.12 (italics added indicating portion inserted into the standard clause by the Contracting Officer).

11. Section H.14 established the small business subcontracting goals for the contract:

> **H.14 Small Business/Small Disadvantaged Business/Women-owned Small Business Subcontracting Goals**
>
> The Contractor, if not a Small Business, must establish the following below listed subcontracting goals in their subcontracting plan, submitted in accordance with AMS Clause 3.6.1-4, "Small, Small-Disadvantaged and Women-Owned and Service-Disabled Veteran Owned Small Business Subcontracting Plan."
>
> Work shall be allocated at least twenty-five (25) percent of the contract dollar value to small businesses over the full life of the contract. This twenty-five (25) percent of the contract dollar value to be allocated to small businesses is further broken down 10% small disadvantaged, 5% women-owned and 3% service disabled veteran owned."
>
> The small business and disadvantaged Business Subcontracting Plan, (to be completed after award), if required, is deemed acceptable by the Contracting Officer and is hereby incorporated into this contract.

AR Exh. A at § H.14.

12. Section I of the contract incorporated by reference the following relevant AMS clauses: 3.2.2.3-33, “Order of Precedence (July 2004),” and 3.6.1-4, “Small Business/Small Disadvantaged Business/Women-owned Small Business

Subcontracting Plan (April 2007)." *AR* Exh. A at § I.1; Exh. B, Amendment 0002 at I-2.

13. Section K.7 of the Solicitation set forth the text of AMS Clause 3.2.2.7-7 "Certification Regarding Responsibility Matters (January 2009)," which requires the contractor to complete a certification regarding debarment, suspension, civil fraud, criminal offenses, and terminations for default of Federal Government contracts. *AR* Exh. A at § K.7.

14. Section L.1 of the Solicitation incorporated the following relevant AMS clauses:

    3.2.2.3-1 False Statements in Offers (July 2004)
    …
    3.2.2.3-14 Late Submissions, Modifications, and Withdrawals of Submittals (July 2004)
    …
    3.2.2.3-17 Preparing Offers (July 2004)
    3.2.2.3-18 Prospective Offeror's Requests for Explanation (July 2004)
    3.2.2.3-19 Contract Award (July 2004)
    …
    3.6.2-15 Evaluation of Compensation for Professional Employees (April 1996)

    AR Exh. A at § L.1.

15. Section L.7 addressed the minimum requirements for an offeror to be found responsible. It stated in full:

    L.7 RESPONSIBLE PROSPECTIVE CONTRACTORS

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

    (a) Have adequate financial resources to perform the contract, or the ability to obtain them;

    (b) Be able to comply with the required or proposed delivery or performance schedule, taking into consideration all other commercial and Government business commitments;

(c) Have a satisfactory record of integrity and business ethics;

(d) Have a satisfactory performance record;

(e) Have the necessary organization, experience, accounting and operational controls, or the ability to obtain them;

(f) Be otherwise qualified and eligible to receive an award under applicable laws and regulations.

AR Exh. A at § L.3.

16. Section L.10 gave the FAA the right to incorporate statements made in offers into a clause under Section H of a resulting contract. The provision states:

> **L.10 OFFEROR STATEMENTS**
> Offerors are cautioned as to the veracity of statements, promises or offers made during the evaluation process. The FAA reserves the right to contractual invoke any statements, promises, or offers of any kind made during the evaluation process through the creation of one or more Section H clauses in order to the bind the Offeror to any specific representation made to the FAA.[)]

AR Exh. A at § L.10.

17. Section L.11.1 explained that the source selection process would include a "[f]ormal review of the Offeror's Subcontracting Plan, if applicable[.]" *AR* Exh. A at § L.11.1 (e). The subcontracting plan was to be included in Volume I, Section E of an offeror's proposal. *AR* Exh. A at § L.13.2.

18. Section L.14. described Volume I of an offeror's proposal, and stated in part:

> L.14.1.5 **Section E - Subcontracting Plan.** The Offeror, if not a Small Business, must provide a Subcontracting Plan that describes Offeror's subcontracting goals and commitment to assuring that Small, Small-Disadvantaged and Women-Owned and Service-Disabled Veteran Owned Small Business Subcontracting Plan concerns are provided the maximum practicable opportunity to participate in this procurement. (See Section H-14 of the SIR for the goals percentages.

> L.14.1.5 [sic] **Section F - Business Declaration Form.** The Offeror must complete the Business Declaration Form included in Section L, Attachment L-l.

AR Exh. A at § L.14.

19. The Solicitation contained an erroneous statement of the North American Industry Classification System ("NAICS") code for this acquisition, stating:

> **L.20 North American Industry Classification system (NAICS) CODE [sic]**
>
> The North American Industry Classification System (NAICS) code for this requirement is 541990, "Engineering Services". [sic]

AR Exh. A at § L.20. The error is that the stated NAICSA code, "541990," does not match with the stated NIACS Industry Title, "Engineering Services." The proper code description for code 541990 is "All Other Professional, Scientific and Technical Services," as shown in the table found in the Small Business Administration's regulations:

NAICS codes	***NAICS U.S. Industry Title***	***Size standards in millions of dollars***	***Size standards in number***
541330	Engineering Services	$4.5	
Except,	Military and Aerospace Equipment and Military Weapons	$27.0	
Except,	Contracts and Subcontracts for Engineering Services Awarded Under the National Energy Policy Act of 1992	$27.0	
----- *[intervening rows omitted]* -----			
541990	All Other Professional, Scientific and Technical Services	$7.0	

13 CFR § 121.201 (2009). As shown above, the proper NIACS code for "Engineering Services," is "541330."

20. Attachment L.-1 contained the Business Declaration Form used by the FAA, designated FAA Template No. 61 (rev. 10/03). Line 10 required offerors to state the firm's gross receipts for the past three years. *AR* Exh. A at Attachment L.-1. Line 11 requires the offeror to state whether it is a small business. *Id*.

21. Section M.1 of the Solicitation explained in part:

> **M.l.1 AWARD SELECTION:** The Offeror whose offer conforms to the requirements of the solicitation and provides the best value to the FAA will be selected for award. The best value is defined as the proposal that presents the most advantageous solution to the FAA, based on the evaluation of technical, price and other factors specified in the SIR. The best value approach provides the opportunity for technical cost/price trade-offs and does not require that award be made to either the Offeror submitting the highest rated proposal or the Offeror submitting the lowest price, although the ultimate award may be to either one of those Offerors.

AR Exh. A at § M.1.1.

22. The Solicitation provided the following statement regarding the order of importance of the various evaluation factors:

> **M.l.2 ORDER OF IMPORTANCE**: The basis for award will be made against the evaluation factors contained in section M and the FAA's assessment of the risk involved in making an award to an Offeror. All factors will be considered in the evaluation for award. The following evaluation factors are listed in descending order of importance. Technical is the most important factor, followed by Business/Management Approach factor, followed by Past Performance factor, followed by Price. The Technical and Business Management Approach will be numerically scored. Past Performance will be evaluated as either acceptable or unacceptable. Price will be evaluated for completeness, reasonableness and realism and will not be scored. As technical differences between offers become smaller, the price becomes more important.

AR Exh. A at § M.1.2.

23. Section M.1.3 of the Solicitation established the eligibility for award, stating:

> **M.l.3 <u>ELIGIBILITY FOR AWARD</u>**: To be eligible for award, the Offeror must meet the [sic] all the requirements of the SIR. However, the FAA reserves the right to reject any and all offers, waive any requirements, minor irregularities and discrepancies, if it would be in the best interest of the FAA to do so. The Offeror must also be determined to be financially viable and otherwise responsible.

AR Exh. A at § M.1.3

24. Section M explained that Subcontracting Plans would be evaluated:

> **M.4.1 VOLUME I, Section E, Subcontracting Plan, if applicable.**
>
> The Subcontracting plan will be evaluated based upon the Offer's demonstrated commitment to assuring that small business concerns are provided maximum opportunity to participate in this effort. The evaluation will consider the plausibility that the established subcontracting goals can be achieved. The Subcontracting Plan will be evaluated by the FAA Small Business Office and deemed acceptable or unacceptable.

AR Exh. A at § M.4.1. (boldface added).

25. Price was to be evaluated as follows:

> **M.4.5. Factor 4 Price Proposal Evaluation**
> The total evaluated base period and four options years for each area will be considered in making award decision. **Price will not be scored in the evaluation of proposals.** The price proposal will be assessed to the completeness, reasonableness and realism of each Offer's response, the confidence level in the Offeror's ability to provide resources to the proposed prices and whether the pricing methodology appears to be well developed and substantiated. A definition for completeness, reasonableness and realism are as follows:
>
> **Completeness**: Responsiveness in providing all SIR requirements. Review of the proposal to ensure data provided is sufficient to allow for compete [sic] analysis and evaluation of the prices delineated in Section B and includes all the information and exhibits required by Section L.
>
> **Reasonableness**: A[n]assessment as to whether the propose[d] price does not exceed that which would be incurred by a prudent person in performing the required effort. Prices that are unreasonably low and/or

> do not realistically consider market condition, inflation, deflation and general economic conditions will not be considered for award.
>
> **Realism**: An assessment of the level of confidence and reliability placed in the Offeror's proposed price elements and whether they produce a realistic proposed price based upon Government requirements and the Offeror's proposed technical approach. Therefore, the price evaluation will also determine additional inherent cost uncertainties within each Offeror's proposal. The price evaluation team will identify variables and/or discrepancies within an Offeror's proposal.

AR Exh. A. at § M.4.5. (boldface in the original).

26. The Source Selection Plan ("SSP") reiterated many of the provisions in the Solicitation regarding price evaluation, and noted that the Price Report "will generally be by exception." This meant that "the discussion will focus on any proposals with unreasonable, apparently unrealistic or unbalanced rates, and any Offerors whose financial condition appears to be weak." *AR* Exh. E, at 5-6. The plan noted in the Technical Evaluation section, "If there is a conflict between the SIR [*i.e.*, the Solicitation] and this SSP, the SIR will prevail." *Id.* at 4.

27. Section M also addressed the process of determining Responsibility. Omitting any mention of the subcontracting plan, Section M.6 stated:

> **M.6 RESPONSIBILITY**
>
> An offeror must be determined responsible to be eligible for award. The Government may conduct a Pre-Award Survey at its discretion. The Government reserves the right to conduct a Pre-Award Survey on any subcontractor. To be eligible for award, the contractor must be technically and financially capable of performing the work.

AR Exh. A at § M.6.

28. The FAA amended the Solicitation five times. *AR* Exh. B. Amendment 0005 extended the closing date to June 12, 2009. *Id.*

B. CSSI's Proposal

29. CSSI submitted its proposal on the morning of June 12, 2009. *AR* Exh. C, cover page; *CSSI Comments*, Exh. B ([DELETED] *Affidavit*).

30. The proposal did not include a subcontracting plan. *AR* Exh. C, Vol. I, Table of Contents (stating "N/A").

31. Volume I of CSSI's proposal contained a signed Business Declaration on FAA Template No. 61 (rev. 10/03). *AR* Exh. C, Vol. I.

32. On its Business Declaration, CSSI listed NAIC codes 541330, 541511-513, 541611, 541690, 541710, and 541990 as the nature of its business. *AR* Exh. C, Vol. I. , *Business Declaration* at question 7.

33. In response to Business Declaration question number 10, CSSI stated its gross receipts for the last three years as follows:

    Year Ending 2008 – Gross Receipts $ [DELETED];
    Year Ending 2007 – Gross Receipts $ [DELETED]; and
    Year Ending 2006 – Gross Receipts $ [DELETED].

    AR Exh. C., Vol. I. The ODRA calculates the average Gross Receipts over this period as $ [DELETED].

34. CSSI checked "Yes" for the question on the Business Declaration asking, "Is the firm a small business?" *AR* Exh. C, Vol. I., *Business Declaration* at question 11.

35. Volume III of CSSI's proposal contained twelve resumes, as required by the Solicitation. For the position of Air Traffic Control Specialist, CSSI include the resumes of [Employee 1] and [Employee 2]. *AR* Exh. C, Vol. III at A-5 and A-9, respectively.

36. On June 12, 2009, after CSSI had submitted its proposal in the morning, [Employee 1] tendered his resignation from CSSI. *AR* Exh. D; *CSSI Comments*, Exh. B, [DELETED] *Affidavit*. Although CSSI attempted to retain [Employee 1], at no time prior to award did CSSI inform the FAA that [Employee 1] no longer worked at CSSI and that it did not have a commitment from him to return. *CSSI Comments*, Exh. B. CSSI did not inform the Government of [Employee 1]'s unavailability until after award at the September 10, 2009 "kick-off" meeting. *AR* Exh. CC.

37. [Employee 2] continued to work full-time for CSSI well after the proposal was submitted. In November 2009, however, [DELETED] and caused him to be placed on part-time status on December 1, 2009. *CSSI Comments*, Exh. A, *Moses Affidavit*.

38. CSSI also submitted a separate volume containing its price proposal in accordance with the Solicitation. *AR* Exh. C, Vol. V.

39. CSSI projected an escalation of [DELETED]% in labor rates for the options years based on its current corporate financial planning practices. *AR* Exh. C, Vol. V. at 4. It proposed reductions in the labor rates, however, based on attrition starting in option year 2. The affected labor categories included the Program Manager, the Safety Engineer Sr., and the Air Traffic Control Specialist. *Id.*, at 11-12. It explained this assumption by stating:

    [DELETED]

    AR Exh. C, Vol. V. at 4.

40. CSSI's price proposal also contains constant reductions in the estimated annual G&A rate:

Contract Year	G&A Rate
Base Period	[DELETED]%
Option Year I	[DELETED]%
Option Year II	[DELETED]%
Option Year III	[DELETED]%
Option Year IV	[DELETED]%

AR Exh. C, Vol. V. at 11-13. CSSI explained this aspect of its proposal by stating, "[DELETED]." *Id.* at 7.

C. Evaluation of Proposals

41. Several groups of FAA employees formed teams to evaluate the proposals. Apart from the Source Selection Official ("SSO"), the FAA established a Technical Evaluation Team ("TET"), and a Price Evaluation Team ("PET"). *AR* Exh. E at 2. The Small Business Office ("SBO") reviewed the subcontracting plans. *AR* Exh. K.

42. On July 14, 2009, the Contracting Officer requested offerors to clarify the work experience contained in offerors' resumes of key personnel. *AR* Exh. J. The letter specifically required clarification of the start and end dates, by month and year, of the positions held by the proposed key personnel. *Id.*

43. During evaluation, it became apparent to the TET that there was the potential for organizational conflicts of interest ("OCI") to arise during performance of the contract. *AR* Exh. G, *Falteisek Decl.* at 4. In his Declaration, Mr. Falteisek states, "In the case of CSSI, Inc., this was based on work referenced in its proposal to [DELETED]." *Id.*

44. Consequentially, the Contracting Officer sent another letter to all offerors on July 14, 2009 addressing the subject of, "Potential Organizational Conflict of Interest." *AR* Exh. I. The letter explained that OCIs might exist in regard to "impaired objectivity." According to the letter:

> This situation occurs when a contractor in the course of performance of an FAA contract, is placed in a situation of providing assessment and evaluation findings over itself, or another business division or a subsidiary of the same corporation, or another entity with which it has a significant financial relationship.

Id. The letter further stated:

> In light of the above, please provide the agency with a mitigation plan that[,] if applicable, includes recusal by the vendor from the affected contract work. Such recusal might include divestiture of the work to a third party vendor. If applicable, [p]lease inform your subcontractors that they are required to provide mitigation plans.

Id. The plans were due within five business days from receipt of the letter. *Id.*

45. On July 17, 2009, CSSI responded via email to both July 14, 2009 requests from the FAA. *Agency Response Supplement of February 4, 2010* ("*ARS*"), Tab 3.

46. CSSI's "Organizational Conflict of Interest Avoidance and Mitigation Plan," dated July 17, 2009, is found in *AR* Exh. N. Elements of the plan include:

[DELETED]

AR Exh. N. Sentel responded that it did not have an organizational conflict of interest. *Protest* at 5; *CSSI Comments* at 5. Contracting Officer John Gamble determined that the response from each offeror, including both CSSI and Sentel, was acceptable. *AR* Exh. X and Exh. EE at ¶ 5.

47. CSSI also responded on July 17, 2009 via email to the request for revised resumes. *ARS*, Tab 3. Rather than use the request as an opportunity to inform the FAA of [Employee 1]'s departure, CSSI remained silent and resubmitted his unchanged resume as part of its response. *AR* Exh. O.

48. The TET evaluated the resumes in CSSI's proposal, including those of [Employees 1 and 2], and relied upon them to conclude that CSSI met the requirements of the Solicitation. *AR* Exh. R at 12.

49. The technical evaluation revealed that CSSI and Sentel clearly offered the strongest technical and business approaches. The TET report included the following chart to summarize the results:

COMPANY	A [Sentel]	B [CSSI]	C	D	E
Technical Approach Score (60%)	**4.5**	**4.4**	[DELETED]	[DELETED]	[DELETED]
Sample Task 1 (15%)	1.2	0.9	[DELETED]	[DELETED]	[DELETED]
Sample Task 2 (15%)	1.1	1.1	[DELETED]	[DELETED]	[DELETED]
Sample Task 3 (15%)	1.1	1.1	[DELETED]	[DELETED]	[DELETED]
Sample Task 4 (15%)	1.1	1.3	[DELETED]	[DELETED]	[DELETED]
Risk Assessment	Low	Low	[DELETED]	[DELETED]	[DELETED]
Business/Management Approach Score (40%)	**3.4**	**3.4**	[DELETED]	[DELETED]	[DELETED]
Subfactor 2.1 - Resumes (20%)	2.0	2.0	[DELETED]	[DELETED]	[DELETED]
Subfactor 2.1 – Quality Control Plan (20%)	1.4	1.4	[DELETED]	[DELETED]	[DELETED]
Risk Assessment	Low	Low	[DELETED]	[DELETED]	[DELETED]

AR Exh. R at 8.

50. The PET's report reveals that CSSI's price was the lowest, and that Sentel's price was fourth lowest. The PET did not make any adjustments to any offeror's price as part of a cost realism analysis. The PET summarized their findings in its report using the following table:

OFFEROR	PRICE (IN MILLIONS) [sic]	$ ABOVE THE LOW OFFEROR
IGCE [Independent Government Costs Estimate]	$25,480,071.08	$4,751,722.08
COMPANY A [Sentel]	$[DELETED]	$[DELETED]
COMPANY B [CSSI]	$20,565,349.36	N/A
COMPANY C	$[DELETED]	$[DELETED]
COMPANY D	[DELETED]0	$[DELETED]
COMPANY E	$[DELETED]	$[DELETED]

AR Exh. Q at 3.

51. The SBO reviewed the offerors' subcontracting plans. Sentel's plan was found to be "acceptable." *AR* Exh. L. Regarding CSSI, the report states, "**Company B** – statement provided that "Company B did not submit a subcontracting plan because it is a small business and a subcontracting plan is not required." *Id*. (emphasis in the original). No mention is made in the SBO's report of comparing the actual size standard in the Solicitation to the average annual receipts to determine if CSSI actually was a small business for the purpose of this contract. *Id*.

52. The SSO performed a best value analysis based on the factors found in Section M of the Solicitation. Although Sentel had the highest technical score by a bare 0.1 point over CSSI, the SSO determined that this did not justify the 1.6 million dollar additional expense over CSSI. Accordingly, the SSO recommended award to CSSI. *AR* Exh. T.

53. The Business Clearance Memorandum confirms the SSO's analysis, and noted in the final sentence, "CSSI is a small business." *AR* Exh. U.

54. On August 28, 2009, Contracting Officer Elisa H. Brown informed CSSI that its offer was selected for award. *AR* Exh. W. Unsuccessful offerors, including Sentel, also were advised of the decision and were offered the opportunity to receive a debriefing. *AR* Exh. V.

D. Prior Proceedings

55. After receiving a debriefing, Sentel filed a protest with the ODRA, which was docketed as 09-ODRA-00497. Sentel amended its protest on two occasions. *Protest* Exh. E at 1.

56. As a result of an effort by the parties to resolve the protest through an alternative dispute resolution ("ADR") process, the parties reached a settlement agreement, executed on December 3, 2009. *Protest* Exh. E at 1.

57. In exchange for a dismissal of the initial set of protests, the Contracting Officer John Gamble promised to conduct a new evaluation and render a "New Award Determination." *Protest* Exh. E at Attachment A. In particular, the FAA promised to reevaluate CSSI's Organizational Conflict of Interest ("OCI") Mitigation Plan, CSSI's Price Proposal, and CSSI's status as a small business, including the effect of failing to provide a small business plan with its proposal. *Protest* Exh. E, Attachment A at ¶¶ A, B, and D. The FAA also promised "investigate and document" CSSI's changes in key personnel. *Id*. at ¶ C. "Based on all information provided, the FAA's Source Selection Official will make and document a New Award Determination regarding the award of the contract under the Solicitation." *Id*. at ¶ I. The "re-evaluation, briefing, and New Award Determination" was to be completed by December 15, 2009. *Id*. at ¶ J.

E. The Re-evaluation in December of 2009

58. The FAA conducted a reevaluation of all topics required by the Settlement Agreement. *AR* Exhs. X to DD.

59. The Agency Response contains a report from Contracting Officer Elisa Brown that addresses the issues surrounding CSSI's representation that it was a small business. *AR* Exh. Z. She acknowledged that there was a "patent ambiguity" in the Solicitation regarding the NAICS code, and determined that the appropriate interpretation of the contract is to use "541990 'All Other Professional, Scientific and Technical Services,'" which has 7.0 million dollar limitation. *AR* Exh. Z at 2. She further concluded that CSSI is not a small business based on this code. *Id*. at 3. Nevertheless, the evaluator concluded that this had "no bearing on the initial award decision" because the plan was not an "evaluation factor," and because

other offerors that provided unacceptable plans were still considered eligible for award. *Id*.

60. Ms. Brown also drafted a memorandum detailing the Product Team's investigation regarding CSSI's substitution of [Employee 1] and [Employee 2]. *AR* Exh. AA. After reiterating many of the facts stated above, she reasoned that "the circumstances surrounding the substitution of these individuals to be acceptable because of the following Contract Clauses included in both the Solicitation and the Contract." *AR* Exh. AA at 2. She then cited AMS Clause 3.8.2-17, "Key Personnel and Facilities," and AMS Clause 3.8.2-22, "Substitution of Addition of Personnel." *AR* Exh. AA at 2. Relying on the latter clause, she found that these fell within an exception for terminations of employment and sudden illness. *AR* Exh. AA at 4.

61. Mr. Michael Falteisek reviewed the OCI issues. *AR* Exh. G, *Falteisek Decl.* at 4. His review included documents obtained from CSSI during the initial protest that identified all of contracts and subcontracts that CSSI held in support of the FAA. *Id.*, at 5; *ARS*, Tab 1. Mr. Falteisek also reviewed the work flow in the office and the mitigation plan. *AR* Exh. G, *Falteisek Decl.* at 5-6. He concluded there was a potential for 10% of the total contract workload to be affected by an impaired objectivity OCI, or the appearance of impaired objectivity. *Id.* at 6.

62. Contracting Officer John Gamble reviewed both Mr. Falteisek's reevaluation of the OCI issue and CSSI's mitigation plan. He concluded that the mitigation procedures were sufficient. *AR* Exh. Z at 2.

63. The Agency Record also contains an addendum to the "Report on Evaluation of Price Proposals." *AR* Exh. Y. It addressed two issues raised by Sentel. The first issue was entitled "Up-escalation Rate for Labor Categories: Program Manager, Safety Engineer Sr., and Air Traffic Control Specialist." *Id*, at 6. The Addendum states in relevant part:

[DELETED]

AR Exh. Y at 6. The referenced table thus removed the decrease in rates for the mentioned positions, and continued the [DELETED]% escalation. *Id.*

64. The addendum to the "Report on Evaluation of Price Proposals" also reviewed the G&A rates that CSSI proposed. The addendum states in relevant part:

[DELETED]

AR Exh. Y at 8. The DCAA rate on file, referenced above, was [DELETED]%. *Id*. at 7.

65. In light of the conclusion in the addendum to the "Report on Evaluation of Price Proposals" that CSSI's reduction in labor rates due to attrition was not feasible, the report contains a "should cost" price for CSSI's proposal that increased from $20,565,349 to $21,544,146. *AR* Exh. Y at 8. This change, according to the revaluation, reduced the pricing difference between Sentel and CSSI from $[DELETED] to $[DELETED]. *Compare AR* Exhibits Q at 3, *with* Y at 8.

66. On December 15, 2009, the Source Selection Official considered the findings of the reevaluation process. He concluded:

> I have also considered the impact that the lack of a sub-contracting plan and the lack of two of the original proposed key personnel have on the Agency. In these two areas I find that our failure to accurately assess these impacts prior to the time of award was detrimental to this acquisition process. However, due to the time sensitively of on-going work and the safety missions tied to Flight Plan deliverables, I believe it is in the best interest of the Agency to maintain the current contract with CSSI, Inc., but not exercise any of the Options.
>
> For these reasons, I have determined that a new competition will take place as expeditiously as possible.

AR Exh. DD.

67. Sentel received notice of this decision on December 18, 2009. *Protest*, Exh. F.

68. Sentel received a debriefing on December 23, 2009. *Protest*, Exh. A.

69. To date, the Contracting Office has taken no action regarding the SSO's determination. One Contracting Officer, John Gamble, indicates that a "new contract is to be awarded prior to the end of the base year" of CSSI's current contract. *AR* Exh. DD at 3. But his supervisor, the cognizant branch manager in the contracting office with direct oversight of this acquisition, also executed a Declaration. She also is a Contracting Officer, and states that the SSO's determination "is a recommendation only; this statement is not, and will not be treated as, binding on me as the Contracting Officer." *CSSI Supplement, Scott Decl*. ¶ 4. She further stated, that the determination "was not offered as a corrective action or final agency action, nor will my office treat it as such." *Id*. To date, the Contracting Office has taken no action regarding the recommendation, because Sentel has challenged the SSO's determination. *Id.* Accordingly, CSSI contract remains in place. *Id.* at ¶ 5.

F. These Protest Proceedings

70. Sentel filed this Protest on December 30, 2009. CSSI intervened on January 5, 2010. After significant discovery, two rounds of comments, and extensions due to unprecedented local weather conditions, the record closed on February 17, 2010.

III. Discussion

The present matter is before the ODRA after significant procedural history outlined in Findings of Fact ("*FF*") 55 to 70. To briefly reiterate, after Sentel filed a protest of the award to CSSI, the FAA and Sentel executed a settlement agreement on December 3, 2009. That agreement required the Product Team to reevaluate several aspects of CSSI's proposal in order to make and document a "New Award Determination." The Source Selection Official identified two flaws in the initial evaluation that were "detrimental to

the acquisition process," and determined that the requirement should be recompeted. The Contracting Officer, however, has taken no actual corrective action.

Sentel's present Protest challenges four aspects of the acquisition process, namely issues regarding key personnel, CSSI's missing subcontracting plan, the evaluation of CSSI's price proposal, and finally, the evaluation of CSSI's OCI mitigation plan. Sentel bears the burden of proof, and the ODRA will not recommend that a post-award protest be sustained where a contract award decision has a rational basis and is neither arbitrary, capricious, nor an abuse of discretion and is supported by substantial evidence. *Protest of Ribeiro Construction Company, Inc.*, 08-TSA-031. In "best value" procurements as contemplated by this Solicitation, the ODRA will not substitute its judgment for those of the designated evaluation and source selection officials as long as the record demonstrates that their decisions satisfy the above test, were consistent with the AMS and the evaluation and award criteria set forth in the underlying solicitation. *Id.* citing *Protest of PCS*, 01-ODRA-00184. Sentel bears the burden of proof, and the ODRA's findings of fact must be supported by substantial evidence in the record. 14 C.F.R. § 17.37(j). Additionally, Sentel must show prejudice by demonstrating that, but for the improper actions in this Protest, it would had a substantial chance of receiving the award. *Protest of Ribeiro Construction Company, Inc.*, 08-TSA-031 (citing *Protest of Optical Scientific Incorporated*, 06-ODRA-00365).

A. CSSI's Request to Dismiss the Protest is Denied.

As part of its Comments to the Agency Report, CSSI filed a request to dismiss the Protest. The Request alleged that Sentel lacks standing because "Sentel has a far more severe impaired objectivity OCI than any associated with CSSI, and … [Sentel] failed to submit a mitigation plan." *CSSI Comments* at 4. Notably, the Product Team *does not* support this motion.

Under the ODRA Procedural Regulation, 14 C.F.R. Part 17, only an "interested party" has standing to file a protest. 14 C.F.R. § 17.15(a). "An interested party, in the context

of a bid protest, is one whose direct economic interest has been or would be affected by the award or failure to award an FAA Contract." 14.C.F.R. § 17.3(k) (definition of an interested party) (emphasis in the original). The ODRA has looked to this definition to conclude that only an actual offeror in a post-award protest, which had a "substantial chance" for award, but for the alleged acquisition errors, may be deemed an interested party with standing to file a protest. *Protest of Ribeiro Construction Company, Inc.*, 08-TSA-031, citing *Protest of L. Washington & Associates, Inc.*, 02-ODRA-00232, *and Protest of Enroute Computer Solutions*, 02-ODRA-00220 (in order to prevail, a protester must demonstrate that but for complained of actions, protester would have had substantial chance of receiving award). As the *Ribeiro* decision implicitly recognizes, questions of standing and prejudice are inexorably intertwined.[2]

The record shows that Sentel most assuredly had a substantial chance for award. The most important factor in the best value determination in this acquisition was the technical score, and the TET awarded the highest technical score to Sentel. *FF* 22 and 49. Furthermore, the best value analysis, in both the SSO's initial award determination and in the Contracting Officer's Business Clearance Memorandum, primarily compared Sentel and CSSI as the two offerors who stood a substantial chance for award. *FF* 52 and 53. CSSI won the award because its technical score was very close to Sentel's, but CSSI's price was determined to be significantly less. *FF* 52. Sentel, in this protest, has challenged both the technical and price evaluations of CSSI's proposal. Thus, the record demonstrates that Sentel is indeed an interested party within meaning of the ODRA Procedural Regulation and the ODRA's precedents.

Aside from the foregoing general analysis supporting Sentel's standing as an interested party, CSSI's arguments regarding Sentel's own alleged OCI problems are not supported in the record. As the record shows, Contracting Officer John Gamble found Sentel's response to the correspondence from Sentel in July to satisfy the Agency's concerns regarding possible OCI issues. *FF* 46. Without supporting citations to the record or

[2] "Moreover, because Ribeiro was rightfully removed from the competition, it was not prejudiced by and lacks standing to challenge the TSA's subsequent actions, …" *Protest of Ribeiro Construction Company, Inc.*, 08-TSA-031 at 81.

attachments to its Comments, CSSI alleges that Sentel is currently under contract with the FAA's Office of Safety Support and Independent Assessment to perform Independent Operational Test and Evaluation ("IOT&E"). *CSSI Comments* at 4. Aside from unsupported argument by counsel, CSSI does not elaborate what work is being performed under Sentel's current contract. *Id.* Furthermore, in response to the CSSI's Request to Dismiss, Sentel provides the Declaration of Christopher Gates, Sentel's Vice President of the Test Engineering Group. Although somewhat argumentative, Mr. Gates' declaration credibly rebuts CSSI's unsupported request to dismiss the Protest for lack of standing. *Sentel's Supplemental Comments, Gates Decl.* at ¶ 3-5.

Finally, the AMS grants contracting officers considerable leeway regarding the mitigation of OCIs, including whether to handle issues as they arise on a case-by-case basis. This point is discussed more fully later in these Recommendations and Findings. *Recommendations and Findings, infra* at pp. 40. Thus, challenges to any protester's standing on this ground is weak at best because an otherwise rational award decision may still be made to an offeror with an existing OCI. Indeed, as the discussion below shows, that the ODRA now recommends denial of Sentel's Protest regarding CSSI's own OCI affecting ten percent of the work under the Solicitation.

Accordingly, CSSI's request to dismiss the Protest is denied, and the ODRA affirmatively finds that Sentel has standing to maintain this Protest.

B. CSSI Failed to Give Notice Regarding Changes in Key Personnel

Sentel argues that CSSI improperly "baited" the FAA with resumes of key personnel, and that the FAA during performance has improperly permitted CSSI to "switch" to using other employees whose resumes were not submitted as part of the competition. Sentel relies on the fact that CSSI submitted the resumes of [Employees 1 and 2] as proposed Air Traffic Control Specialists, but ultimately did not employ them for this Contract. *Protest* at 31. Citing the ODRA's decision in the *Protests of Camber Corporation and Information Systems & Networks Corporation (Consolidated)*, 98-ODRA-00079 and -

00080, Sentel charges that such a "bait and switch" requires the award to CSSI be terminated. *Protest* at 29.

The Protester correctly cites *Camber* as the lead ODRA case regarding bait and switch of key employees. As stated in *Camber*, "[T]he term 'bait and switch' generally refers to an offeror's misrepresentation in its proposal of the personnel that it expects to use during contract performance." *Camber*, 98-ODRA-00079 at 45. The case further explains:

> To demonstrate a "bait and switch," a protester must show not only that personnel other than those proposed are performing the services, *i.e.*, the "switch" -- but also that: (1) the awardee represented in its proposal that it would rely on certain specified personnel in performing the services; (2) the agency relied on this representation in evaluating the proposal; and (3) it was foreseeable that the individuals named in the proposal would not be available to perform the contract work.

Camber, 98-ODRA-00079 at 45-46. "Where such a misrepresentation materially influences an agency's evaluation of an offeror's proposal, it undermines the integrity of the competitive procurement system and generally provides a basis for rejection or termination of a contract award based upon the proposal." *Id.* (quoting *Ann Riley & Associates, Ltd., Reconsideration*, Comp. Gen. Dec. B-271741.3, 1997 U.S. Comp. Gen. LEXIS 299, 97-1 CPD ¶122 (March 10, 1997)).

Focusing on the allegations regarding [Employee 1],[3] the undisputed record shows that on June 12, 2009, CSSI included his resume in its proposal for the position of Air Traffic Control Specialist. *FF* 35. [Employee 1], however, tendered his resignation from CSSI on the same day, albeit *after* the company submitted its proposal. *FF* 34. Although CSSI attempted to retain [Employee 1], at no time prior to award did CSSI inform the FAA that [Employee 1] no longer worked at CSSI and that it did not have a commitment from him to return. *FF* 36. Indeed, on July 14, 2009, the FAA requested clarifications

[3] The allegations regarding [Employee 2] arose as a result of [DELETED] that ultimately caused CSSI to place him on disability leave in December 2009. CSSI raises the Americans with Disabilities Act, 42 U.S.C. §§ 12101-12117, and 12201-12213, as a defense in this Protest, asserting that that Act barred CSSI from inquiring into his condition and possibly not considering him for work on this project. *CSSI Comments* at 16. The ODRA need not reach this question in light of the clearer issues regarding [Employee 1], who resigned from CSSI within hours after CSSI submitted its offer.

regarding unrelated aspects of the resumes. *FF* 42. Rather than using the request as an opportunity to inform the FAA of [Employee 1]'s departure, CSSI remained silent and resubmitted his resume as part of its response on July 17, 2009. *FF* 47. CSSI did not inform the Government of [Employee 1]'s unavailability until after award, *i.e.*, at the September 10, 2009 "kick-off" meeting. *FF* 36. The Technical Evaluation Team ("TET") evaluated his resume and relied upon it to conclude that CSSI met the requirement of the Solicitation. *FF* 48.

CSSI responds to this aspect of the Protest by arguing that "there is no evidence whatsoever that CSSI intentionally or negligently misrepresented the availability of key personnel" (*CSSI Comments* at 16), and more specifically, "Sentel does not provide any evidence that CSSI knew or had reason to know that [Employee 1] would notify CSSI shortly after submission … that he intended to resign his employment with the company." *Id.* at 17. CSSI misses the key point. However suspicious the timing of [Employee 1]'s resignation appears,[4] the ODRA does not conclude – *nor need it conclude* – that CSSI officials knew at the time it submitted the proposal that [Employee 1] would not be available after contract award. The key fact, rather, is that in the eight weeks between proposal submission and contract award, CSSI failed to advise the FAA that [Employee 1] would not perform the contract. *FF* 36 and 47. Silence, in this case, equates to a misrepresentation.

A misrepresentation occurs during contract formation when a party fails to correct a material representation that may have been true when originally stated, but which the party subsequently learns is no longer true. *Restatement (Second) Contracts* § 161(a) (1981). As the comments to the Restatement explain, a party that has made such an

[4] The Declaration of CSSI's [DELETED], [Employee 1]'s former supervisor, states:

> On June 12, 2009, [[Employee 1]] came to my office after the SMS II proposal had been submitted that morning. He asked me if the proposal had been submitted and I confirmed that it was, in fact, submitted. He then offered me his letter of resignation dated June 12, 2009. I had no knowledge of [Employee 1]'s plans to leave CSSI prior to this discussion on June 12, 2009 after the SMS proposal submission.

CSSI Comments, Exh. B ([DELETED] *Affidavit*).

assertion "is expected to speak up and correct the earlier assertion." *Id.* at cmt. c. This principle was affirmed in the *Camber* decision, wherein the ODRA stated, "Offerors who become aware that key personnel whom they offer will not be available to perform a contract simply cannot keep such information to themselves." *Camber*, 98-ODRA-00079 at 49. While the decision in this Protest could rest on the fact that CSSI affirmatively resubmitted [Employee 1]'s resume in July 2009 (*FF* 47), the ODRA sees no reason to limit the duty to disclose material changes to circumstances when the agency affirmatively asks for "best and final offers" ("BAFO"), clarifications, or other additional information.[5] Any evaluation of a material misrepresentation in a proposal, whether it is an initial proposal or a BAFO, wastes the evaluation team's resources and undermines the fairness of the acquisition process.

Despite the material misrepresentations in CSSI's proposal, the Contracting Officer who reevaluated this aspect of CSSI's proposal in December of 2009 concluded, "I find the circumstances surrounding the substitution of these individuals [DELETED] to be acceptable because of the following Contract Clauses included in both the Solicitation and the Contract." *FF 60.* She then cited AMS Clause 3.8.2-17, "Key Personnel and Facilities," and AMS Clause 3.8.2-22, "Substitution of Addition of Personnel." *FF* 60. The latter clause was stated in full in clause H.12, and has the following relevant language:

> (2) Substitution of Personnel.
>
> (a) For the first 12 months of contract performance, the Contractor must not substitute personnel for the individuals whose resumes or other personal qualification were submitted with its offer and that were determined by the Contracting Officer to be acceptable at the time of contract award, unless such substitutions are because of an individual's sudden illness, death, or termination of employment. In any of these events, the Contractor must promptly notify the Contracting Officer and propose substitute personnel as required by paragraph (4) below.

[5] The *Camber* decision relied on several GAO decisions involving offerors that failed to verify or correct key personnel representations during subsequent stages of the procurements. *See Camber,* republished in 1998 ODRA LEXIS 141, at 115-118 (ODRA 1998).

AR Exh. A at § H.12 (emphasis added).[6] Regarding [Employee 1], Ms. Brown simply cited his resignation as a termination of employment within the meaning of the emphasized language in the clause, quoted above. *FF* 60. Given the emphasis in evaluations of proposed key personnel, however, the *Camber* decision rejected reliance on these types of clauses to excuse "bait and switch" scenarios. *Camber,* 98-ODRA-00079 at 49 (citing *Omni Analysis*, Comp. Gen. Dec. B-233372, 89-1 CPD ¶ 239 (March 6, 1989)). The ODRA in *Camber* specifically addressed the same twelve-month ban on substitutions of key personnel by writing:

> The present case is clearly exceptional, having a solicitation provision which instead provided for no substitutions of key personnel for a period of 12 months after contract award (other than for death, illness, or termination of employment). Here, the word "key" was very much an indicator that "particular persons" were critical, not merely "personnel qualifications." Thus, the need for assurance of availability of the key personnel offered was all the more important in the present case.

Camber, 98-ODRA-00079 at 49.

As in *Camber*, the ODRA finds in the present Protest that: 1) CSSI represented that it would provide the services of [Employee 1] in response to the Key Personnel requirements of the Solicitation; 2) the TET evaluated his resume and relied upon it to conclude that CSSI was technically acceptable; and 3) prior to award, CSSI did not correct its representation after [Employee 1] resigned, even though it knew that he would not serve as one of the key Air Traffic Control Specialists. Ultimately, in fact, [Employee 1] did not perform any work under the Contract. Under these circumstances, an impermissible bait and switch occurred that undermined the integrity of the procurement process. As the *Camber* decision explains, bait and switch actions render the technical evaluation and resulting award irrational regardless of the care and thoroughness of the evaluators. *Camber,* 98-ODRA-00079 at 50.

[6] The other clause relied upon by the Contracting Officer, AMS Clause 3.8.2-17, is inapposite. That clause requires a contractor to give written, advance notice to the Contracting Officer "prior to removing … specified personnel." *See* AMS Clause 3.8.2-17 at ¶ (b). As shown above, CSSI remained silent rather than giving the required notice to the Contracting Officer, thereby rendering the clause inapplicable to the present Protest.

C. CSSI Was Ineligible for Award of the Contract for Failure to Provide a Subcontracting Plan

Several sections of the SIR required each offeror to submit small business subcontracting plans if the offeror did not qualify as a small business. Sentel correctly argues that CSSI's failure to submit a subcontracting plan rendered it ineligible to receive the award.

Both the original Solicitation and Amendment 0002 incorporated by reference AMS Clause 3.6.1-4, "Small Business/Small Disadvantaged Business/Women-owned Small Business Subcontracting Plan (April 2007)." *FF* 12. The pertinent part of that clause states:

> (c) The offeror, upon request by the Contracting Officer, shall submit and negotiate a subcontracting plan, where applicable, which separately addresses subcontracting with small business concerns, with small disadvantaged business concerns, with women-owned small business concerns, and with service- disabled veteran owned small business concerns. If the offeror is submitting an individual contract plan, the plan must separately address subcontracting with small business concerns, small disadvantaged business concerns, women-owned small business concerns and service-disabled veteran owned small business concerns with a separate part for the basic contract and separate parts for each option (if any). The plan shall be included in and made a part of the resultant contract. The subcontracting plan shall be negotiated within the time specified by the Contracting Officer. Failure to submit and negotiate the subcontracting plan shall make the offeror ineligible for award of a contract.

AMS clause 3.6.1-4 (c) (April 2007) (emphasis added). The emphasized language plainly states that if the Contracting Officer requests a plan, offerors that do not qualify as small businesses must provide one, and that failure to provide a plan "shall" – not "may," "might," or "could" – render the offeror ineligible for award. The second phrase emphasized in the quote above indicates that an acceptable plan will be made part of the resulting contract.

Other parts of the Solicitation harmonize with this plain reading. Consistent with AMS clause 3.6.1-4 (c), *supra*, section L.14.1.5 instructed that offerors, "if not a Small

Business, must provide a Subcontracting Plan ….” *FF* 18. This unequivocally serves as a “request by the Contracting Officer” for a plan, consistent with AMS clause 3.6.1-4 (c), *supra.* Similarly, § L.13.2 explains how proposals must be organized, and it requires that Volume I, Section E contain the subcontracting plan. *FF* 17. Those plans, according to §§ L.11.1 and M.4.1, were to be evaluated by the FAA Small Business Office on an acceptable or unacceptable basis. *FF* 17 and 24. Further, like AMS clause 3.6.1-4 set forth in Section I of the Solicitation, Sections H.14 and L.10 provide for incorporation of items like the Subcontracting Plan into the resulting contract. *FF* 11 and 16.

CSSI strains against the plain reading of the Solicitation, described above, by quoting a portion of § H.14, and relying upon the AMS Clause 3.2.2.3-33, “Order of Precedence (July 2004).” *CSSI Comments* at 12-13. Specifically, CSSI quotes a portion of § H.14 that states, “The small business and disadvantaged Business Subcontracting Plan, (***to be completed after award***), if required, is deemed acceptable by the Contracting Officer and is hereby incorporated into this contract.” *CSSI Comments* at 12 (emphasis added by CSSI). According to CSSI, this quote from § H.14 “expressly states that the subcontracting plan was to be completed after award[.]” *Id.* at 12. According to CSSI, this narrow reading of § H.14 trumps any contrary interpretation based on clauses incorporated by Sections I, L, and M of the Solicitation because the Order of Precedence clause gives greater importance to the Schedule (including Section H) over clauses found in Section I and elsewhere. *Id.* at 12.

CSSI’s interpretation is unacceptable because it renders portions of the Solicitation meaningless and fails to harmonize § H.14 both internally and with the other parts of the Solicitation before resorting to the Order of Precedence clause. The internal inconsistency of CSSI’s interpretation starts with the first paragraph of § H.14, which requires the subcontractor plans to be “submitted in accordance with AMS Clause 3.6.1-4,” the very clause in Section I that CSSI now seeks to avoid. *See FF* 11 for full text of § H.14. As stated previously, AMS Clause 3.6.1-4 addresses the pre-award period by expressly stating, “Failure to submit and negotiate the subcontracting plan shall make the

offeror ineligible for award of a contract." The ODRA also finds a second inconsistency in the portion of § H.14 that CSSI relies upon. Specifically, last paragraph of H.14 quoted by CSSI uses the present tense of the verb "is," *i.e.*, the plan "… ***is*** deemed acceptable," and "… ***is*** hereby incorporated into this contract." CSSI, however, asserts that the subcontracting plans were to be submitted *after* award. Despite these difficulties – the reference to AMS Clause 3.6.1-4 and the verb tense – CSSI ends its analysis of the contract as a whole by resorting to the Order of Precedence clause to avoid addressing the key language found in Sections I, L, and M. *CSSI Comments* at 12-13.[7]

The ODRA, however, will seek a plain, harmonious interpretation of a solicitation prior to turning to the Order of Precedence clause. *Protest of Northrop Grumman Systems Corporation*, 06-ODRA-00384. "In such matters, the plain and unambiguous meaning of the solicitation controls, and all of the solicitation's parts must be read together and harmonized if possible, so that no provisions are rendered meaningless." *Id.* The ODRA interprets the poorly drafted parenthetical phrase in § H.14 ("(to be completed after award)") as a placeholder that would allow insertion of a detailed phrase to identify which plan was being incorporated. In this way, the Contracting Officer could conform the resulting contract to the process described in other parts of the Solicitation. Under that process, subcontracting plans were required as part of proposals under § L.13.2, § L.14.1.5, and AMS clause 3.6.1-4 (c); the FAA Small Business Office was to evaluate the plans under §§ L.11.1 and M.4.1; and finally, the acceptable plan of the successful offeror was to be incorporated into Section H of the resulting contract, per § L.10, and AMS clause 3.6.1-4 (c). Upon incorporation of the acceptable subcontract plan into the placeholder found in § H.14, the use of the present tense word "is" makes sense because at that point, an existing plan actually *is* approved and actually *is* incorporated into the resulting contract.

[7] CSSI does not state in its Comments that it actually relied upon this interpretation when it submitted its proposal. Instead, CSSI states that it did not submit its proposal because it believed it qualified as a small business. *CSSI Comments* at fn 3. Furthermore, the FAA has not advanced this interpretation of § H.14 in its Agency Response. *AR* at 8-10.

Rather than embracing CSSI's strained reading of § H.14, the Product Team argues that the evaluation of the subcontracting plan merely was an aspect of the responsibility determination. *AR* at 8-9. This argument is not grounded in the AMS or the Solicitation. The AMS states:

> Responsible contractors only may receive awards. To be determined responsible, a prospective contractor:
> - Has or can obtain adequate financial resources to perform a contract;
> - Has the ability to meet any required or proposed delivery schedules;
> - Has a satisfactory performance history;
> - Has a satisfactory record of integrity and proper business ethics;
> - Has appropriate accounting and operational controls that may include, but are not limited to: production control, property control systems, quality assurance programs, and appropriate safety programs; and
> - Is qualified and eligible to receive an award under applicable laws or regulations.

AMS Policy 3.2.2.2. Nothing in the AMS suggests that evaluation of a specific subcontracting plan relates to a responsibility determination. The subcontracting plan is not related in kind or nature to the stated aspects of responsibility like financial ability, performance history, integrity, accounting systems, or other information. Further, the Solicitation has its own statements regarding responsibility found in §§ L.7 and M.6. *FF* 15 and 27. These provisions are separate and distinct from evaluation of the subcontracting plan under § M.4.1. and they say nothing regarding the adequacy of the subcontracting plan as a part of the responsibility determination. *Id*. Instead, providing a subcontracting plan was a specific Solicitation requirement if the offeror was not a small business, and failure to conform to this requirement would render an offeror ineligible for award under §§ M.1.1, M.1.3, M.4.1, and AMS clause 3.6.1-4 (c), regardless of the evaluation factors for the best value determination. *FF* 12, 21, 23, and 24.

As the foregoing discussion demonstrates, under the terms of this Solicitation, offerors that did not satisfy the small business size standard were obligated to provide a subcontracting plan as part of their proposal. If such offerors failed to provide a plan,

they were ineligible for award. The undisputed facts in this Protest show that CSSI did not submit a subcontracting plan with its proposal. *FF* 30. This portion of the Protest, therefore, hinges on whether CSSI met the size standard of the Solicitation. Addressing this issue, however, is complicated by what the Product Team calls a "patent ambiguity" in the North American Industry Classification System (NAICS) statement found in § L.20. *FF* 59.

The Solicitation stated:

> **L.20 North American Industry Classification system (NAICS) CODE [sic]**
>
> The North American Industry Classification System (NAICS) code for this requirement is 541990, "Engineering Services". [sic]

FF 19. Regrettably, the proper NAICS U.S. Industry Title for code 541990 is "All Other Professional, Scientific and Technical Services," not "Engineering Services." According to the Small Business Administration regulations in effect at the time of the Solicitation, a business under NAICS Code 541990 must have less than $7.0 million in average annual revenue over a three year period. 13 CFR § 121.201 (2009). The NAICS U.S. Industry Title "Engineering Services" uses code 541330, and has a size limitation of $4.5 million, except for "Military and Aerospace Equipment and Military Weapons," which is $27 million. 13 CFR § 121.201 (2009); *see also* FF 19 (setting forth the regulatory table in part). As part of the reevaluation process concluded in December 2009, the Product Team determined these provisions created a patent ambiguity that it interprets to refer to $7.0 million dollar NAICS Code 541990, "All Other Professional, Scientific and Technical Services." *FF* 59.

"An ambiguity exists where two or more reasonable interpretations of the terms or specifications of the solicitation are possible." *Protest of E & I Systems, Inc.*, 99-ODRA-00146. The ODRA concludes that § L.20 indeed was ambiguous, and reasonably could be interpreted to impose the $7.0 million limitation for NAICS code 541990, "All Other Professional, Scientific and Technical Services," or the $4.5 million limitation for NAICS code 541330, "Engineering Services." The ODRA bases this conclusion on the fact that

the code for the first interpretation is included within the Solicitation, while the NAICS U.S. Industry Title for the second interpretation is also included in the Solicitation. The ODRA rejects as unreasonable a third interpretation that the $27 million limitation should apply because neither the code number nor the NAICS U.S. Industry Title of ""Military and Aerospace Equipment and Military Weapons," appears anywhere in the Solicitation. The ODRA will not add terms to a contract to create an ambiguity.

The record reveals that CSSI signed a business declaration representing that CSSI was a small business, while at the same time also indicating that CSSI had an average annual revenue of $[DELETED]. *FF* 33 and 34. Thus, regardless of whether the proper interpretation of the size standard yields a $4.5 million or $7.0 million size limitation, the reviewing officials in the SBO had actual notice that CSSI exceeded both small business size limitations. Such notice calls into question any statements by CSSI that it is a small business. The net result is that the conclusion that CSSI met the applicable size standard lacked a rational basis because it was clear on the face of the Business Declaration during the initial evaluation that CSSI did not qualify. *Cf. Protest of Enterprise Engineering Services, LLC*, 09-ODRA-00490 at 36 (facially acceptable business declaration sufficient to reject a challenge to standing).

Upon reevaluation in December 2009, the Contracting Officer properly concluded that CSSI "is not a small business," but nevertheless, the evaluator concluded that this had "no bearing on the initial award decision" because the plan was not an "evaluation factor," and because other offerors who had provided unacceptable plans were still considered eligible for award. Neither of these *post hoc* justifications support the Product Team's failure to take corrective action to remedy its flawed procurement.

The evaluator's first justification that the subcontracting plan was not part of the evaluation factors, ignores the terms of the Solicitation and suggests a fundamental misunderstanding of the award process. Section M.1.1 explained,

> **M.l.1 AWARD SELECTION:** The Offeror whose offer conforms to the requirements of the solicitation and provides the best value to the FAA will be selected for award. The best value is defined as the

> proposal that presents the most advantageous solution to the FAA, based on the evaluation of technical, price and other factors specified in the SIR. …

FF 21 (emphasis added). The first emphasized phrase highlights the requirement to conform with the SIR, including therefore the requirement to submit a subcontracting plan. The second emphasized phrase further limits the award to the best value. This language establishes two distinct criteria for award. The evaluation factors are crucial in the best value determination, but the existence of such factors does not serve to waive the other requirements expressly stated in the Solicitation.

The second *post hoc* rationale, regarding unacceptable plans of other unsuccessful offerors, is unpersuasive. The Solicitation creates a fundamental difference between an offeror that actually provides a subcontracting plan, albeit an unacceptable plan, and an offeror that completely fails to provide a plan. AMS clause 3.6.1-4, "Small Business/Small Disadvantaged Business/Women-owned Small Business Subcontracting Plan (April 2007)" contemplates negotiation of the plan to correct unacceptable features, but it is incumbent on the offeror to submit the plan in the first instance. More importantly, the evaluator's observation that offerors with unacceptable plans remained in the competition is irrelevant. Those other offerors are not parties to this Protest, and a lack of prejudice to a non-party has no bearing here. Sentel, on the other hand, did protest, and its subcontracting plan was deemed "acceptable." *FF* 51. In this circumstance, the Product Team impermissibly waived the Solicitation requirement that CSSI submit a subcontracting plan, and thereby, conferred a competitive advantage on CSSI.

D. The Flawed Evaluation of CSSI's Cost Proposal

Sentel also challenges the FAA's evaluation of CSSI's proposed prices. According to Sentel, two aspects of CSSI's price proposal are unsupported, *i.e.*, an assumption about labor rates and another about General & Administrative ("G&A") rates. Sentel correctly notes that the resulting contract is a Cost Plus Fixed Fee contract, which places the "risk

of any mistake in cost proposal formulation … squarely on the Government." *Protest* at 19 (citing *Protest of Raytheon Technical Servs. Co.*, 02-ODRA-00210). By implication, Sentel charges that any favorable evaluation of CSSI's allegedly unsupported assumptions is irrational and not supported by substantial evidence. *Id.* at 19-21. Sentel also charges that the Price Evaluation Team ("PET") failed to consider "the probable price to the Government for each Offeror, including a discussion and calculation of any adjustment made to an Offeror's proposed estimated price," as required in the Source Selection Plan. *Sentel's Comments* at 7 (citing *AR* Exh. E at 5). According to Sentel, a proper analysis would show that CSSI's proposal would no longer be the low price offeror, but rather, would cost $[DELETED] more than Sentel's proposal. *Id.* at 7. In this Protest, the Product Team responds that the issue "boils down to mere disagreement" with the evaluation, which is not a proper basis to sustain a protest. *AR* at 7.

Sentel is correct that the proposed prices under this Solicitation must be well developed and substantiated. Section M.1.2 of the Solicitation identified three considerations for the price evaluation, stating, "Price will be evaluated for completeness, reasonableness and realism and will not be scored." *FF* 22. Section M.4.5 elaborated on these three considerations, partially stating:

> **Realism**: An assessment of the level of confidence and reliability placed in the Offeror's proposed price elements and whether they produce a realistic proposed price based upon Government requirements and the Offeror's proposed technical approach. Therefore, the price evaluation will also determine additional inherent cost uncertainties within each Offeror's proposal. The price evaluation team will identify variables and/or discrepancies within an Offeror's proposal.

FF 25. In evaluating the proposals, the price evaluation team was to assess "whether the pricing methodology appears to be well developed and substantiated." *Id.* These Solicitation provisions align with the AMS Guidance, which states in part:

> Cost realism analysis is an objective process of identifying the specific elements of a cost estimate or a proposed price and comparing those elements against reliable and independent means of cost measurement. This analysis judges whether or not the estimates under analysis are verifiable, complete, and accurate, and whether or not the offeror's

> estimating methodology is logical, appropriate, and adequately explained. This verifies that the cost or prices proposed fairly represent the costs likely to be incurred for the proposed services under the offeror's technical and management approach.

AMS Guidance T3.2.3(A)(1)(i)(2) (emphasis added). [8] The question before the ODRA, therefore, is whether the evaluators had a rational basis, supported by substantial evidence, to conclude that CSSI's prices were "well developed and substantiated;" "verifiable, complete, and accurate;" and "logical, appropriate, and adequately explained," with regard to the price evaluation factor. Sentel, of course, bears the burden of proof to show that no such rational basis exists.

As stated above, Sentel challenges the evaluation of two specific assumptions underlying CSSI's cost proposal. The first assumption was that CSSI would replace eight key personnel in contract-year three with professionals who would be paid [DELETED]percent less than those working in the first year of performance. *Protest* at 19. In the initial evaluation, the PET accepted this assumption, but upon reevaluation in December 2009, the PET concurred with Sentel that "this assumption was unfeasible and a more likely outcome would be the continuance of an escalation in line with what [CSSI] proposed [for the other labor categories]." *FF* 50 and 63. This revised analysis comported with the evaluation standards articulated above because the record does not reveal any factual basis to support the idea that qualified individuals could be hired at substantially reduced rates. The net result, according to the Product Team's reevaluation, is an increase in CSSI's proposed price from $20,565,349.00 to $21,544,146.00. *FF* 65. This change, according to the revaluation, reduced the pricing difference between Sentel and CSSI from $[DELETED] to $[DELETED]. *Id*. CSSI considers this issue moot.[9] Sentel agrees that the reevaluation of the labor rates was fundamentally appropriate, but it

[8]The Source Selection Plan reiterated the Solicitation evaluation criteria, but stated that the resulting Price Report would be "by exception." *FF* 26. No party has suggested that this provision somehow relieves the PET from conducting its analysis in accordance with the AMS or the Solicitation. Such an argument, nevertheless, would have no merit.

[9] CSSI has not made an argument in this Protest that its labor rate assumptions were correct or substantiated. Instead, CSSI simply considers the issue moot in light of the FAA's reevaluation. *CSSI Comments* at 10.

believes the adjustment should be even greater because Sentel also challenges the G&A rate assumptions found in CSSI's proposal.

Unlike the Product Team's reevaluation of the labor rates, the reevaluation of CSSI's G&A rates did not conform to the standard in the Solicitation and the AMS Guidance. CSSI assumed that it would grow each of the year of the contract, thereby reducing its G&A rates from [DELETED]% in 2009 to [DELETED]% in 2013. *FF* 40. The PET considered this issue when it conducted the reevaluation in December 2009. It stated:

[DELETED]

FF 64. As this quoted paragraph states, rather than finding affirmative support within the proposal or other available information, the PET accepted the decreasing rates because there was "no contrary data in the DCAA rates on file." This analytical approach is the converse of the analysis required by Solicitation because it does not determine that the proposal is "well developed and substantiated." [A] change of [DELETED]% – CSSI's 2009 rate of [DELETED]% from the 2008 rate of [DELETED]% in the DCAA file – in no way substantiates, or even adequately explains the optimistic assumption that G&A rates will steadily decline to [DELETED]% by 2013. Similarly, the PET's use of CSSI's average proposed rate fails to support the conclusion because averaging unsubstantiated future G&A rates simply creates an *unsubstantiated average rate*. Any comparison of an unsubstantiated average G&A rate for CSSI to the other rates proposed by other offerors or to the DCAA rates does not meet the standard of the Solicitation or the AMS Guidance. The ODRA therefore concludes that the reevaluation of CSSI's G&A lacked a rational basis supported by substantial evidence. The issue of prejudice is discussed below after review of Sentel's last issue regarding organizational conflicts of interest.

E. Organizational Conflict of Interest

Sentel asserts that CSSI has an impaired objectivity Organizational Conflict of Interest ("OCI"). *Protest* at 9. Sentel argues that the FAA's evaluation of CSSI's mitigation plan

was erroneous, lacked a rational basis, and contravened the AMS. *Id*. The ODRA disagrees.

The AMS Policy gives considerable leeway to the contracting officer regarding the most effective manner to address OCI situations. It states:

> **3.1.7 : Organizational Conflicts of Interest**
> The policy of the FAA is to avoid awarding contracts to contractors who have unacceptable organizational conflicts of interest. The FAA will resolve organizational conflict of interest issues on a case-by-case basis; and when necessary to further the interests of the agency, will waive or mitigate the conflict at its discretion.

AMS Policy 3.1.7. The AMS Guidance provides examples of how a contracting officer can mitigate situations involving impaired objectivity. It advises in part:

> If the requirements of the FAA procurement indicate that the successful vendor may be in a position to provide evaluations and assessments of itself or corporate siblings, or other entity with which it has a significant financial relationship, the affected contractor should provide a mitigation plan that includes recusal by the vendor from the affected contract work. Such recusal might include divestiture of the work to a third party vendor.

AMS Guidance § T3.1.7 (A)(2)(b)(2). Under the AMS, therefore, the Contracting Officer is fully empowered to require recusal or divestiture, on a case-by-case basis as a matter of contract award or of contract administration. *Protest of MAXIMUS, Inc.*, 04 TSA-009.

According to the Program Manager, Mr. Falteisek, who was on the TET, it became apparent during the original evaluation that OCIs were a potential concern, and "in the case of CSSI, Inc., this was based on work referenced in its proposal to the [DELETED]. *FF* 43. The Contracting Officer, therefore, requested offerors to provide OCI mitigation plans. *FF* 44. CSSI provided an OCI mitigation plan, and it identified within its four corners remedies that included recusal and divestiture, as provided in *AMS Guidance* § T3.1.7 (A)(2)(b)(2). *FF* 46. Contracting Officer John Gamble determined that CSSI's plan was acceptable. *Id.*

During its reevaluation of CSSI's proposal in December 2009, the Product Team reviewed CSSI's current work within the Agency, and determined that any of CSSI's OCIs based on impaired objectivity amounted to ten percent of the contract work. *FF* 61. The agency included in this review all of all of the contracts and subcontracts that CSSI held involving the FAA. *FF* 61. The Program Office considered this information, reviewed the work flow of projects coming to the Program Office, and identified areas where CSSI might review its own work. *FF* 61; *see e.g., AR* Exh. G, *Falteisek Decl.* at 5 (discussing potential work by CSSI on "[DELETED]"). The ODRA finds that Mr. Falteisek, in light of his position and the details in his declaration, presents credible testimony in this regard. The Contracting Officer, in turn evaluated the procedures stated in CSSI's mitigation plan, and determined that the issues identified by the Program Office could be sufficiently handled as a matter of contract administration. *FF* 62.

In this Protest, Sentel challenges the Product Team's determination that ten percent of the work under the contract may be subject to OCI problems. Sentel asserts that the figure is fifty-eight percent. *Sentel's Comments* at 32. The ODRA views this as a mere disagreement with the evaluation rather than sustainable ground of protest. *Protest of Ribeiro Construction Company, Inc.*, 08-TSA-031. Moreover, "the Protester bears the burden of proof by substantial evidence that the award decision lacked a rational basis or was otherwise improper." *Id.* (citing 14 C.F.R. §17.37(j)).

The ODRA has reviewed Sentel's Protest, the Comments, and the Supplemental Comments, and notes that Sentel contributes no further evidence to the record produced and considered by the Product Team. For example, Sentel charges:

> As an Offeror, it was CSSI's responsibility to disclose – and FAA's responsibility to ascertain – the nature of CSSI's OCI situations. CSSI currently holds FAA contract Nos. DFTAWA-03-d-03002, DTFAWA-05-C-00097, and DTFAWA-08-C000095, among others, which include developing safety, strategic, and programmatic analysis and documentation for the following programs ….

Sentel's Comments at 29. But the charge is made based on citations to CSSI's own proposal, which clearly was a disclosure to the FAA. *Id.* (citing *AR* Exh. C., Vol. 1, Tab

3 (CSSI's proposal regarding past performance)). Many of the other arguments, particularly in Sentel's Comments, are simply unsupported. For example, at page 30, Sentel charges without citation that all "support for the SSWG ["Safety Systems Work Group"] constitutes approximately 20% of the [SMS] Contract scope of work." Further on, again without citation, it asserts that developing SMS policy "constitutes an additional 15% of the work on the Contract." *Sentel's Comments* at 32. From an evidentiary point of view, these figures are unsupported estimates by Sentel that reflect mere disagreement with the evaluators, and do not provide a basis to sustain the Protest. As a result, Sentel has not shown that the Product Team's reevaluation in December 2009 lacked a rational basis, was unsupported by substantial evidence, was arbitrary and capricious, or an abuse of the discretion found in the AMS regarding the treatment of OCIs.

Regardless of whether the OCI amounts to ten percent of the work or fifty-eight percent of the work, Sentel presses on to argue that the original evaluation and award to CSSI were made under the mistaken belief that CSSI had no OCI issues. *Sentel's Comments* at 33. Sentel argues that its Protest should be sustained because the "agency did not give meaningful consideration to the potential OCI" as part of that initial award decision. *Id.* at 34 (quoting *Nortel Government Solutions, Inc.*, B-299522.5; B-299522.6 (2008) at 5). The ODRA distinguishes *Nortel*, however, because that GAO decision did not involve a reevaluation after an initial protest. Instead, the GAO *recommended* reevaluation of the proposals in light of the OCI issue. *Nortel* at 23. Thus, even if the ODRA were to agree with Sentel in principle, Sentel already has received the remedy identified in the *Nortel* decision. *FF* 57, 61, and 62. Regarding agency considerations, albeit under the Federal Acquisition Regulation, the GAO observed, "Once an agency has given meaningful consideration to potential conflicts of interest, our Office will not sustain a protest challenging a determination in this area unless the determination is unreasonable or unsupported by the record." *Nortel* at 5. As discussed above, Sentel has not met its burden to show that the Product Team's determination on reevaluation was irrational, not supported by substantial evidence, or was arbitrary or capricious. The ODRA, therefore, recommends this aspect of the Protest be denied.

F. Sentel has Demonstrated Prejudiced

Sentel must establish prejudiced by showing that, but for the improper actions by the Product Team, it would have had a substantial chance of receiving the award. *Protest of Ribeiro Construction Company, Inc.*, 08-TSA-031; *Protest of Optical Scientific Incorporated*, 06-ODRA-00365.

The record demonstrates that Sentel has been prejudiced because CSSI erroneously was deemed eligible for award despite its failure to provide a subcontracting plan. If CSSI had been eliminated, Sentel would have had an overwhelming technical advantage over the other offerors. This best value award was to be based on, in descending order of importance, the Technical Approach, the Business/Management Approach, Past Performance, and Price. *FF* 22. "As technical differences between offers become smaller, the price becomes more important." *FF* 22. Sentel's technical evaluation score was substantially higher than those of any other offeror other than CSSI. *FF* 40. Indeed, Sentel received a 4.5 overall score for its Technical Approach, whereas the remaining offerors (other than CSSI) could muster at most a score of [DELETED] for "Company D." Company D's Business/Management Approach was [DELETED], however, compared with Sentel's score of 3.4. Furthermore, Company D's price exceeded Sentel's by $[DELETED].

Moreover, CSSI's misrepresentation regarding [Employee 1] was part of the basis for CSSI's technical score, which was only 0.1 point lower than Sentel's score. *FF* 39. This slight technical difference rendered the price differences between CSSI and Sentel more important in the best value determination. *FF* 22. The SSO relied heavily on this slight technical difference to find that Sentel's minor technical advantage did not outweigh CSSI's erroneously perceived cost advantage. *FF* 43. The best value determination, therefore, was skewed to Sentel's detriment by CSSI's misrepresentation and by the flawed cost analysis.

The ODRA, accordingly, finds prejudice, and recommends that the Protest be sustained with regard to CSSI's failure to provide a subcontracting plan, its misrepresentation regarding [Employee 1], and its unsubstantiated cost proposal.

G. The Current Status Irrationally Provides No Remedy to Sentel

As indicated in the Findings of Fact, the SSO's award determination in December of 2009 found the substitution of key personnel and the lack of a subcontracting plan to be "detrimental to the acquisition process." *FF* 52. He nevertheless raised concerns over the disruption that any corrective action might have on time sensitive work and the safety mission of the office. *Id.* He therefore recommended that CSSI's base year be allowed to be completed, but that no new options be exercised and a new competition be held. *Id*. The Contracting Officer who serves as the Branch Manager, however, does not consider the SSO's determination binding,[10] and her office has taken no action despite another Contracting Officer's promise, in the agreement settling the Sentel's prior protests, to render a new award deterimination. *FF* 57 and 69. The net result is that Sentel has shown prejudicial improprieties in the acquisition process but has been left with no remedy.

The overarching purpose of bid protest proceedings, including the Settlement Agreement that the FAA executed in Sentel's earlier protests, is to ensure compliance with the AMS and uphold the integrity of the FAA's unique acquisition system. The SSO articulated a remedy that sought to balance the mission critical needs of the agency while correcting detrimental actions. Failure to take any corrective action in light of acknowledged and prejudicial deficiencies in the acquisition process would be contrary to these purposes.

[10] The FAA's counsel suggests that the Branch Manager's treatment of the SSO's determination is based on the argument that a subcontracting plan was not an evaluation factor. *ARS* at 2-4. This reasoning is not in the declaration itself, and regardless, the ODRA has found in these Findings and Recommendations that submission of a subcontracting plan was a requirement of the Solicitation that CSSI failed to meet.

IV. CONCLUSION AND RECOMMENDATION

The ODRA recommends that Sentel's Protest be sustained in part based on CSSI's misrepresentation of key personnel, CSSI's failure to provide a subcontracting plan, and the evaluation of the CSSI's price proposal. The ground of the Protest that alleges CSSI's OCI should be denied.

AMS Policy § 3.9.3.2.2.4 and the ODRA Procedural Regulation, grant "broad discretion" to the ODRA to recommend remedies, including the recommendation to direct an award to a successful protester. Sentel seeks immediate termination of the CSSI contract and a directed award to Sentel. The ODRA interprets Sentel's request as a representation that it remains able to provide the key personnel offered in its proposal.

In the present Protest, a directed award to Sentel is appropriate. As discussed above, CSSI failed to provide a subcontracting plan, and should have been deemed ineligible for award under the terms of the Solicitation. Furthermore, as the decision in *Camber* recognizes, elimination of offerors like CSSI from the competition is an appropriate remedy for misrepresentations and substitution of key personnel. *See Camber* at 50. The record establishes that Sentel's technical approach was substantially higher than the remaining offerors. *FF* 40. Companies C and E had substantially lower technical evaluations and elevated risk when compared to Sentel. *Id.* Although C and E had lower prices, the evaluation criteria establish that technical approach is the most important factor in the best value analysis, while price is the least important. *FF* 22 and 41. Furthermore, price becomes more important only when technical differences diminish. *FF* 22. In these circumstances, the ODRA concurs with Sentel that a directed award is the appropriate remedy.

The ODRA therefore recommends: (1) that Sentel be awarded a contract under the Solicitation for one base year, subject to the availability of funds and the continuing need for the services by the FAA; and (2) that the existing contract with CSSI be terminated for the convenience of the FAA within a reasonable period, allowing for transition of

work from CSSI to Sentel without interruption of the services involved. The Product Team should also be directed to report to the Administrator through the ODRA every 60 days on the status of the implementation of the remedy.

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

APPROVED:

_____/s/_____
Anthony N. Palladino
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FAA Office of Dispute Resolution for Acquisition

April 7, 2010