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

FINDINGS AND RECOMMENDATIONS

Matter: **Protest of Evolver, Inc.**
 Pursuant to Findings and Recommendations,
 09-ODRA-00495 and Final Order, 09-ODRA-509

Docket No.: **10-ODRA-00523**

Appearances:

For the Protester,
Evolver, Inc.:

John R. Tolle, Esq. of
Barton, Baker, Thomas & Tolle, LLP

For the FAA,
William J. Hughes Technical Center:

William R. Sheehan, Esq. and Michaela Davis, Esq.

For the Intervener,
Enroute Computer Solutions:

Marc Lamer, Esq. of Kostos and Lamer, PC

I. Introduction

On March 17, 2010, Evolver, Inc. (“Evolver”) filed a bid protest (“Protest”) with the Federal Aviation Administration (“FAA”) Office of Dispute Resolution for Acquisition (“ODRA”). The Protest challenges corrective action taken by the William J. Hughes Technical Center (“Center”) at the direction of the FAA Administrator, based on the recommendation of the ODRA, pursuant to an earlier Protest (“Initial Protest”). The Initial Protest, which was docketed as Case Number 09-ODRA-00495, challenged the award of a Time and Materials contract for engineering and technical support services pursuant to solicitation DTFAC-09-R-00008 (“Contract”). The Contract was for the Service Operations Support Program (“SOS-8”), and had been awarded to Enroute

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Computer Solutions (“ECS”). The Administrator directed the Center to implement the remedy that had been recommended by the ODRA, as follows:

(1) reevaluate both ECS’s and Evolver’s technical proposals under Evaluation Factor 2 Corporate Experience/ Past Performance in a manner consistent with these Findings and Recommendations; (2) request cost data, including to the extent necessary the information required by AMS Clause 3.6.2-15 Evaluation of Compensation for Professional Employees (April 1996), from Evolver and perform a cost analysis in a manner consistent with these Findings and Recommendations.

Protest of Evolver, 09-ODRA-00495. The Center completed its corrective action on March 4, 2010, maintaining the award to ECS.

Evolver challenges the Center’s determination as irrational because the Center: (1) improperly reevaluated Evolver’s Past Performance/ Corporate Experience under Factor 2; (2) improperly reevaluated Evolver’s proposed price; (3) deviated from the ODRA’s directive for the reevaluation of Price by also reducing its score from “Good” to “Satisfactory” under Factor 1; (4) improperly evaluated Evolver’s and ECS’s proposals under Factor 1, Program Management Plan; and (5) failed to have meaningful discussion concerning Evolver’s initial price evaluation. Protest ground number three is moot. After a review of the Protest allegations, the Center informed the ODRA in its Agency Report that it elected to take voluntary corrective action with regard to Evolver’s score under Factor 1 Program Management. In an Addendum to the Contracting Officer’s Corrective Action of March 4, 2010, the Center restored Evolver’s Factor 1 score to “Good.” Protest grounds four and five concern the Initial Protest, which was decided in a Final Agency Order issued on November 13, 2009. 09-ODRA-509. Inasmuch as Evolver seeks reconsideration of the ODRA’s Findings and Recommendations in the Initial Protest, those issues are addressed herein. For the reasons discussed, the ODRA recommends that the Protest be denied in its entirety.

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II. Findings of Fact

A. Initial Decision and Corrective Action

1. On November 19, 2009, the FAA Administrator issued Order Number 09-ODRA-509 adopting the ODRA's Findings and Recommendations in *Protest of Evolver, Inc.*, 09-ODRA-00495.
2. The ODRA recommended and the Administrator sustained the Protest against the award by the Center and directed the following corrective action be taken:

- (1) reevaluate both ECS's and Evolver's technical proposals under Evaluation Factor 2 Corporate Experience/ Past Performance in a manner consistent with these Findings and Recommendations;
- (2) request cost data, including to the extent necessary the information required by AMS Clause 3.6.2-15 Evaluation of Compensation for Professional Employees (April 1996), from Evolver and perform a cost analysis in a manner consistent with these Findings and Recommendations. If Evolver is eligible for award and its proposal is found to represent the best value to the Government, the Center should take appropriate action to terminate the ECS contract for convenience and award the contract to Evolver. Finally, the Center should be directed to complete the above in a reasonable period and to report back to the Administrator through the ODRA on the outcome of the recommended action.

Protest of Evolver, Inc., 09-ODRA-00495 (footnote omitted).

3. On January 28, 2010, the ODRA sent a letter to the Center requesting an update on the status of the Center's corrective action.
4. On February 1, 2010, the Center responded with a detailed timeline of all events related to the corrective action taken up to that date, including:

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On November 25, the Contracting Officer sent letters to Evolver and ECS requesting complete cost breakdowns in accordance with the ODRA decision. The CO also requested information regarding any DCAA audit information that may be available. Responses were requested by December 14.

On December 7-17, the TET reconvened and reevaluated the Protester's and Intervenor's technical proposals in accordance with the ODRA decision. As part of that review, the CO also scheduled telephonic conferences with the various references on Evolver's past contracts.

Over the week of January 5 through January 11, the TET, [the] CO, and Counsel conducted conference calls with the identified points of contact for all of Evolver's past performance references.

The conference calls elicited information that was contradictory to certain aspects of Evolver's technical proposal, and in accordance with AMS Toolbox T3.2.2-6, on January 20, the CO presented that information to Evolver and asked the company to explain the discrepancies. The CO also asked for labor rate information on several referenced contracts. The due date for this information is February 4, 2010.

Once this information is received, we anticipate that the CO can make and issue her final decision on corrective action within two weeks. The only impediment to this that we can foresee is if Evolver's response on February 4 contradicts the information we received from its contact references, it may be necessary to promptly contact these references again, possibly in a joint teleconference with Evolver, to resolve and discrepancies.

Letter of February 1, 2010 at 1-2.

5. On February 23, 2010, Evolver's Counsel sent a letter to the ODRA, copied to the parties, responding to the Center's response.
6. In its Letter, Evolver stated with regard to the reevaluation of its past performance:

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Evolver obviously was not a party to any of the telephone conversations the Agency had with Evolver's past performance references, nor were the questions provided to Evolver's customers in advance where they could have prepared themselves for the telecom discussion. The result, based upon the information the Agency provided Evolver concerning these conversations, were some obvious misunderstandings or mis-statements as to Evolver's past performance.

In accordance with Agency letter of January 20, 2010, Evolver responded to these inaccuracies by providing a 37 page response in its February 4th submission that clarified each point raised by the Agency. Evolver did this by submitting either affidavits from the particular references or additional emails and other documentation from the references that confirmed the accuracy and relevancy of Evolver's past performance as stated in its proposal.

February 23 Letter at 1-2.

7. On March 4, 2010, the Center filed with the ODRA, the corrective action determination by the Contracting Officer ("Determination").
8. The Determination provided the following Reevaluation Scores:

	Factor 1 PM Mgt.	Factor 2 Corp. Ex.	Factor 3 Key Pers.	Price
Evolver	<i>Satisfactory</i>	Satisfactory	Excellent	[DELETED]
ECS	Excellent	<i>Satisfactory</i>	Good	[DELETED]

Determination at 12 (emphasis in original).

9. In the Determination, the Center concluded:

Evolver has no experience with the NAS whatsoever, and its subcontractor brings only Program Management support. It has no knowledge of the "exact, as-built construction of the hardware, software, and documentation" as described in SOW 1.2. In fact, it argues a definition of the SOS-8 SOW that completely

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dismisses the highly technical maintenance and engineering that is the very core of the requirement. It relies heavily on the capture of incumbent personnel for the necessary knowledge, yet, at the same time, proposes to capture these people by slashing their salaries. We must also recognize that Evolver's lower "fringe" rate, when applied to its very low direct labor rates, will add further risk to recruitment and retention.

If any significant portion of the incumbents reject employment, either SOS-8 will fail or Evolver will be left to procure the necessary talent at rates which will quickly bankrupt the small company. Under any rational analysis this approach constitutes risk of the sort described in AMS clause 3.6.2-15, "Evaluation of Compensation of [P]rofessional Employees." I find the overall level of risk to be at least "moderate," and probably "severe," and that it impacts all three subfactors of Factor 1.

As the ODRA decision pointed out, the deletion of AMS clause 3.6.2-15 through Amendment 0002 requires that any concerns about recruitment and retention be addressed in Factor 1, *Program Management*. Under the facts discussed above, and given the degree of risk that Evolver's proposal presents, I find that the offeror deserves a score of "Satisfactory" for Factor 1. I recognize the technical Team never saw the cost data that contributes to this risk, and I therefore override their previous score of "Good" and downgrade it to "Satisfactory" for purposes of this corrective action.

Determination at 11.

10. With regard to Technical Factor 1, Program Management, the Center concluded:

[T]he Acquisition Team reevaluated its concerns about the adequacy of Evolver's labor rates to recruit and retain qualified personnel. Specifically, the Team requested and obtained the actual cost components of Evolver's fully burdened rates, including the direct labor component, i.e. salaries. The Team analyzed those direct labor rates, and, in accordance with the ODRA decision and Amendment

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0002, addressed its concerns under Factor 1, *Program Management*.

Determination at 7.

B. Addendum to the Contracting Officer's Corrective Action of March 4, 2010

11. In the Addendum, the Contracting Officer states:

After reviewing the new protest in conjunction with the ODRA Decision, I find that the risk posed by Evolver's salary structure should not be addressed under Factor 1, but rather should be an independent finding of cost risk.

Agency Report, Tab 1, Addendum to the Contracting Officer's Corrective Action of March 4, 2010 at 1-2.

12. The Addendum provided the Final Scores as follows:

	Factor 1 PM Mgt.	Factor 2 Corp. Ex.	Factor 3 Key Pers.
Evolver	<i>Good</i>	Satisfactory	Excellent
ECS	Excellent	Satisfactory	Good

Agency Report, Tab 1, Addendum to the Contracting Officer's Corrective Action of March 4, 2010 at 2 (emphasis in original).

C. Past Performance

13. Solicitation Section M.4 Factor 2: Corporate Experience/Past Performance, provides:

In this section [sic] you must describe the company's experience in providing similar work in size (Hours/FTEs) and scope (type of effort) as that described in the SOW to show the competency to succeed on this effort. . . .

The corporate experience of any subcontractors will be considered in reviewing the corporate experience; however, greater weight will be accorded to the corporate

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experience of the prime. For subcontractor's corporate experience, their experience in performing as a prime or subcontractor will be considered equally. . . .

The offeror must identify work [sic] which is currently ongoing or which has been performed within the last five years. . . .

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

The offeror will be evaluated under this factor based primarily on the extent and quality of its own corporate past performance as a prime or subcontractor. . . . Proposed subcontractor's past performance history will be considered, but is less significant. . . .

Protest of Evolver, 09-ODRA-00495 at FF 5.

14. The Determination states:

[I]n implementing the ODRA decision, the Team had to draw a balance between eliciting the necessary information to fully understand Evolver's proposal and creating an unfair advantage through a second, private round of discussions with the protester. To avoid unfair advantage, we reviewed Evolver's and ECS' [sic] technical proposals as they were submitted on April 16, 2009. We reviewed and credited the information in Evolver's rebuttal of February 4, 2010 to the extent that it explained information already contained in its proposal. We could not, however, allow Evolver to supplement its proposal with new references, contacts, or information that was not already in the proposal.

Determination at 1-2.

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i. ECS Reevaluation

15. For ECS's Factor 2 Score, the Contracting Officer concluded:

The TET concluded that ECS warrants a score of "Good" for Factor 2.

I concur with the TET that ECS' [sic] *Corporate Experience* proposal demonstrates a very strong understanding of the requirements, but I find that it also contains a moderate degree of risk because it has never managed a prime contract of comparable *Size*. Other than [DELETED], the other [DELETED] contracts were very small compared to SOS-8. According to the Technical Evaluation Plan, this lack of comparable management experience poses a degree of risk that warrants an overall Factor 2 score of "Satisfactory." Accordingly, I find that the TET's score of "Good" is still overstated and that ECS's score for purposes of this corrective action should be "Satisfactory."

Determination at 4.

16. After the reevaluation of ECS's past performance, the TET concluded:

[T]he TET has revised the grade for ECS' [sic] *Corporate Experience/ Past Performance* to "Good". [sic] The TET continues to ascertain that Evolver's *Corporate Experience/ Past Performance* grade remains unchanged at "Satisfactory". [sic]

* * * *

ECS has identified work as a prime contractor on the [DELETED]. This FAA engineering support services contract describes work that is similar in scope but is smaller in size than the NAS as described in the SOW paragraph 1.2. The TET concurs that an Offeror's exhibit of a contract significantly smaller in size does not merit a grade of "Excellent[.]"

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Technical Evaluation Team Response to ODRA Findings and Recommendations and Administrative Order Dated 11/13/2009 for Service Operations Support (SOS) 8, Determination, Tab 3 at p. 1-2.

17. The TET stated in its report:

The TET re-evaluated ECS' [sic] Corporate Experience/ Past Performance as a subcontractor to [DELETED] on the [DELETED] contract. This exhibit can be found in ECS' [sic] proposal dated 28 January, 2009 on page 2-3. The TET continues to maintain that the Offeror has adequately detailed their work as a subcontractor on the [DELETED] contract[,] which is of similar size and scope as the SOS-8 description of NAS efforts described in the SOW paragraph 1.2. This demonstrates ECS' [sic] competency to provide successful SOS-8 contract execution.

The TET re-evaluated ECS' [sic] Corporate Experience/ Past Performance as a subcontractor to [DELETED] on the [DELETED] contract and ECS' [sic] subcontract support to [DELETED] on the [DELETED] contract. This exhibit can be found in ECS' [sic] proposal dated 28 January, 2009 on page[s] 2-5 and 2-6 respectively. The TET continues to maintain that the Offeror clearly described the relevance of their work on the [DELETED]. The work described on these contracts is similar in scope to the SOS-8 contract and indicates the competency the Government can expect from the Offeror.

The TET also incorporated credit originally given to ECS for their subcontractor [DELETED] support. As nothing was changed concerning the subcontractor's Corporate Experience/ Past Performance, the subcontractor did not impact this reevaluation.

Determination, Tab 3 at p.2.

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ii. Evolver Reevaluation

18. On January 20, 2010, the Contracting Officer, [DELETED], sent an e-mail to Evolver – Additional Information Request – DTFAC-09-R-00008, requesting that Evolver answer additional questions related to its past performance and respond to the findings from telephonic past performance interviews. *Determination*, Tab 4, e-mail, dated 01/20/2010.
19. The Contracting Officer referenced Evolver’s Factor 2 response, specifically, the past performance references identified as 2.1, 2.2, 2.3, and 2.4, that were used to substantiate Evolver’s breadth and depth of its capability, readiness, and reliability. Telephonic past performance interviews were conducted by the evaluation team with the past performance references to further understand Evolver’s participation in these contracts. *Id.*
20. The Contracting Officer’s e-mail “elaborates on the findings” providing synopses of the results of the interviews. The CO and members of the TET conducted telecons with: Reference 2.1 [DELETED]; Reference 2.2 [DELETED]; Reference 2.3 [DELETED]; and Reference 2.4 [DELETED]. *Id.*
21. The Contracting Officer’s e-mail also noted that “some procurement awards, such as the subcontract to [DELETED] identified in the 2.4 reference was a cost plus fixed fee arrangement,” and the Contracting Officer requested Evolver’s billable rates for all engineering and computer science labor categories in References 2.1-2.4. *Id.*
22. The Contracting Officer noted that “[t]here appears to be a disparity between Evolver’s Business Declaration dated 1/28/09 and the amount of

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IDIQ effort actually performed by Evolver during year ending 2006, 2007, and 2008. Evolver claims significantly large dollars in their (technical proposal, discussions, etc.), but it appears Evolver has actually billed less.” *Id.*

23. The Contracting Officer asked in the e-mail, “What had Evolver actually billed on the contracts identified in 2.1 through 2.4 as of 1/28/09?” *Id.*

24. The e-mail continued: “At this time, Evolver is requested to address any facts presented above. Remember that any response received must have been relevant during the timeframe provided in Evolver’s initial proposal of 1/28/09, and as supplemented on 4/16/2009. Your response is requested on or before 2/4/2010.” *Id.*

25. On February 4, 2010, Evolver submitted its Response to E-Mail of January 20, 2010 from [DELETED]. *Determination*, Tab 5.

26. The Response included:

- Summary response demonstrating the relevancy of Evolver’s corporate experience;
- A copy of the referenced FAA email with Evolver’s response to your questions or concerns;
- Evolver’s [DELETED] Contract Past Performance Citation with cross references to DTFACT-09-00008 SOW and signed by the COR/COTR affirming Evolver’s performance in these areas;
- Additional information on the [DELETED] contract with cross references to DTFACT-09-00008 SOW;
- List of all [DELETED] billing the Evolver [DELETED] contract in April 2009;
- Copy of email from [DELETED] confirming the [DELETED] Evolver had employed under the [DELETED] contract in April 2009;
- Evolver’s [DELETED] Contract Past Performance Citation with cross references to DTFACT-09-00008 SOW;

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- Additional information describing the relevance of the [DELETED] contract to this effort;
- Excerpt from Evolver's [DELETED] SOW highlighting the automation and technology support services we are providing;
- A description of the services provided by one of our automation technicians at [DELETED] and signed by the on-site government manager, [DELETED] [,] to verify that Evolver is providing these services;
- [DELETED] Contract Past Performance Citation indicating relevance to DTFAC-09-00008 SOW and signed by the COR/COTR affirming Evolver's performance in these areas;
- Additional information describing the relevance of the [DELETED] contract to this effort;
- [DELETED] Contract Past Performance Citation indicating relevance to DTFAC-09-00008 SOW and signed by the COR/COTR affirming Evolver's performances in these areas;
- Additional information describing the relevance of the [DELETED] contract to this effort;
- And summary table that cross references Evolver's corporate experience with the SOS-8 SIR evaluation criteria and SOW requirements.

Evolver Response to E-Mail of 01/20/2010 from [DELETED], Tab 5.

27. The following table shows the TET's understanding of Evolver's initial proposal from January 28, 2009 and the Best and Final Offers ("BAFO") dated April 16, 2009 (internal notes omitted).

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Ref.	Contract	Status	Size/FTE	Scope
2.2	[DELETED]	Prime	[DELETED]	Minimal
2.3	[DELETED]	Prime	[DELETED]	Minimal
2.1	[DELETED]	Subcontractor	[DELETED]	Minimal
2.4	[DELETED]	Subcontractor	[DELETED]	Minimal

Determination, Tab 7.

28. The following table shows the TET's understanding of Evolver's Past Performance/ Corporate Experience after receipt of Evolver's Response to [DELETED] e-mail dated February 4, 2010 (internal notes omitted).

Ref.	Contract	Status	Size/FTE	Scope
2.2	[DELETED]	Prime	[DELETED]	Lacking
2.3	[DELETED]	Prime	[DELETED]	Minimal
2.1	[DELETED]	Subcontractor	[DELETED]	Minimal
2.4	[DELETED]	Subcontractor	[DELETED]	Minimal

Determination, Tab 7.

29. In its report, the TET stated:

In accordance with the reference on page 34 of the ODRA Decision, the TET has reevaluated Evolver's Corporate Experience/ Past Performance. Evolver's grade for Factor 2 remains unchanged at "Satisfactory". [sic]

The Order stated that the TET was flawed in their evaluation of the number of Full Time Equivalents, [sic] (FTEs). The TET's reference to [DELETED] was not based on a representation contained in Evolver's proposal or its response. It was a calculation that used the value of the contract to estimate the number of FTEs [DELETED]. It was a way to correlate the contractual values with the

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claimed number of FTEs. The TET used this estimate because Evolver's claim that the company "... manages a workforce of [DELETED] IT employees..." seemed unrealistically large in the performance of a [DELETED] contract.

Based on the additional information Evolver provided in the e-mail to [DELETED] dated 12/9/2009, and Evolver's original proposal (Exhibit 2.1 – [DELETED]), we now know that Evolver is in fact a subcontractor on a US Government contract managing [DELETED] Evolver FTEs. Thus, the TET's original estimate of [DELETED] [sic] was very close to that actual number of [DELETED]. The claim of [DELETED] FTEs remains completely unsubstantiated; the "Size" of this contractual effort is in fact almost exactly as the TET originally estimated.

Further, the narrative for this contract (Exhibit 2.1. of Evolver's Technical Proposal dated January 28, 2009) depicts IT, helpdesk, 1st level support and minimal 2nd level engineering support. Helpdesk and 1st level support are not part of the SOS-8 SOW requirement, and the 2nd level engineering is minimal in both size and complexity compared with the SOS-8 SOW.

Based on the additional information Evolver provided in the e-mail to [DELETED] dated 12/9/2009, and Evolver's original proposal (Exhibit 2.2 – [DELETED]), Evolver is a prime contractor on a US Government contract with [DELETED]. The narrative for this contract (Exhibit 2.2 of Evolver's Technical Proposal dated January 28, 2009) depicts IT, helpdesk, 1st level support and minimum 2nd level engineering support. This contractual reference is larger than the [DELETED] vehicle discussed above and may be considered similar in "Size" to SOS-8. However, the work again includes only minimal 2nd level engineering of systems as complex as SOS-8, and it therefore lacks "Scope."

Based on the additional information Evolver provided in the e-mail to [DELETED] dated 12/9/2009, and Evolver's original proposal (Exhibit 2.3 – [DELETED]), Evolver is a prime contractor on a US Government contract with [DELETED] Evolver FTEs. The narrative for this contract (Exhibit 2.3 of Evolver's Technical Proposal dated January 28, 2009) depicts IT, helpdesk, 1st level

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support and minimum 2nd level engineering support. Helpdesk and 1st level support are not part of the SOS-8 SOW requirement, and Evolver's 2nd level engineering does not approach the complexity of SOS-8. This contractual reference is not similar in "Size" or "Scope."

Based on the additional information Evolver provided in the e-mail to [DELETED] dated 12/9/2009, and Evolver's original proposal (Exhibit 2.4 – [DELETED]), Evolver is a subcontractor on a US Government contract with [DELETED] Evolver FTEs. The narrative for this contract (Exhibit 2.4 of Evolver's Technical Proposal dated January 28, 2009) depicts IT, helpdesk, 1st level support and minimum 2nd level engineering support. Helpdesk and 1st level support are not part of the SOS-8 SOW requirement, and Evolver's 2nd level engineering does not approach the complexity of SOS-8. This contractual reference is not similar in "Size" or "Scope."

The TET also incorporated credit originally given to Evolver for their subcontractor [DELETED] support. As nothing was changed concerning the subcontractor's Corporate Experience/ Past Performance, the subcontractor did not impact this reevaluation.

In sum, the TET originally did not base the grade of "Satisfactory" strictly on size, but took into account Evolver's overall depiction of size and scope on the exhibits provided. Based on the newly provided information, the TET continues to maintain that the performance on all the contracts Evolver submitted as a prime or subcontractor provides only a minimally acceptable understanding of a more complex system, such as the NAS described in SOW section 1.2. The TET maintains that Evolver's grade for Factor 2 remains unchanged at "Satisfactory". [sic]

Determination, Tab 3.

30. For Evolver's Factor 2 Score, the Contracting Officer concluded:

Evolver's *Corporate Experience* proposal, in total, clearly demonstrates *Size* through its management of several large contracts. As to *Scope*, the [DELETED] contracts

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evidence a small degree of both Engineering and Second Level Maintenance, albeit not on systems as complicated as the NAS. Evolver itself has never touched the NAS, and its subcontractor, [DELETED] has NAS experience only in SOS program support. In the words of SOW Section 1.2, Evolver has no knowledge whatsoever of the “*as-built construction of the hardware, software, or documentation . . . for each NAS system[.]*” Under these facts, I find that Evolver has demonstrated a minimal understanding of the requirements, and that there is a moderate to high risk to successful completion of this contract. Under the Technical Evaluation Plan, these findings warrant a grade of “Satisfactory.”

Determination at 6 (emphasis in original).

D. Cost Analysis

31. Solicitation Section M.5 Price Evaluation, provides:

Pricing shall be provided on pricing schedule located in Section J and is to be part of Volume 2 (Price). The evaluation of price proposals will consider the total price offered for the base service period and the six (6) 1-year options.

Evolver, FF 8, AR Tab 1 at 68.

32. On November 25, 2009, in an email, the Center requested from Evolver cost data, any “studies, analyses, or surveys Evolver consulted in devising [its] price submission,” and a “copy of Evolver’s Defense Contract Audit Agency (DCAA) audit or rate check . . . that were utilized to develop Evolver’s 4/16/09 revised price proposal.” *Determination*, Tab 1, email, dated 11/25/09.
33. On November 25, 2009, the Center requested from ECS cost data and a “copy of ECS’ [sic] Defense Contract Audit Agency (DCAA) audit or

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rate check . . . that were utilized to develop ECS' [sic] 1/28/09 price proposal." *Determination*, Tab 1, email, dated 11/25/09.

34. By letter dated December 11, 2009, ECS provided its response to the Center's request for cost data. *Determination*, Tab 2.
35. ECS did not have a current DCAA audit of its rates. "The most recent DCAA audit of ECS was in the 2004 calendar year and was unrelated to the above-referenced Contract/Price Proposal submission. The 2004 DCAA audit was in the nature of a Rate Request and the ECS Rates were approved." *Determination*, Tab 2. ECS, Response to Center's Request for Cost Data at 1.
36. The dates and results of the DCAA audits were provided stating on all occasions: "Rates Approved." *Id.* at 2.
37. "The direct labor rates (salaries) set forth in the Price Proposal submission incorporated local survey salary data, actual salary data for ECS employees performing similar tasks, as well as actual incumbent salaries where known." *Id.*
38. Attachment 1 – ECS SOS 8 Proposed T&M Rate Breakdown (On-Site) is incorporated by reference into these Findings of Fact. *Determination*, Tab 2.
39. Attachment 1 – ECS SOS 8 Proposed T&M Rate Breakdown (Off-Site) is incorporated by reference into these Findings of Fact. *Id.*
40. Evolver submitted a document entitled, "Request for Cost Data Submission – Evolver Response," dated December 14, 2009. *Id.* ("Response").

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41. In its Response, Evolver states:

. . . Our methodology started with a complete assessment of the SIR labor category descriptions and qualifications to build a framework for the direct labor pricing and then applying multiple data sources to refine the proposed average salaries. Next, we apply our indirect rates in accordance with DCAA principles and cost accounting standards to build the direct labor costs into a price or sell rate for each category. The result is a realistic rate sheet that accommodates career progression within a job family such as Technical Specialist and higher pricing for those job families that require more stringent qualifications such as Computer Scientists and Engineers. . . . *[W]e recognize that some of the incumbent workforce may be earning more or less than the direct labor we bid for their particular category.* This is normal and expected for T&M contracts with large incumbent workforces. However, we are confident that we have properly priced each category and that Evolver will be able to hire the incumbent workforce and attract and retain new hires over the life of the contract.

Id. at 2 (emphasis added).

42. According to the Response, “Evolver used the following indirect rates, based on forecasted rates and costs for the year, to determine the indirect multipliers used to calculate our proposed rates for each labor category.”

The following table illustrates those rates:

Annual Escalation	[DELETED]	Fringe	[DELETED]
On-Site Overhead	[DELETED]	G&A	[DELETED]
Off-Site Overhead	[DELETED]	Fee	[DELETED]

Id.

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43. In its Response, Evolver states: “The indirect rates were applied to direct labor costs in conformance with DCAA, FAR, and FAA AMS guidelines and requirements” *Id.*
44. Appendix A of Evolver’s Response, “Labor Category Price Build Up,” is incorporated by reference into these Findings of Fact. It shows the “target average salaries for each of the proposed labor categories, as well as the buildup of direct costs that resulted in the labor rates that were bid.” *Id.*
45. Evolver did not have DCAA audited indirect rates and had not been audited by DCAA. *Id.*
46. Evolver also states in its Response:

For T&M contracts where multiple employees and/or subcontractors will be assigned the same labor category, Evolver’s proposed price starts with the average salary associated with each labor category and then adds our indirect rates to achieve our price to the FAA. . . . It is rational to ensure that average salaries demonstrate a natural career and compensation progression within each labor category family to ensure retention, and in relation to other labor category families to reflect the differing SIR requirements. That is why the Computer Scientist and Engineering labor category families are priced higher than the Technical Specialist categories – they have more stringent qualifications. Evolver utilized a variety of supporting data to verify the average salaries needed to ensure we bid realistic and reasonable pricing, as well as to enhance our ability to capture current incumbents . . .

Id. at 3.

47. Evolver used salary survey data, incumbent survey data, advertised jobs data, and entry level data and career progression. *Id.* at 3-6.

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48. Appendix B of Evolver's Response Salary Survey Data Comparison is incorporated by reference as statements to the source selection officials into these Findings of Fact.
49. Appendix C of Evolver's Response, "Incumbent Direct Data Comparison," is incorporated by reference into these Findings of Fact.
50. In its Response, Evolver provided salary survey data as follows:

2.1 Salary Survey Data

[DELETED]. From offices around the world they solicit, analyze and publish an extensive library of online, printed and interactive reports.

Their "in-country" experts apply their local knowledge of the varied employment markets, practices and customs to deliver a complete compensation picture that can be used to create sound, market-based pay programs for entire organizations. Their international databases contain compensation information covering millions of employees based on the annual survey participation of organizations ranging from emerging growth companies to many of the world's largest conglomerates.

For the SOS-8 effort, the Evolver team utilized the [DELETED] and the [DELETED]. The [DELETED] is an informative and detailed reference that provides pay data on what other employers in their labor market are paying for a full range of IT and e-Commerce jobs.

Appendix B contains the results of our analysis of these surveys as they apply to the SOS-8 labor categories. Of the 48 labor categories included in SOS-8, a) [DELETED] did not have rates from the survey that accurately matched SOS-8 requirements; b) [DELETED] salaries from the survey were lower than the Evolver proposed salary (by an average of [DELETED]); and c) [DELETED] salaries from the survey were higher than the Evolver proposed salary (by an average of [DELETED]). . . .

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The other 3 survey salaries that were more than [DELETED] per year higher than what Evolver proposed were in the area of Computer Scientist. In general, the salaries listed for Computer Scientists in the [DELETED] were higher than the data that Evolver found from other sources (incumbent data and job postings). Evolver believes that this is attributable to the fact that the [DELETED] survey contains data for computer scientists performing new design and development of advanced systems, whereas the incumbent and job posting salaries used were primarily for software operations and maintenance efforts on these types of systems, which typically are more long-term, stable engagements that characteristically do not pay as much as leading edge development jobs. . . .

Response at 3-5.

51. In its Response, Evolver provided incumbent survey data as follows:

2.2. Incumbent Survey Data

Evolver used data gathered on current incumbent SOS contractor salaries and direct rates to identify the salaries that would be needed to retain incumbents in their current labor category. Appendix C provides a comparison of Evolver's proposed salaries to current incumbents based on the labor categories that were applicable. Of the 48 labor categories included in SOS-8, a) [DELETED] did not have rates from the survey that accurately matched SOS-8 requirements; b) [DELETED] salaries from the survey were lower than the Evolver proposed salary (by an average of [DELETED]); and c) [DELETED] salaries from the survey were higher than the Evolver proposed salary (by an average of [DELETED]). . . .

Id. at 5-6.

52. In its Response, Evolver provided advertised jobs data as follows:

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2.3. Advertised Jobs Data

During the preparation of our initial and revised offers, Evolver performed internet searches to identify then current job openings in the southern New Jersey area similar in nature to the SOS-8 labor categories. Our search revealed the following average salaries being offered:

Job description	Advertised Salary	Comparable SOS-8 Category
Program Manager	[DELETED]	Program Manager
Sr. Administrative Assistant	[DELETED]	Admin Asst 2
Sr. Engineer	[DELETED]	Engineer 3
Engineer	[DELETED]	Engineer 5
Sr. Computer Scientist	[DELETED]	Computer Scientist 2
Computer Scientist	[DELETED]	Computer Scientist 5
Sr. Technical Specialist	[DELETED]	Technical Specialist 2
Technical Specialist	[DELETED]	Technical Specialist 4
Sr. SW Configuration Manager	[DELETED]	Software CM Specialist 1
Sr. Database Analyst	[DELETED]	Database Specialist 1
Database Analyst	[DELETED]	Database Specialist 3
Sr. Documentation Specialist	[DELETED]	Documentation Specialist 1
Documentation Specialist	[DELETED]	Documentation Specialist 3
Sr. Business Process Analyst	[DELETED]	Process Improvement Spec 2

Each of these offered salaries were lower than their comparable Evolver proposed SOS-8 salary.

Id. at 6.

53. In its Response, Evolver provided entry level data and career progression as follows:

2.4. Entry Level Data and Career Progression

Additional analysis that we performed to determine proper pricing within a job family that contains multiple labor

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categories such as Technical Specialist and Engineer was to determine the entry level salary and then build a progressive ladder of raises each year that are adequate to retain high performing resources. . . .

Id. at 6.

54. Tab 2 to the Agency Report, containing of detailed cost data, is incorporated by reference into these Findings of Fact.
55. Determination, Tab 8, which shows a table comparing the labor rates between ECS and Evolver is incorporated by reference into these Findings of Fact. The ODRA notes that the table provided in Tab 8 is undated.
56. In the Determination, the Contracting Officer stated:

I analyzed the direct labor rate data from the incumbent SOS-6 contractor, and compared it to the ECS and Evolver cost/price proposals. The incumbent's SOS-6 information was derived from actual employee pay stubs and is represented in Column 2 of the attached mapping chart, Tab 8. Those SOS-6 direct labor rates are important for this analysis because they represent the base salaries of the incumbent personnel from which any pay reductions under SOS-8 will be taken. This is the focus of AMS Clause 3.6.2-15, *Evaluation of Compensation of Professional Employees*.

Analysis of Evolver's detailed cost breakdown data confirms that their direct labor rates do in fact pose a significant risk in recruiting, [sic] and retaining, especially in the highly populated categories of *Technical Specialist*. Most of Evolver's *Technical Specialist* rates impose dramatic cuts not only from the SOS-6 levels, but also from the current ECS SOS-8 rates. In some instances, Evolver proposes to capture the incumbent *Specialists* at pay cuts up to [DELETED] from what they were earning under SOS-6, and [DELETED] from what ECS offered. . . .

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Determination at 9.

57. The Contracting Officer also states:

The total number of *Technical Specialist* hours shown above is 1,049,222. When the difference between ECS' [sic] and Evolver's bid rates across all 6 levels is multiplied by 1,049,222, the total *dollars* that Evolver proposes to cut from these salaries is [DELETED]. Under any reasonable assessment, this is risky for a company that is heavily dependent on these individuals. Evolver has claimed that it does not need to make a profit on every category, and that some losses can be made up for by profits in others, or carried in its indirect rate or fee pools. It has also suggested that in a depressed job market and in an isolated setting such as Southern New Jersey, these people have no choice. I disagree. The six categories above account for potential losses on a scale that cannot be carried by any small company if the incumbent "rejection rate" forces Evolver to raise its offers to capture the expertise. I also find that the "no place else to go" argument is based on assumptions that carry tremendous risk. . . . The current contractor employee population exceeds 1500, and will grow significantly when the Agency's *Next Generation Program* support contracts are awarded this year. This is exactly the sort of risk that AMS 3.6.2-15 was intended to address.

Id. at 10-11.

58. The following table shows the Center's Indirect Rate analysis:

ECS			Evolver		SOS-6 Incumbent	
	On-site	Off-site	On-site	Off-site	On-site	Off-site
Fringe	[DELETED]	[DELETED]	[DELETED]	[DELETED]	[DELETED]	[DELETED]
Overhead	[DELETED]	[DELETED]	[DELETED]	[DELETED]	[DELETED]	[DELETED]
G&A	[DELETED]	[DELETED]	[DELETED]	[DELETED]	[DELETED]	[DELETED]
Profit	[DELETED]	[DELETED]	[DELETED]	[DELETED]	[DELETED]	[DELETED]

Id. at 8.

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59. The following table shows the Center’s Direct Labor Component (Salaries) of Average Bid Rates Per Labor Category:

	SOS-6 Pay Stubs	ECS Bid Rate	Evolver Bid Rate
Tech. Spec. 1	[DELETED]	[DELETED]	[DELETED]
Tech. Spec. 2	[DELETED]	[DELETED]	[DELETED]
Tech. Spec. 3	[DELETED]	[DELETED]	[DELETED]
Tech. Spec. 4	[DELETED]	[DELETED]	[DELETED]
Tech. Spec. 5	[DELETED]	[DELETED]	[DELETED]
Tech. Spec. 6	Not Available	[DELETED]	[DELETED]
Reference Tab 8	Column 2	Column 4	Column 7

Id. at 10.

III. Discussion

A. Standard of Review

In accordance with the ODRA Procedural Regulations, 14 C.F.R. Part 17, and the FAA’s Acquisition Management System (“AMS”), the ODRA will only recommend that a post-award bid protest be sustained where a contract award decision lacks a rational basis, is arbitrary, capricious, or an abuse of discretion. *Protest of Ribeiro Construction Company, Inc.*, 08-TSA-031. In “best value” procurements, such as in the instant case, the ODRA will not substitute its judgment for that of the designated evaluation and source selection officials as long as their decisions satisfy the above test. *Protest of PCS*, 01-ODRA-00184. An offeror’s mere disagreement with the source selection officials’ judgment concerning the adequacy of its proposal is insufficient grounds to establish that they acted irrationally. *Protest of En Route Computer Solutions*, 02-ODRA-00220. In a challenge to a corrective action taken pursuant to the direction of the ODRA, the ODRA looks to see if the actions have a rational basis supported in the record, and are consistent with the Final Agency Order. *Protest of Camber Corporation*, 98-ODRA-00102.

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The ODRA's Findings must be supported by substantial evidence, and the Protester bears the burden of proof. 14 C.F.R. § 17.37(j); *Protest of Carahsoft/Avue*, 08-TSA-034. In addition, a protester must demonstrate that the Agency's actions were prejudicial. In other words, Evolver must show that but for the Center's allegedly improper corrective action, it would have had a substantial chance of receiving the award. *Id.*

B. Reconsideration of the Initial Protest

In the Initial Protest, the ODRA reviewed the administrative record and made Findings of Fact with regard to all of the issues raised by Evolver. *Protest of Evolver*, 09-ODRA-00495. The ODRA considered all of the arguments advanced by the parties, and, in making its recommendation to sustain the Initial Protest, specifically discussed those issues which it believed to be controlling. The Initial Protest was decided by the FAA Administrator in a Final Agency Order issued on November 13, 2009. 09-ODRA-509. In that Final Order, the Administrator sustained the Initial Protest and directed that the Center take corrective actions recommended by the ODRA. *Id.*

In the instant Protest, Evolver reasserts two of the issues from the Initial Protest. Specifically, Evolver alleges that the Center improperly evaluated Evolver's and ECS's proposals for Technical Factor 1 Program Management Plan, and that the Center did not conduct discussions with Evolver concerning its proposed price ("Additional Issues"). *Protest* at 33 and 37. As noted above, a Final Agency Order was issued with regard to the Initial Protest. The ODRA, thus, views Evolver's re-raising of the Additional Issues as a request for reconsideration of the Findings and Recommendations. A party seeking reconsideration at the ODRA has the burden of demonstrating: (1) clear errors of material fact or law in the underlying decision; or (2) previously unavailable information that would warrant reversal or modification. *Protests of Hi-Tec Systems, Inc.*, 08-ODRA-00459,-00460 (Consolidated), *Decision Denying Motion for*

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Reconsideration dated November 20, 2008. For the reasons discussed below, the ODRA denies Evolver's reconsideration request.

(1) Technical Factor 1

With regard to its assertion that the Center improperly evaluated Evolver's and ECS's proposals under Factor 1, Program Management Plan, Evolver states "the [Center's] initial evaluation of Evolver's proposal under Factor 1 was flawed, and Evolver should have received an Excellent rating versus the Good rating that it did." *Protest* at 37. Evolver then goes through a detailed comparison of the evaluations conducted of its and ECS's proposals under Factor 1. *Id.* at 38-44.

Solicitation Section M.4 Factor 1: Program Management Plan provides:

The Program Management Plan must describe the offeror's plans for managing the support services to be provided in accordance with the statement of work. . . .

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

Program Management Approach

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

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

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Employee/Subcontract Recruitment/Retention

Offeror must document/demonstrate successful recruitment capabilities and competitive employee benefits in order to recruit and retain a highly educated and skilled workforce. Documentation may include, but not limited to recruitment plan, company health plan, sick/annual leave benefits, 401K, and life/health insurance.

Provide a narrative explaining past and planned approaches for recruiting personnel to meet the requirements in the SOW.

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

Employee Training/Educational Benefits

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

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

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

Protest of Evolver, 09-ODRA-00495 at Finding of Fact (“FF”) 4. For Factor 1, the Program Management Plan, the TET concluded for Evolver:

Evolver did not demonstrate knowledge of the SOW section 3.2.1 Program Management. The Offeror identified the NAS lead and STA lead as two separate positions. The SOW does not identify either of these positions; however, section 3.2.1[.], clearly identifies the role of contractor leads.

* * * *

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Evolver's statement in section 1.2 concerning the big picture of long-term success considers employee character traits as being far more important than level of experience. SIR attachment J-2 Labor Category Experience Requirements clearly defines the labor categories as needing predetermined years of related experience. The Technical Evaluation Team finds this illogical.

The Offeror provided satisfactory detail on the benefits package to retain a skilled workforce. The recruitment approach defined does not provide adequate detail to demonstrate successful recruitment capabilities outside the local commuting area. . . .

Id. at FF 24. For Factor 1, Program Management, the TET concluded for ECS:

ECS demonstrates an adequate understanding of the Government's requirement for program management by clearly defining the role of the program manager and the contractor leads in accordance with the SOW 3.2.1.

* * * *

ECS demonstrates an understanding of the significance of recruitment and retention by clearly defining the benefits package offered to their employees and subcontractors. The Offeror has successfully reached outside the local commuting area by offering relocation packages to qualified candidates.

The Offeror has an established program in place that has a proven success rate for training employees in NAS operations. . . .

The Technical Evaluation Team notes a conflict between the company-based alignment of system responsibility specified in Exhibit 1-4 of ECS's proposal, and paragraph 1.1.5 [sic] which states there will be an impartial assignment of work that will be based on an individual's skill set.

Id. at FF 26.

The Contracting Officer then held discussions with the offerors regarding their proposals. *Id.* at FF 28-30. After reviewing the offerors' submissions, the TET rescored the proposals. *Id.* at FF 31-32. For the Factor 1 Management Plan, the TET concluded for Evolver:

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Evolver provided a Factor 1 response to the Contracting Officer's Discussion Letter dated April 1, 2009. Evolver's rating was elevated in Factor 1 to a Good from an Unacceptable.

Evolver demonstrates an adequate understanding of the Government's requirement for program management by clearly defining the role of the Program Manager and the Contractor Leads in accordance with the SOW section 3.2.1. The Contractor Lead responsibility is an integral part of successful contract program management. The Contractor Lead is the interface between the Program Manager and the staff performing the actual work defined in the delivery orders. Evolver's "Response to FAA Technical Concerns/Issues" (section 1.1) clarifies the roles and responsibilities of the Program Manager's authority over resolving any and all Prime/Subcontractor issues and adds to the strength of defining the Program Manager's authority while performing SOS-8 contract management.

The Offeror continues to depict in section 1.1.3 and in Evolver's "Response to FAA Technical Concerns/Issues" (section 1.1) a minimal understanding of the Delivery Order and Sub-Task Assignments as provided in the SOW. The Offeror provided no narrative in the four step Program Management Model concerning the *Execution* step.

Evolver's clarification of the Technical Evaluation Team's concern regarding the statement in section 1.2 is acceptable and logical.

The Offeror provided satisfactory detail on the benefits package to recruit (hire)/retain a skilled workforce.

The recruitment approach defined provided adequate detail to demonstrate successful recruitment capabilities outside the local commuting area.

Evolver's employee training/educational benefits narrative provides minimum detail to ensure that the staff remains proficient in their areas of expertise to support contract requirements.

Id. at FF 33. For Factor 1, Program Management, the TET concluded for ECS:

Enroute Computer Solutions (ECS) provided a Factor 1 response to the Contracting Officer's Discussion Letter dated April 1, 2009.

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Evaluation Team found the additional information provided by ECS added clarification to their Offeror's Program Management Plan. ECS's rating was elevated in Factor 1 to an Excellent from a Good.

ECS demonstrates an extensive understanding of the Government's requirement for program management by clearly defining the role of the Program Manager and the Contractor Leads in accordance with the SOW section 3.2.1. The Contractor Lead responsibility is an integral part of successful contract program management. The Contractor Lead is the interface between the Program Manager and the staff performing the actual work defined in the delivery orders.

The Offeror depicts a good technical understanding of the Delivery Order and Sub-Task Assignments as provided in the SOW.

The Offeror's approach to team transparency is well documented in section 1.1.2. [Sic] and 1.1.5. This provides a single chain of command to facilitate successful contract management.

ECS demonstrates an understanding of the significance of recruitment and retention by clearly defining the benefits package offered to their employees and subcontractors. The Offeror has successfully reached outside the local commuting area by offering relocation packages to qualified candidates.

The Offeror has an established program in place that has a proven success rate for training employees in NAS operations. ECS's adequate narrative of their employee's training/education benefits demonstrated to the Technical Evaluation Team the Offeror's ability to maintain the proper skill mix through individual initiative, continuing education programs, or other company sponsored training programs.

Id. at FF 35. Other than a thorough comparison of the proposals, Evolver did not demonstrate where the TET deviated from the Solicitation criteria. Thus, Evolver did not meet its burden to demonstrate that the TET acted irrationally in assigning its ratings. *Protest of Carahsoft/Avue*, 08-TSA-034. As the above quotes from the TET's Report demonstrate, the Center had a rational basis for scoring the proposals as they did. The ODRA concludes that the Center's ratings of both ECS's and Evolver's proposal under Factor 1 are well supported by substantial evidence in the record. Evolver's

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arguments in this regard constitute mere disagreement with the source selection officials' judgment concerning the adequacy of its and ECS's proposals and do not establish that the evaluators acted irrationally. *Protest of En Route Computer Solutions*, 02-ODRA-00220. As the above discussion demonstrates, Evolver does not provide a basis for reconsideration of the Initial Decision. The ODRA therefore will not reconsider its Findings and Recommendation on this issue *Protest of Maximus, Inc.*, 04-TSA-009, *Decision Denying Maximus Inc.'s Motion for Reconsideration* dated November 29, 2004.

(2) Discussions

Evolver also reasserts from the Initial Protest that the Center failed to have meaningful discussions concerning Evolver's initial price evaluation. *Protest* at 33. Evolver observes that "the [Center] conducted discussions with the offerors, including Evolver, prior to requesting best and final offers. By not raising a concern about Evolver's prices during the discussion phase[,] the [Center] failed to conduct meaningful discussions with Evolver." *Protest* at 34. Evolver relies on decisions by the Government Accountability Office in support of its position. *Id.* However, those cases involve the Federal Acquisition Regulations ("FAR"), which provide more rigid requirements with regard to communications with offerors than does the AMS. *Compare* FAR § 15.306 with AMS § 3.2.2.3.1.2.2. The AMS does not require communications with offerors. AMS § 3.2.2.3.1.2.2. While discussions with offerors are not required, the ODRA has held that the Agency must have a rational basis in the conduct of its communications. *Consolidated Protests of Consecutive Weather*, 02-ODRA-00250, 02-ODRA-00251, 02-ODRA-00252, and 02-ODRA-00254 (consolidated). The ODRA has also ruled that where the Agency engages in communications with offerors, they must be meaningful. *Protest of Information Systems & Networks Corporation*, 99-ODRA-00116.

According to the Contracting Officer:

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There appeared to be a lack of understanding of the SIR among all offerors, other than ECS. The choice was between an award on Initial Offers to ECS, or to conduct a round of discussions and call for Revised Offers. We decided to conduct discussions and call for revised offers. The CO's rationale was that "once the requirements were clarified through discussions, the entire range of competition, both technical and price, would tighten up considerably.

Protest of Evolver, 09-ODRA-00495 at FF 28. On April 1, 2009, the Contracting Officer provided all offerors with a copy of the portions of the initial Technical Report as it related only to their proposal, and requested that they address the TET's technical concerns and pricing. *Id.* at FF 29. On April 16, 2009, the offerors submitted revised proposals. *Id.* at FF 30. The TET reviewed the revised proposals in conjunction with the Initial Proposals. *Id.* at FF 31.

Based on the administrative record, the ODRA concludes that the Center acted rationally in not holding discussions with Evolver with regard to its price. The record demonstrates that the Contracting Officer undertook an extensive analysis of Evolver's proposed price and concluded that it presented a risk. *Id.* at FF 42-62. The record does not show that the Contracting Officer needed to seek clarifications of Evolver's low price.¹ *Id.* In her Declaration, the Contracting Officer states:

After we conducted the above noted analysis, we were concerned that Evolver would, within the first few months, experience trouble in recruiting the necessary personnel and might place the FAA in the position of renegotiating the rates on a single source basis or re-competing the entire agreement. While we understood that the SIR's redefinition of labor categories would result in lower wages for some categories, that was largely demonstrated by the fact that all companies were well below the IGCE. We believed that the range of pricing we received gave a better indication of the market value of these services, but Evolver's pricing was a dangerously low outlier from the average of those.

¹ The purpose of communications, among other things, is to ensure mutual understandings between the FAA and offerors about all aspects of their proposals. AMS 3.2.2.3.1.2.2. See *Protest of Columbus Technologies and Services, Inc.*, 10-ODRA-00514.

Id. at FF 60.

Evolver has not demonstrated that clarifications based on further discussions with the Center would have been beneficial. Rather, Evolver merely disagrees with the Contracting Officer's conclusion that its proposed price was too low and posed a risk to successful contract performance. *Protest of En Route Computer Solutions*, 02-ODRA-00220. As the above discussion demonstrates, Evolver does not provide a basis for reconsideration of the Initial Decision. The ODRA, therefore, will not reconsider its Findings or Recommendations on this issue. *Protest of Maximus, Inc.*, 04-TSA-009, *Decision Denying Maximus Inc.'s Motion for Reconsideration* dated November 29, 2004.

B. Current Protest Issues

(1) Past Performance Reevaluation

In the Initial Protest, the ODRA recommended and the Administrator ordered that the Center "reevaluate both ECS's and Evolver's technical proposals under Evaluation Factor 2 Corporate Experience/ Past Performance in a manner consistent with these Findings and Recommendations." *Protest of Evolver*, 09-ODRA-00495. Evolver now challenges the Center's reevaluation ratings of ECS and itself as "Satisfactory" under Factor 2, Corporate Experience/ Past Performance. *Protest* at 13-21. Evolver asserts that:

[T]he [Center] should have given Evolver an Excellent rating under this factor based on its prime contract experience (Excellent), the size of its corporate experience (Excellent), and the relevancy of its scope (Good to Excellent). When scoring in relation to ECS's past performance, at a minimum, Evolver deserves a higher past performance rating given the significant weakness ECS has in no relevant prime contract experience, which is the highest scoring element of the past performance factor.

Protest at 15. Evolver further asserts that:

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The [Center's] conclusion regarding the relevancy of Evolver's past performance is at odds with the information provided in Evolver's proposal and the information gathered from Evolver's customers in January and contained in Tab 4, where three of the four references contacted by the FAA confirmed that Evolver was performing the five components of Second Level Maintenance Engineering that were at the heart of this procurement....

Protest 19-20. In its response, the Center states that “[b]oth companies are only [rated] “Satisfactory” because they are weak in one half of the Factor. Evolver has *Size* but lacks *Scope*, ECS has *Scope* but lacks *Size*.” *AR* at 6. For the reasons discussed below, the ODRA finds that Evolver's arguments as to the Center's rating of its and ECS's past performance under Factor 2 constitute mere disagreement with the ratings given by the source selection officials. *See, e.g., Protest of PCS*, 01-ODRA-00184.

The evaluation of past performance is a matter within the discretion of the source selection officials. *Protest of Carahsoft/Avue*, 08-TSA-034. Technical evaluators have considerable latitude in assigning ratings, which reflect their selective judgment of a proposal's merits. *Protest of Universal Systems & Technology, Inc.*, 01-ODRA-00179. Accordingly, the ODRA will not substitute its judgment for that of the source selection officials provided they have given a rationally based past performance rating consistent with the stated evaluation criteria in the solicitation. *Id.*

Section M.4, Factor 2: Corporate Experience/Past Performance, states:

In this section [sic] you must describe the company's experience in providing similar work in size (Hours/FTEs) and scope (type of effort) as that described in the SOW to show the competency to succeed on this effort. . . .

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

..

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The offeror will be evaluated under this factor based primarily on the extent and quality of its own corporate past performance as a prime or subcontractor. . . . Proposed subcontractor's past performance history will be considered, but is less significant. . . .

Protest of Evolver, 09-ODRA-00495 at FF 5. The Technical Evaluation Plan defines these ratings as follows:

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

Satisfactory: A proposal that at least meets all of the Government's requirements, contains at least minimal detail, demonstrates at least a minimal understanding of the requirements, and is at least minimally feasible (moderate to high risk). No deficiencies exist and any combination of weaknesses is not a risk to successful contract performance.

Id. at FF 11. As discussed below, the TET adhered to both § M.4 and the evaluation plan in its reevaluation of the ECS and Evolver proposals.

(a) The ECS Reevaluation

In the Initial Protest, the ODRA found that the TET's rating of ECS's past performance as "Excellent" lacked a rational basis because the TET deviated from the explicit evaluation criteria in the Solicitation. *Protest of Evolver*, 09-ODRA-00495. The TET had rated ECS's technical proposal "Excellent," the highest possible score for Factor 2 Corporate Experience/ Past Performance, on the basis that:

ECS has identified work as a prime contractor on the [DELETED]. This large FAA engineering support services contract describes **work that is similar in scope but is smaller in size** than the NAS as described in the SOW paragraph 1.2.

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Id. at FF 27 (emphasis added). Pursuant to the ODRA's direction, the TET reconvened and reevaluated the past performance of ECS giving it a revised rating of "Good." FF 16. In its Report, the TET stated:

[T]he TET has revised the grade for ECS' [sic] Corporate Experience/ Past Performance to "Good". [sic] The TET continues to ascertain that Evolver's Corporate Experience/ Past Performance grade remains unchanged at "Satisfactory". [sic]

Id. The record demonstrates, consistent with the direction from the ODRA, that the TET took into account the fact that ECS's work as a prime contractor on the [DELETED] contract is similar in scope to the requirements for the SOS-8 contract but smaller in size. *Id.* The TET states:

ECS has identified work as a prime contractor on the [DELETED]. This FAA engineering support services contract describes work that *is similar in scope but is smaller in size* than the NAS as described in the SOW paragraph 1.2. The TET concurs that an Offeror's exhibit of a contract significantly smaller in size does not merit a grade of "Excellent[.]"

Id. (emphasis added). In addition, the Contracting Officer, in her capacity as the source selection official, took into account additional risk associated with the lack of size of the [DELETED] contract when compared against the requirements of SOS-8, and further lowered ECS's Factor 2 rating to "Satisfactory." FF 15. The Determination states:

The TET concluded that ECS warrants a score of "Good" for Factor 2. I concur with the TET that ECS' [sic] *Corporate Experience* proposal demonstrates a very strong understanding of the requirements, but I find that it also contains a moderate degree of risk because it has never managed a prime contract of comparable *Size*. Other than [DELETED], the other [DELETED] contracts were very small compared to SOS-8. According to the Technical Evaluation Plan, this lack of comparable management experience poses a degree of risk that warrants an overall Factor 2 score of "Satisfactory." Accordingly, I find that the TET's score of "Good" is still overstated and that ECS's score for purposes of this corrective action should be "Satisfactory."

Id. Thus, the ODRA finds that the Center’s reevaluation of ECS’s past performance is consistent with the Administrator’s direction and the ODRA’s Findings and Recommendations in the Initial Protest, § M.4, and the evaluation plan. Evolver’s assertions to the contrary constitute mere disagreement with the source selection officials’ rating, which has a rational basis supported by substantial evidence in the record. *Protest of Universal Systems & Technology, Inc.*, 01-ODRA-00179.

(b) The Evolver Reevaluation

In the Initial Protest, the ODRA found that the TET’s rating of Evolver’s past performance under Factor 2 as “Satisfactory” lacked a rational basis because the TET deviated from the evaluation criteria in Section M that required it to evaluate past performance for both size (number of Full Time Equivalents (“FTE”)) and scope (type of effort). *Protest of Evolver*, 09-ODRA-00495. Specifically, the ODRA found that the TET’s determination of the size of Evolver’s contracts based on the number of FTEs was different than the number of FTEs stated in Evolver’s proposal. *Id.* Pursuant to the Administrator’s direction, the record shows that the TET reevaluated Evolver’s past performance consistent with the ODRA’s Findings and Recommendations and the evaluation criteria in Section M. In its Report, the TET states:

The Order stated that the TET was flawed in their evaluation of the number of Full Time Equivalents, [sic] (FTEs). The TET’s reference to “[DELETED] FTE’s” was not based on a representation contained in Evolver’s proposal or its response. . . .

Based on the additional information Evolver provided in the e-mail to [DELETED] dated 12/9/2009, and Evolver’s original proposal (Exhibit 2.1 – [DELETED]), we now know that Evolver is in fact a subcontractor on a US Government contract managing [DELETED] Evolver FTEs. . . .

Further, the narrative for this contract (Exhibit 2.1. of Evolver’s Technical Proposal dated January 28, 2009) depicts IT, helpdesk, 1st level support and minimal 2nd level engineering support. Helpdesk and 1st level support are not part of the SOS-8 SOW

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requirement, and the 2nd level engineering is minimal in both size and complexity compared with the SOS-8 SOW.

Based on the additional information Evolver provided in the e-mail to [DELETED] dated 12/9/2009, and Evolver's original proposal (Exhibit 2.2 – [DELETED]), Evolver is a prime contractor on a US Government contract with [DELETED] Evolver FTEs. The narrative for this contract (Exhibit 2.2 of Evolver's Technical Proposal dated January 28, 2009) depicts IT, helpdesk, 1st level support and minimum 2nd level engineering support. This contractual reference is larger than the [DELETED] vehicle discussed above and may be considered similar in "Size" to SOS-8. However, the work again includes only minimal 2nd level engineering of systems as complex as SOS-8, and it therefore lacks "Scope."

Based on the additional information Evolver provided in the e-mail to [DELETED] dated 12/9/2009, and Evolver's original proposal (Exhibit 2.3 – [DELETED]), Evolver is a prime contractor on a US Government contract with [DELETED] Evolver FTEs. The narrative for this contract (Exhibit 2.3 of Evolver's Technical Proposal dated January 28, 2009) depicts IT, helpdesk, 1st level support and minimum 2nd level engineering support. Helpdesk and 1st level support are not part of the SOS-8 SOW requirement, and Evolver's 2nd level engineering does not approach the complexity of SOS-8. This contractual reference is not similar in "Size" or "Scope."

Based on the additional information Evolver provided in the e-mail to [DELETED] dated 12/9/2009, and Evolver's original proposal (Exhibit 2.4 – [DELETED]), Evolver is a subcontractor on a US Government contract with [DELETED] Evolver FTEs. The narrative for this contract (Exhibit 2.4 of Evolver's original proposal (Exhibit 2.4 – [DELETED]), Evolver is a subcontractor (Exhibit 2.4 of Evolver's Technical Proposal dated January 28, 2009) depicts IT, helpdesk, 1st level support and minimum 2nd level engineering support. Helpdesk and 1st level support are not part of the SOS-8 SOW requirement, and Evolver's 2nd level engineering does not approach the complexity of SOS-8. This contractual reference is not similar in "Size" or "Scope."

* * * *

. . . [T]he TET continues to maintain that the performance on all the contracts Evolver submitted as a prime or subcontractor provides only a minimally acceptable understanding of a more

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complex system, such as the NAS described in SOW section 1.2. The TET maintains that Evolver's grade for Factor 2 remains unchanged at "Satisfactory". [sic]

FF 29. This part of the Report shows that the TET took into account both the size and scope of Evolver's contracts in comparison to the requirements for SOS-8. *Id.* It also shows that the TET based its reevaluation rating of "Satisfactory" on the actual number of FTEs under the contracts proffered by Evolver. *Id.* The TET, after reevaluation, maintained Evolver's past performance rating as "Satisfactory." *Id.* Thus, the ODRA finds that the Center's reevaluation of Evolver's past performance is consistent with the direction of the Administrator and the ODRA's Findings and Recommendations and had a rational basis. Evolver's assertions to the contrary constitute mere disagreement with the source selection officials' rating, which has a rational basis supported by substantial evidence in the record. *Protest of Universal Systems & Technology, Inc.*, 01-ODRA-00179.

(c) NAS Experience

Finally, Evolver asserts that the Center used evaluation criteria not disclosed in the Solicitation in its reevaluation with regard to past performance experience with the National Airspace System ("NAS") itself. Evolver asserts that:

. . . having NAS experience was a key factor in corporate experience scoring, and this was undisclosed in the SIR. In addition, the emphasis on capturing incumbent personnel, because they have detailed, hands-on experience supporting the NAS systems, reduces the risk of corporate experience on NAS systems. Thus[,] the [Center] has constructed an argument that introduces a biased scoring (NAS systems experience) of corporate experience that is not stated in Section M and utilizes only a portion of the Requirements section stated in the SOW to discount Evolver's experience.

Protest at 19. In its Agency Report, the Center states that "as the Statement of Work ("SOW") Section 1.2 explained in detail, we are seeking engineering support for one of

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the most unique, complicated, and custom-designed systems in the world designed to control aircraft.” *AR* at 5. As the ODRA emphasized in its Findings and Recommendations in the Initial Protest, “award[s] must be based on the stated evaluation criteria,” and AMS 3.2.2.3.1.2.3 is broadly worded to encompass any deviation from the evaluation criteria established in the solicitation.” *Protest of Evolver*, 09-ODRA-00495 (internal citations omitted). In the instant case, the ODRA finds that the Center’s reevaluation did not deviate from the stated award criteria.

As Center Counsel points out in the Agency Report, Section M, Factor 2 requires that the offeror “describe the company’s experience in providing **similar work** in size and scope *as that described in the SOW* to show competency to succeed in this effort.” *AR* at 4. (emphasis in bold added, emphasis in italic in original). While actual experience with the NAS itself was not an evaluation criteria, experience “similar” to “that described in the SOW” was a requirement. FF 13. The SOW explicitly describes the NAS as the requirement that past performance would be evaluated against. The SOW states:

1.2 Background

The National AirSpace System (NAS) is the air traffic controller's tool that enables the Federal Aviation Administration (FAA) to fulfill its mission to provide safe and efficient use of national airspace. The NAS is comprised of radar target, weather detection, flight data and supporting processing systems, air traffic processing and display systems within the EnRoute, Oceanic, flight service and terminal air traffic control environments, communications systems, flight plan data information systems, and NAS maintenance and support systems. The NAS is identified in the FAA configuration control document NAS-MD-001. FAA Order 1100.157A requires Operations Support Services to perform second-level maintenance engineering upon many NAS systems/subsystems. Personnel at NAS field facilities perform first-level NAS maintenance functions of on-site repairs, preventative maintenance, system certification, and generation of trouble reports and casefiles. . .

* * * *

1.2.1 Maintenance of Existing NAS Systems

The NAS contains many diverse systems, the age of which often presents obsolescence-driven supportability problems that require engineering solutions. Spare components with which to repair failed modules may be unobtainable and spare units may be depleted. Some systems contain software that was developed with peculiar languages, compilers and support platforms that are no longer used or supported. Supportable, functionally identical replacement items may need to be designed, developed, tested, acquired and implemented to keep the NAS functioning. Other NAS systems include more advanced technology and state-of-the-art hardware and software. New hardware, software and support items must be functionally interchangeable with the items being replaced to minimally impact existing performance standards and to minimize expensive requalification testing. Specific FAA requirements are identified through analysis of field facilities problem reports, and as NAS Configuration Control Decisions (CCD) for casefiles are approved for system implementation.

1.2.2 Baselineing and Maintenance of Capital Improvement Program Systems

The FAA is modernizing and improving the performance and supportability of the NAS to meet the agency's short and long-term goals. During the acquisition phase of modernization programs, selected contractors will produce deliverables pertaining to system-baseline descriptions, installation, and testing that will necessitate a considerable review and audit effort. The Operations Support Teams contribute to definitions of supportability requirements, monitors development, performs System Testing to ensure the system's supportability, receives the program library baselines, supports NAS integration/testing and commissioning, and then assumes level-2 maintenance responsibility.

While the Contracting Officer mentions the lack of direct NAS experience by Evolver and its subcontractor, it is explicit in the Determination that Evolver's rating as it pertained to the "Scope" of its experience under Factor 2 was based properly on a comparison of its prior work to SOW 1.2. FF 30. The Contracting Officer states in the Determination:

Evolver's *Corporate Experience* proposal, in total, clearly demonstrates *Size* through its management of several large

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contracts. As to *Scope*, the [DELETED] **contracts evidence a small degree of both Engineering and Second Level Maintenance, albeit not on systems as complicated as the NAS.** Evolver itself has never touched the NAS, and its subcontractor, [DELETED] has NAS experience only in SOS program support. In the words of SOW Section 1.2, Evolver has no knowledge whatsoever of the “*as-built construction of the hardware, software, or documentation . . . for each NAS system[.]*” Under these facts, I find that Evolver has demonstrated a minimal understanding of the requirements, and that there is a moderate to high risk to successful completion of this contract. Under the Technical Evaluation Plan, these findings warrant a grade of “Satisfactory.”

Id (emphasis in bold added, emphasis in italics in original). Evolver relies upon the Contracting Officer’s statement in the Determination’s conclusion that “Evolver itself has never touched the NAS.” *Protest* at 19. The statement by the Contracting Officer when viewed in context and weighed against the record as a whole, particularly the findings of the TET, FF 17, amounts to no more than a mere scintilla of evidence, and is not sufficient to support an ODRA finding that the Center deviated from the Solicitation criteria. *Multimax, Inc. v. Federal Aviation Administration*, 231 F.3d 882, 887 (D.C. Cir. 2000). The ODRA finds that Evolver’s protest allegations constitute a mere disagreement with the Center’s reevaluation of its and ECS’s past performance under Factor 2. *Protest of Universal Systems & Technology, Inc.*, 01-ODRA-00179.

(2) Price Reevaluation

In the Initial Protest, the ODRA found that the Center had deviated from the requirements of the AMS by concluding that Evolver’s proposed price was unreasonably low and posed a risk to successful contract performance without undertaking a cost analysis. *Protest of Evolver*, 09-ODRA-00495. As the remedy, the Administrator directed the Center to “request cost data, including to the extent necessary, the information required by AMS Clause 3.6.2-15 Evaluation of Compensation for Professional Employees (April 1996), from Evolver and perform a cost analysis in a manner consistent with these Findings and Recommendations.” 09-ODRA-509. Evolver challenges the results of the Center’s cost analysis pursuant to that reevaluation. *Protest* at 21. Evolver asserts that the Center, in its cost analysis of

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Evolver's proposed price: (1) used evaluation criteria not contained in the Solicitation, and (2) its determination lacks a rational basis for concluding that Evolver's prices are too low and represent a risk to successful performance. *Protest* at 21 and 25. For the reasons discussed below, the ODRA finds that the Center did not utilize undisclosed evaluation criteria, and that Evolver has not met its burden to prove that the Center's cost analysis lacks a rational basis.

(a) Unstated Evaluation Criteria

First, Evolver argues that the Center used undisclosed evaluation criteria because "incumbent capture was not an evaluation criteria." *Protest* at 27. As the ODRA has repeatedly stated, "award[s] must be based on the stated evaluation criteria," and AMS § 3.2.2.3.1.2.3 is broadly worded to bar any deviation from the evaluation criteria established in the solicitation." *Protest of Evolver*, 09-ODRA-00495 (internal citations omitted).

While Evolver asserts that "AMS Clause 3.6.2 – 15 was not part of the SIR," *Protest* at 27, as part of the remedy in the Initial Protest, the Administrator directed the Center to "request cost data, including, to the extent necessary, the information required by AMS Clause 3.6.2-15 Evaluation of Compensation for Professional Employees (April 1996)." 09-ODRA-509. The focus of the Center's cost analysis of Evolver's proposed price is that it poses a risk to contract performance by calling into question Evolver's ability to capture and retain incumbent personnel. FF 9. In the Determination, the Contracting Officer concludes:

Evolver has no experience with the NAS whatsoever, and its subcontractor brings only Program Management support. It has no knowledge of the "exact, as-built construction of the hardware, software, and documentation" as described in SOW 1.2. In fact, it argues a definition of the SOS-8 SOW that completely dismisses the highly technical maintenance and engineering that is the very core of the requirement. It relies heavily on the capture of incumbent personnel for the necessary knowledge, yet, at the same time, proposes to capture these people by slashing their salaries.

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We must also recognize that Evolver's lower "fringe" rate, when applied to its very low direct labor rates, will add further risk to recruitment and retention.

If any significant portion of the incumbents reject employment, either SOS-8 will fail or Evolver will be left to procure the necessary talent at rates which will quickly bankrupt the small company. Under any rational analysis this approach constitutes risk of the sort described in AMS clause 3.6.2-15, "Evaluation of Compensation of [P]rofessional Employees." I find the overall level of risk to be at least "moderate," and probably "severe," and that it impacts all three subfactors of Factor 1.

FF 9. This is consistent with the Administrator's direction and the ODRA's Findings and Recommendations. The ODRA held in the Initial Protest that the Contracting Officer under the AMS must first undertake a cost analysis to substantiate its determination that Evolver's pricing posed a risk to contract performance. *Protest of Evolver*, 09-ODRA-00495. Such a determination of risk is the focus of a cost analysis under the AMS, and is not an independent evaluation criteria. *Id.* Thus, the ODRA finds that Evolver's argument in this regard constitutes mere disagreement with the Contracting Officer's cost analysis, which supports her determination that Evolver's proposed prices poses a risk to performance. *Protest of Universal Systems & Technology, Inc.*, 01-ODRA-00179.

(b) Cost Analysis

Evolver next asserts that the Contracting Officer's cost evaluation is flawed because "she failed to analyze . . . the difference between the entire burden on direct labor, which is made up of fringe benefits, overhead, G&A, and profit." *Protest* at 26. Evolver further asserted that "[w]ithout a large enough sample size to determine a true average in the market, this data cannot claim to be an accurate representation of what it would take to hire a qualified individual." *Protest* at 27 and 32. In response, the Center asserts in its Agency Report that:

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Evolver's proposal relies on massive pay cuts in many labor categories that cannot be "offset by higher margins on other categories" as they claim. See protest page 28. This is what creates the risk and renders their price not fair and reasonable. What the Corrective Action found is that these prices will not permit Evolver to accomplish the work as it has proposed.

AR at 7. For the reasons discussed below, the ODRA finds that the Center's cost analysis had a rational basis, was consistent with the Administrator's direction and the ODRA's Findings and Recommendations, and that Evolver's arguments in the instant Protest amount to a mere disagreement with the source selection official's cost analysis.

The record shows that, pursuant to the direction of the Administrator, the Center requested from Evolver: cost data, any "studies, analyses, or surveys Evolver consulted in devising [its] price submission," and a "copy of Evolver's Defense Contract Audit Agency (DCAA) audit or rate check . . . that were utilized to develop Evolver's 4/16/09 revised price proposal." FF 32. The Center also requested from ECS: cost data and a "copy of ECS' [sic] Defense Contract Audit Agency (DCAA) audit or rate check . . . that were utilized to develop ECS' [sic] 1/28/09 price proposal." FF 33. On December 14, 2009, Evolver submitted a "Request for Cost Data Submission – Evolver Response." FF 40. The record also shows that the Center reviewed actual employee pay stubs from the incumbent SOS-6 contractor. FF 54. The Evaluation Team then reevaluated Evolver's proposed price by conducting a cost analysis based on the additional information. FF 56. The Evaluation Team conducted a cost comparison of both indirect and direct rates among Evolver, ECS, and the SOS-6 incumbent contractor. FF 58-59.

Using the cost information, the Contracting Officer:

[A]nalyzed the direct labor rate data from the incumbent SOS-6 contractor, and compared it to the ECS and Evolver cost/price proposals. The incumbent's SOS-6 information was derived from actual employee pay stubs and is represented in Column 2 of the attached mapping chart, Tab 8. Those SOS-6 direct labor rates are important for this analysis because they represent the base salaries

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of the incumbent personnel from which pay reductions under SOS-8 will be taken. . . .

FF 56. Based on her analysis of the cost data, the Contracting Officer concluded:

Analysis of Evolver's detailed cost breakdown data confirms that their direct labor rates do in fact pose a significant risk in recruiting, [sic] and retaining, especially in the highly populated categories of *Technical Specialist*. Most of Evolver's *Technical Specialist* rates impose dramatic cuts not only from the SOS-6 levels, but also from the current ECS SOS-8 rates. In some instances, Evolver proposes to capture the incumbent *Specialists* at pay cuts up to [DELETED] from what they were earning under SOS-6, and [DELETED] from what ECS offered. . . .

Id.

The record shows that even from the submission of its Response, there was disagreement between Evolver and the Center with regard to the analysis of the cost data. Evolver admitted in its Response:

[W]e recognize that some of the incumbent workforce may be earning more or less than the direct labor we bid for their particular category. This is normal and expected for T&M contracts with large incumbent workforces. However, we are confident that we have properly priced each category and that Evolver will be able to hire the incumbent workforce and attract and retain new hires over the life of the contract.

FF 41 (emphasis added). The Center concluded in its own analysis that:

The total number of *Technical Specialist* hours shown above is 1,049,222. When the difference between ECS' [sic] and Evolver's bid rates across all 6 levels is multiplied by 1,049,222, the total *dollars* that Evolver proposes to cut from these salaries is [DELETED]. Under any reasonable assessment, this is risky for a company that is heavily dependent on these individuals. Evolver has claimed that it does not need to make a profit on every category, and that some losses can be made up for by profits in others, or carried in its indirect rate or fee pools. It has also suggested that in a depressed job market and in an isolated setting such as Southern New Jersey, these people have no choice. I disagree. The six categories above account for potential losses on

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a scale that cannot be carried by any small company if the incumbent “rejection rate” forces Evolver to raise its offers to capture the expertise. I also find that the “no place else to go” argument is based on assumptions that carry tremendous risk. . . . The current contractor employee population exceeds 1500, and will grow significantly when the Agency’s *Next Generation Program* support contracts are awarded this year. . . .

FF 57 (emphasis in original). The ODRA finds that the Center’s cost analysis is rationally based and consistent with the Findings and Recommendations. Evolver’s assertion that, according to its own pricing strategy, that it can capture the incumbent workforce is speculative at best and constitutes a mere disagreement with the Center’s conclusion that the proposed rates pose a risk to contract performance. *Protest of Universal Systems & Technology, Inc.*, 01-ODRA-00179.

The Protester bears the burden of proof to demonstrate that the award decision lacked a rational basis or was otherwise improper. 14 C.F.R. § 17.37(j); *Protest of Carahsoft/Avue*, 08-TSA-034. To the extent that Evolver is arguing that the Center’s cost analysis lacks a rational basis because it did not take into account all of Evolver’s cost data, the ODRA finds that Evolver has not met its burden. *Id.* The record demonstrates that Evolver provided a wide variety of cost data that it used in its pricing strategy, which included salary survey data from [DELETED], a company that solicits, analyzes, and publishes reports on compensation data; a survey of incumbent compensation; and the results of an analysis of advertised jobs in the local market. FF 50. However, this is merely the data used to support Evolver’s proposed price. FF 40-53. Moreover, Evolver’s Response concedes that the [DELETED] compensation profiles do not accurately match the SOS-8 requirements for the NAS. FF 50. The Response states:

Appendix B contains the results of our analysis of these surveys as they apply to the SOS-8 labor categories. Of the 48 labor categories included in SOS-8, a) [DELETED] *did not have rates from the survey that accurately matched SOS-8 requirements*; b) [DELETED] salaries from the survey were lower than the Evolver proposed salary (by an average of [DELETED]); and c)

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[DELETED] salaries from the survey were higher than the Evolver proposed salary (by an average of [DELETED]). . . .

The other 3 survey salaries that were more than [DELETED] per year higher than what Evolver proposed were in the area of Computer Scientist. *In general, the salaries listed for Computer Scientists in the [DELETED] were higher than the data that Evolver found from other sources (incumbent data and job postings). Evolver believes that this is attributable to the fact that the [DELETED] contains data for computer scientists performing new design and development of advanced systems, whereas the incumbent and job posting salaries used were primarily for software operations and maintenance efforts on these types of systems, which typically are more long-term, stable engagements that characteristically do not pay as much as leading edge development jobs. . . .*

Id (emphasis added). The same goes for the advertised jobs survey. Evolver states in its Response that it “performed internet searches to identify then current job openings in the southern New Jersey area similar in nature to the SOS-8 labor categories.” FF 52. However, Evolver again does not provide a connection between these jobs in the Southern New Jersey market and the specific market for government contractors with NAS experience, or even how these positions relate to SOW § 1.2. Thus, the ODRA finds that Evolver has not met its burden to demonstrate the Center’s failure to use such data in its cost analysis lacked a rational basis. *Protest of Carahsoft/Avue*, 08-TSA-034.

IV. Conclusion

For the foregoing reasons, the ODRA concludes that the corrective action taken by the Center pursuant to the contract in question was consistent with the direction of the Administrator and the ODRA’s Findings and Recommendations, and is rationally based and supported in the record. The ODRA therefore recommends that the Protest be denied in its entirety.

C. Scott Maravilla
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FAA Office of Dispute Resolution for Acquisition

APPROVED:

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