

PUBLIC VERSION

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

FINDINGS AND RECOMMENDATIONS

Matter: **Protest of Adsystech, Inc.**

Under Solicitation No. DTFAWA-07-R-00024

Docket No.: 09-ODRA-00508

Appearances:

For the Protester: Daniel S. Koch, Esq., Roy I. Niedermayer, Esq.,
 of Paley Rothman Goldstein Rosenberg & Cooper
 Chartered

For the FAA Program Office: Gregory C. Carter, Esq.

For the Intervener: Kathleen M. Thompson

I. Introduction

On December 9, 2009, Adsystech, Inc. (“Adsystech”) filed a post-award bid protest (“Protest”) with the Federal Aviation Administration (“FAA”) Office of Dispute Resolution for Acquisition (“ODRA”). The Protest challenged the award of contract number DTFAWA-09-D-00056 to Jerry Thompson and Associates, Inc. (“JTA”). On February 8, 2010, Adsystech filed a Supplemental Protest (“*Supp. Protest*”) based on materials provided by the FAA’s Headquarters (“Product Team”) as part of the Agency Response (“AR”) to the Initial Protest. Collectively, the Protest and the Supplemental Protests are referenced as the “Protests.”

PUBLIC VERSION

The Protest includes eight counts, but the various counts mix theories and overlap in places. Generally speaking, Counts One, Two, Seven, as well as parts of Four, and Six challenge the administration of the competition. Counts Three, Five, Eight, and the remaining parts of Counts Four and Six challenge the actual evaluation results. Count One complains that the duration of the procurement – almost two years – caused errors in the evaluation. The Supplemental Protest, filed with the assistance of counsel, adds three counts. Count Nine alleges that the award to JTA violates Acquisition Management System (“AMS”) Clause 3.6.1-7, “Limitations on Subcontracting Clause.” Count Ten alleges misconduct by the evaluators, who allegedly raised or lowered evaluation scores to ensure that a subcontractor to the awardee would be available to the FAA. Finally, Count Eleven alleges that FAA supervisory officials pressured the evaluators to favor the awardee in selecting sample tasks and during the evaluation.

The Product Team’s overall position relies on a request to dismiss Counts Nine through Eleven, conclusory statements in declarations, and narrow aspects of the overall issues. The Product Team, however, is constrained by the loss of crucial documentation of the evaluation and award recommendations.

Although granted status as an Intervenor, JTA did not file comments on the Agency Report. JTA also did not file a pleading addressing the Product Team’s dismissal request.

For the reasons discussed herein, the ODRA finds that the record in this case does not show a rational basis for the evaluations conducted under Phases 1 and 2 of this competition. Adsystech established under Counts Four and Five that the debriefing failed to articulate a rational basis for the evaluation. Further, the sparse documentation produced in the Agency Response, even after direction from the ODRA to provide specific supplements, confirms that the record contains no documented rational basis for the evaluation and ultimate award to JTA. The ODRA therefore recommends that the Protests be sustained in part and denied in part.

PUBLIC VERSION

As discussed more fully in the Conclusion of these Findings and Recommendations, the ODRA recommends that a new Contracting Officer and Evaluation Team be appointed in order to conduct a new competition under appropriate revisions to the Solicitation. Upon award of the new contract, the current contract with JTA should be terminated for the convenience of the Government.

II. Findings of Fact

A. The Solicitation as Amended

1. On November 23, 2007, the Product Team issued Solicitation DTFAWA-07-R-00024 (“Solicitation”), which sought proposals for “Financial Analysis and Support Services” (FASS). *AR* Tab 3, Section B at 1; Tab 4 at 1.

2. The Statement of Work (“SOW”) generally described the work as follows:

The Air Traffic Organization (ATO) of the Federal Aviation Administration (FAA) is responsible for business and financial management oversight, among its many duties and responsibilities. It has responsibility of the facilities and equipment (F&E) appropriation exceeding approximately \$2.5 billion annually, and the Research, Engineering, and Development (R,E&D) appropriation exceeding \$100 million annually. FAA Lines of Business (LOBs) will require resources and support experienced in the following: program, business, and technical management; budget and financial development; systems engineering support; cost accounting, accounting system (DELPHI), budget execution tool (BET), labor distribution and reporting (LDR); Cru-x labor, time and attendance system reporting; other financial systems and reporting, financial and business management process improvement studies and analyses; cost/benefit analyses; earned value management (EVM); acquisition planning support; applications development and maintenance support using ORACLE as it applies to Federal financial systems and management, and administrative support. This required analysis support is being managed under the FAA program name of Financial Analysis and Support Services (FASS).

AR Tab 4 at § C.1.0.1.

PUBLIC VERSION

3. The resulting contract would be performed on a cost plus fixed fee basis, and was designated as a set aside for award only to a small business. *AR* Tab 4, Section B at 1; Section I at 1 (*incorporating* AMS Clause 3.6.1-1, “Notice of Small Business Set-Aside (July 2006)”).
4. The Solicitation, as issued initially, contained AMS Clause 3.6.1-7, “Limitation on Subcontracting (August 1997),” which in relevant part states:

3.6.1-7 Limitations on Subcontracting (August 1997)

By submission of an offer and execution of a contract, the Offeror/Contractor agrees that in performance of the contract in the case of a contract for:

(a) Services (except construction). At least 50 percent of the cost of contract performance incurred for personnel shall be expended for employees of the prime contractor.

(b) Supplies (other than procurements from a regular dealer in such supplies). The prime contractor shall perform work for at least 50 percent of the cost of manufacturing the supplies, not including the cost of materials.

...

AR Tab 3, Section I, at 18.

5. At the time the Solicitation was released, AMS Clause 3.6.1-7, “Limitation on Subcontracting (August 1997),” was a mandatory clause to be used in AMS Contracts of this nature. Specifically, the prescription for this clause stated:

PRESCRIPTION:

Shall be included used [sic] in SIRs and Contracts if any portion of the requirement is to be set aside for small businesses, very small businesses, or SEDBs.

AR Tab 49.

6. Amendment 000001, with an effective date of January 10, 2008, made several changes, including deleting AMS Clause 3.6.1-7, “Limitation on Subcontracting

PUBLIC VERSION

(August 1997). *AR* Tab 4 at 2. In its place, the Product Team added special requirement H.18, which states in relevant part:

H.18 Limitations on Subcontracting

By submission of an offer and execution of a contract the Offeror/Contractor agrees that in performance of the contract in the case of a contract for:

(a) Services (except construction). At least 51 percent of the cost of contract performance incurred for personnel shall be expended for eligible small businesses as identified by the NAICS size standard associated with this procurement.

(b) Supplies (other than procurements from a regular dealer in such supplies). The prime contractor shall perform work for at least 51 percent of the cost of manufacturing the supplies, not including the cost of materials.

...

AR Tab 4, at § H.18. The intent behind these changes, according to the Contracting Officer, was to promote competition. *AR* Tab 46, [DELETED] *Decl.* ¶¶ 2-4.

7. The Contracting Officer coordinated her actions pertaining to the Limitation on Subcontracting clause with the Small Business Office (*AR* Tab 46, [DELETED] *Dec.* ¶ 4) and with counsel (*AR* Tab 48), but not with the FAA's Acquisition Executive. The ODRA therefore finds that the FAA's Acquisition Executive did not approve the deletion or modification of AMS Clause 3.6.1-7, "Limitation on Subcontracting (August 1997)."
8. Amendment 000002 contained a list of questions posed by interested parties with answers from the Product Team. Question number seven stated,

#7: **Reference:** L.17 (Volume 4 - Oral Presentation Briefing Package).

Question: Please verify as to whether the Oral Presentation will be videotaped. It is our opinion that in order to ensure that material stated during the presentation is accurately evaluated that a living record of the presentation be available to evaluators, This is specifically of

PUBLIC VERSION

importance when evaluators what [sic] to ensure/clarify what they heard during the presentation not just what is written on presentation slides.

Response: At present, it is the FAA [sic] intent to Videotape presentations made during Phase 2 of this procurement.

AR Tab 5 at 2.

9. Amendment 000003, issued on February 14, 2008, amended and repaginated sections L and M of the Solicitation. *AR* Tab 6. The final amendment, number 000004 issued on February 20, 2008, required technical and cost proposals to be submitted on February 28, 2008. *AR* Tab 7.

10. Section L.3 of the Solicitation, as amended, established a two-phase evaluation process. It stated:

Offeror's [sic] proposals will be evaluated in two Phases. The evaluation factors for each phase of the evaluation are specified in Section M.2., Evaluation Criteria and the Basis for Award. After Phase 1 of the evaluation, the Contracting Officer, after consultation with the team, will make the final determination on which offerors proceed to Phase 2 of the evaluation.

Based on information submitted by the Offeror, orally or in writing, if the Offeror does not have a reasonable chance of receiving this award, then that Offeror will be eliminated from further consideration. Any Offeror eliminated from further consideration will be officially notified in writing. Offerors that demonstrate a reasonable chance of receiving this award after Phase 1 will be provided with sample tasks that will be used to prepare for Phase 2 evaluation.

The two phases of the evaluation process are the following:

Phase 1: Technical Proposal, Cost Proposal and Past Performance
Phase 2: Oral Presentation

Final award of the Financial Analysis and Support Services (FASS) contract will be based on the combined results of Phase 1 and 2 Evaluations, as well as the total evaluated cost and fixed fee.

PUBLIC VERSION

Individual teams will assembled [sic] to conduct separate evaluations for each of the Offerors' submissions, i.e. a Technical Proposal and Past Performance Team, an Oral Presentation Team, and a Cost Team. Individuals from the Cost Team will not be permitted to participate on any of the other teams, and the Cost and Price Proposals will not be revealed to any of the other evaluation team members during the evaluation process.

The individual teams will evaluate Offerors' submissions according to the evaluation factors specified In Section M.2, Evaluation Factors. An assessment of the risks inherent in each offeror's proposal will also be provided to the Source Selection Official. At the conclusion of Phase 2 of the evaluation, individual teams will compile a report of their evaluations and present their findings to the Source Selection Official (SSO), who will then select the offer providing the greatest overall value to the FAA.

AR Tab 6 at 92-93.

11. Section M.2 of the Solicitation, as amended, described the evaluation criteria:

M.2 EVALUATION CRITERIA AND THE BASIS FOR AWARD

Award will be made to the responsible offeror whose proposal, conforming to the SIR provides the best value to the Government. The offeror's technical proposal and oral presentation are considered to be significantly more important than the cost proposal. Although cost is the least important evaluation factor, it is an important factor and should not be ignored. The degree of its importance will increase with the degree of equality of the technical proposals in relation to the other factors on which selection is to be based. Furthermore, costs will be evaluated on the basis of cost realism. Cost realism pertains to the offeror's ability to project costs that are realistic and reasonable and indicate that the offeror understands the nature and scope of work to be performed.

The evaluation factors and sub-factors are listed below in descending order of importance in Section #5, Basis of Award, below. The procurement will involve 3 distinct Phases:

- Technical Approach (Phase 1)
- Oral Presentations on Sample Tasks (Phase 2)
- Total Evaluated Cost Proposal
- ...

PUBLIC VERSION

AR Tab 6 at 116. This lengthy clause then describes six detailed evaluation criteria for Phase 1. *Id.* at 117-18. Factors One through Six under Phase 1 each contained between up to five sub-factors, for a total of sixteen sub-factors under Phase 1. *Id.* Similarly, Phase 2 had three evaluation factors containing a total of ten sub-factors. *Id.* at 119.

12. Clause M.2 also described the intended basis for award:

4. Basis of Award

The Government reserves the right to make award on initial proposals, without requesting best and final offers. Therefore, each offeror is urged to submit their best proposal.

Final award of the FASS contract will be based on the combined results of the Phase 1 and 2 evaluations, as well as the total evaluated cost and fixed fee. Phase 2 results will be of significantly greater weight than Phase 1. The rank order of importance of all technical factors are listed in descending order of importance, and are:

1. Phase 2 Results
2. Phase 1 Results

These combined technical considerations have greater weight than the evaluated total estimated cost and fixed fees in the determination of which proposal is most advantageous to the FAA.

AR Tab 6 at 120.

13. Proposals were due on February 28, 2008. *AR* Tab 7 (Amendment 000004).

B. The Evaluation Plan

14. The 38-page Evaluation Plan established a complex, highly detailed evaluation process, and set June 30, 2008 as the goal for award of the FASS contract. *AR* Tab 10 at 2. The plan discussed the two-phased evaluation scheme. It required an evaluation of the technical proposals submitted under Phase 1, and stated, “All pertinent aspects of the evaluation will be documented via the guidance and forms provided in this plan, and provided to the Contracting Officer (CO).” *Id.* Offerors that were not eliminated under Phase 1 would be provided with a list of

PUBLIC VERSION

- weaknesses or deficiencies, along with sample tasks to discuss in Phase 2. *Id.* They were to respond in writing to the weaknesses and deficiencies, and provide briefing slides to use at an oral briefing. *Id.* The plan reiterated, “Again, all pertinent aspects of the evaluation for Phase 2 will be documented via the guidance and forms provided in this plan and provided to the CO.” *Id.*
15. The Director of Strategy and Performance Analysis, AJP-2, served as the Source Selection Official (“SSO”). *AR* Tab 10 at 4. [DELETED] served as the “Acquisition Manager,” and led the evaluation team of four other evaluators. *Id.*
16. The Evaluation Plan had a section entitled, “Duties and Responsibilities.” *AR* Tab 10 at 6-7. This section specifically required the technical evaluators to “complet[e] individual worksheets and assign[] an adjectival rating for the evaluation factors,” and to “submit[] documentation to substantiate findings for each Offeror evaluated.” *Id.* at 7.
17. The Evaluation Plan had a section entitled, “Detailed Evaluation Procedures.” The evaluators were permitted to make notes on their copies of proposals, but were to “take great care to assure that key findings, issues, strengths, or weaknesses are also transcribed on their score sheets for individual offerors.” *AR* Tab 10 at 8. The plan included provisions for documenting minority viewpoints. *Id.* at 9.
18. The Product Team was also required to keep the evaluation materials secure. Proposals, the evaluation sheets, and draft reports were to be kept in a locked room. *AR* Tab 10 at 8-9. Every team member was responsible for “ensuring that due precaution [was] taken to safeguard all notes and proposal information bearing on this evaluation,” and “assisting in maintaining strict accountability of all documentation.” *Id.* at 6. Each evaluator was charged to “maintain strict accountability for all documentation used and created by the evaluator.” *Id.* at 7.

PUBLIC VERSION

19. The Evaluation Plan warned in boldface, capital letters:

NOTE TO EVALUATORS: ALL SCORING SHEETS WILL BECOME PART OF THE OFFICIAL CONTRACT FILE, AND INPUTS WILL BE USED IN THE SELECTION OF AN OFFEROR FOR AWARD OF A CONTRACT AND DEBRIEFING OF UNSUCCESSFUL OFFERORS. NARRATIVE COMMENTS ARE IMPERATIVE AND MUST BE CLEAR AND CONCISE FOR STRENGTH, WEAKNESSES, DEFICIENCIES AND RISKS.

AR Tab 10 at 9.

20. The Phase 1 evaluation consisted of six factors, broken down into sixteen sub-factors. *AR* Tab 10 at 10-12; Tab 6 at 117-118. The Evaluation Plan contained a blank, six-page worksheet that the individual evaluators were to use for Phase 1, for each proposal he or she reviewed. *AR* Tab 10 at 19-24. The Evaluation Plan stated,

Evaluators shall record strengths, weaknesses, deficiencies, or ambiguities on their provided worksheets, or additional blank pages. An assessment of risks that the Offeror may present in support of the Statement of Work should be addressed for each evaluation factor by the evaluation team. This documentation is extremely important, as this information will be accumulated for each factor and used to establish an overall adjectival and numerical rating for each. Care should be taken to ensure that the written comments are consistent with the adjectival and numerical ratings assigned. For example, if an adjectival rating of Exceptional is given to a factor, there should be comments concerning the strengths identified that support a very high rating. Likewise, an adjectival rating of Unacceptable should result in the identification of deficiencies, and/or weaknesses that resulted in an extremely low rating. Continuation sheets may be added to the worksheets if necessary.

Id. at 12.

21. The Phase 2 evaluation consisted of three factors, broken down into ten sub-factors. *AR* Tab 10 at 29-30. The Evaluation Plan contained blank, three-page score sheet for the Phase 2 oral presentation. *Id.* at 34-36. As with Phase 1, the Evaluation Plan required,

Each evaluator will be provided worksheets for each of the three evaluation factors and continuation pages for additional notes. Evaluators shall record strengths, weaknesses, deficiencies, risks, or ambiguities found in the review on their worksheets along with an adjectival rating. This documentation of strengths, weaknesses, deficiencies, risks, and ambiguities is extremely important, as this

PUBLIC VERSION

information will be accumulated for each factor and used to establish an overall adjectival and numerical rating for each. Care should be taken to ensure that the written comments are consistent with the adjectival and numerical ratings assigned. For example, if an adjectival rating of Exceptional is given to a factor, there should be comments concerning the strengths identified that support a very high rating. Likewise, an adjectival rating of Unacceptable should result in the identification of deficiencies, and/or weaknesses that resulted in an extremely low rating. Continuation sheets may be added to the worksheets if necessary.

Id. at 30. The Phase 2 oral presentations were to be videotaped, and have three copies produced for each presentation. *Id.* at 29.

22. The Evaluation Plan also required a cost reasonableness analysis to be conducted. *AR* Tab 10 at 37. The cost evaluation is not an issue in this Protest.

C. Phase 1 Evaluation

23. Nine offerors, including both Adsystech and JTA, submitted timely proposals by the February 28, 2008 deadline. *AR* Tab 37, [DELETED] *Decl.* at ¶ 7.
24. The Technical Evaluation team spent approximately seven months reviewing the proposals, and delivered its Phase 1 Technical Proposal Evaluation Report to the Contracting Officer (“CO”) on October 9, 2008. *AR* Tab 11 at 4; Tab 37, [DELETED] *Decl.* ¶ 10. The report, however, is dated December 19, 2008. *AR* Tab 11 at 1. The evaluators’ signatures on the report are dated January 14, 2009. *Id.* at 1-2.
25. The Technical Proposal Evaluation Report references an Attachment A “for consensus scoring.” *AR* Tab 11 at 13. No Attachment A is in the document, but there is a table containing the “Final weighted overall scores for Phase 1:”

Contractor	Weighted Score
A	8.1
B	4.6
C [JTA]	[DELETED]
D	6.5

PUBLIC VERSION

E [Adsystech]	[DELETED]
F	7.6
G	8.2
H	8.0
I	7.6

- Id.* at 14. Attachment B, “Contractor Strengths and Weaknesses,” also referenced on page 13, actually is contained in the document. It has narratives of the strengths and weaknesses for each offeror. While the narratives address each factor, numerical scores are missing, and there is no narrative for the sub-factors contained in the Evaluation Plan and the Solicitation. The report does not use the same format as the Phase 1 score sheets, which closely associate the evaluator’s numeric rating, the narrative, and the evaluation criteria. *Compare AR Tab 11, with AR Tab 42.*
26. Only [the Acquisition Manager]’s Phase 1 Technical Proposal Evaluation Score Sheets are in the record. *AR Tab 42.*
27. Offeror B, with lowest score in Phase 1, was down-selected from the competition. *AR Tab 30 at 2.* Both Adsystech and JTA advanced and received the sample tasks for Phase 2. *AR Tab 12, and Tab 37, [DELETED] Decl. ¶ 11.*
28. On March 27, 2009, the CO wrote to Adsystech, Inc. to[DELETED]. *AR Tab 19. [DELETED]. Compare AR Tab 11, at 24-25, with Tab 19. [DELETED].*
29. By email dated March 30, 2009, [DELETED]. *AR Tab 21. [DELETED]. Id.* No response from the FAA is in the record.
30. On April 3, 2010, [DELETED]. *AR Tab 21.*
31. On May 12, 2009, the Evaluation Team issued a document entitled, “Addendum: Offerors Responses to Weaknesses and FASS Evaluation Team Rescoring.” *AR Tab 24.* Addressing six separate offerors, across five factors and sixteen sub-

PUBLIC VERSION

factors, the document is only one and a half pages long (excluding the title page). Rather than showing numerical changes in the evaluations of the sub-factors, the Evaluation Team provided a table with a legend to summarize their evaluation:

Blank = No Weaknesses found

NC = Weaknesses Found – No change to Original Score

SC = Weaknesses Found – Change to Original Score

Phase 1 Technical Approach Review Rescore Results

	A	D	E	F	G	H
Factor 1						
Subfactor 1			[DELETED]		NC	SC
Subfactor 2					SC	
Subfactor 3		SC				
Factor 2						
Subfactor 1	NC		[DELETED]		NC	
Subfactor 2	NC	SC		SC	NC	
Subfactor 3		SC		SC		
Subfactor 4						
Subfactor 5				SC		
Factor 3						
Subfactor 1		SC				
Subfactor 2						
Subfactor 3						
Factor 4						
Subfactor 1	NC		[DELETED]			
Subfactor 2						
Subfactor 3		SC				
Factor 5						
Subfactor 1						
Subfactor 2						

Id at 2. The Evaluation Team also provided a table that showed AdsysTech's overall, final Phase 1 rating across all factors and sub-factors [DELETED]. *Id.* at 2-3. In fact, the document is missing both the narrative explanations and the actual revised scores for the factors and sub-factors.

32. No document in the evaluation record explains the rationale of the rescoring. *AR passim*. [DELETED]. *AR* Tab 38, [DELETED] *Decl.* ¶ 23.

33. The record includes a spreadsheet listing the original scores and the revised scores, at the sub-factor level, broken down by evaluator. No rationale is

PUBLIC VERSION

provided for the scores in the spreadsheet, either at the factor or sub-factor level. *See AR Tab 42.*

D. Phase 2 Evaluation

34. The eight remaining offerors submitted slides in advance of their oral presentations on February 13, 2009. *AR Tab 12 and 14.*
35. The Product Team used a random process to schedule the order of the oral presentations. Each offeror's identification code was placed on a separate slip of paper, placed in a box, and drawn out to determine the order of presentation. *AR Tab 38, [DELETED] Decl. ¶ 7.* The Product Team scheduled one presentation per day because the presentations could last up to three hours, not including the time to evaluate the presentation. *Id. at ¶ 14.*
36. Adsystech's oral presentation was scheduled for February 23, 2009. *AR Tab 12; see also Tab 37, [DELETED] Decl. ¶ 15.*
37. The Product Team has provided conflicting evidence as to when JTA's oral presentation actually occurred. The CO indicates that JTA was scheduled for March 5, 2009. *AR Tab 37, [DELETED] Decl. ¶¶ 15 and 16.* She also indicates that a few scheduled dates were adjusted to accommodate the needs of other offerors, but that the date for JTA was not changed. *AR Tab 37, [DELETED] Decl. ¶ 13.* Notably, the record also has a table showing presentations schedules, but it shows in handwritten notation that JTA's date was moved from March 2, 2009 to March 5, 2009. *AR Tab 13.* [The Acquisition Manager]'s Declaration contains conflicting information wherein it indicates that the oral presentations ended on March 4, 2009. *See AR Tab 38, [DELETED] Decl. ¶ 21.L; see also Tab 25 at 3 (the "Oral Presentation Evaluation Report").* Thus, the Product Team apparently does not agree as to when JTA actually made its oral presentation.

PUBLIC VERSION

The ODRA concludes, however, that JTA's presentation occurred sometime after Adsystech's presentation.

38. The Protester alleged that the Product Team did not videotape the presentations, despite the representation in Amendment 00002 to the Solicitation. *Protest* at 6. No videotape recording of the presentations is contained in the record. The ODRA finds that no videotape was made of either JTA's or Adsystech's oral presentation.
39. The Agency Response contains the briefing slides that Adystech provided. *AR* Tab 51.¹
40. The record includes blank lists of "expectations" of what would be included in the oral presentations. *AR* Tab 14. These were prepared by subject matter experts, and were to be used by the evaluators during the presentations. *AR* Tab 38, [DELETED] *Decl.* ¶¶ 12 and 13.
41. The Oral Presentation Evaluation Report, dated May 2009, provides "final overall scores" in tabular form:

Phase 2 Oral Presentation Results	
Contractor	Score
A	6.2
C [JTA]	[DELETED]
D	8.8
E [Adsystech]	[DELETED]
F	6.2
G	5.5
H	6.4
I	7.2

AR Tab 25 at 8.

¹ The Product Team provided this document in correspondence faxed to the ODRA on March 9, 2010, and recognized that it was inadvertently omitted from the Agency Response. The ODRA hereby incorporates the document into the Agency Response, and designates it as Tab 51.

PUBLIC VERSION

42. The Oral Presentation Evaluation Report includes a table for each offeror that assigns an overall rating for each task order, followed by a very brief set of comments. The tables for each offeror are one page or less. Adsystech's table is typical in format, and shows:

Contractor E [Adsystech]			
Task Order	Description	Average Score/Rating	Comments
1	Reimbursables	[DELETED]	[DELETED]
2	Business Process Reengineering	[DELETED]	[DELETED]
3	Capitalization	[DELETED]	[DELETED]
Overall	Rating for Phase 2 Portion	[DELETED]	

AR Tab 25 at 13. The “comments” in the table are the only narratives for the actual scores. Notably, these comments are not associated with the three

PUBLIC VERSION

evaluation factors described in the Evaluation Plan and the Solicitation. Furthermore, these comments are not broken down by the ten sub-factors. Nowhere in the report are the scores for the factors and sub-factors shown for the each of the three tasks discussed at the oral presentations. *Id.*

43. The record does not contain any of the evaluators' score sheets or expectations lists that were to be used during the evaluation process for Phase 2.
44. Tab 42 does contain a table called "Stage 2 – Score Results." It reveals scores at the factor and sub-factor levels assigned by each evaluator for each of the three tasks. It does not, however, have any narrative showing the rationale used to assign the numeric scores. *AR* Tab 42.

E. Final Evaluation Summary and Award

45. The Phase 1 and Phase 2 evaluations were summarized in a combined report submitted to the CO in May 2009, but not signed by the Product Team members until August 18 and 19, 2009. *AR* Tab 26.
46. A table in the combined report summarized the evaluation results as follows:

Contractor	Phase 1 Technical Approach Score	Phase 1 Technical Approach Rescore	Phase 2 Oral Presentation Score	Final Score Phase 1 Technical Approach & Phase 2 Oral Presentation Combination
A	8.1	8.1	6.2	6.97
B	4.6	N/A	N/A	N/A
C [JTA]	[DELETED]	[DELETED]	[DELETED]	[DELETED]
D	6.5	6.6	8.8	7.92
E Adsystem	[DELETED]	[DELETED]	[DELETED]	[DELETED] ²
F	7.6	7.6	6.2	6.76
G	8.2	8.2	5.5	6.61
H	8.0	8.0	6.4	7.04
I	7.6	7.6	7.2	7.36

² [The Acquisition Manager] acknowledges a mathematical error for Adsystem's weighted Final Score. The proper result should have been [DELETED]. *AR* Tab 38, [DELETED] *Decl.* at ¶ 20. The error is immaterial.

PUBLIC VERSION

- AR* Tab 26 at 6. The weighting represents an allocation of 40% to Phase 1, and 60% to Phase 2.
47. The combined report did not elaborate on the evaluation at the factor or sub-factor level. It summarized its conclusions by stating:
- [DELETED]
- AR* Tab 26 at 6-7 (footnote references omitted). There is no specific discussion of Adsystem's evaluation. *Id.*
48. On June 4, 2009, the CO recommended selecting JTA after considering both the technical and the cost evaluations. *AR* Tab 27 at 3.
49. In July 2009, the Source Selection Officer ("SSO") relied on the technical reports and recommendations to select JTA for award. *AR* Tab 29 at 3-4.
50. On August 28, 2009, the CO sent requests to both Adystech and to JTA asking them to extend their offer acceptance period to September 21, 2009, at the same terms and conditions, including price. *AR* Tab 31 and 32. Both companies promptly signed the requested extensions on August 31, 2009. *Id.*
51. The final results of the technical and cost evaluations are summarized in the following table:

Offeror	Technical Evaluation (<i>AR</i> Tab 26 at 8)	Evaluated Price (<i>AR</i> Tab 30 at 3)
C (JTA-Ascent)	[DELETED]	\$(DELETED)
D	7.92	43,336,127
I	7.36	52,184,326
E (Adsystem)	[DELETED] (corrected)	[DELETED]

52. On September 21, 2009, the FAA awarded contract number DTFAWA-09-D-00056 to JTA. *AR* Tab 34.

F. The Debriefing

53. On September 22, 2009, Adsystech requested a debriefing. *AR* Tab 36.

54. The debriefing was held on December 2, 2009. *Protest* Exh. 12.

55. Exhibit 12 to the Protest contains the Product Team's slides used at the debriefing. *Protest* Exh. 12. Pages 1 through 4 contained general information about the briefing process. *Id.* Pages 5 through 20 provided evaluation criteria from the Solicitation plus additional information from the Evaluation Plan. *Id.*

56. Pages 21 through 26 of the slides discuss the evaluation of Adsystech's offer in Phase 1. *Protest* Exh. 12 at 21-26. While brief summary narratives were provided,³ the individual scores at the factor and sub-factor levels were not provided. *Id.* Adsystech was informed that its overall Phase 1 score was [DELETED], and rescored to [DELETED] after the Product Team received responses to the disclosed weaknesses. *Id.* at 27.

57. Regarding Phase 2, one slide indicates that Adsystech scored a [DELETED] for its oral presentation. *Protest* Exh. 12 at 28. There is no discussion regarding the basis for this score, or the scores for the three factors and ten sub-factors for each of the three sample tasks. *Id.*

58. The debriefing slides reveal only that Adsystech was rated overall as "FAIR" with a final Phase 1 score of [DELETED]. *Protest* Exh. 12 at 27.

59. The briefing slides do not contain any information regarding the evaluation and rating of the successful proposal from JTA. *Protest* Exh. 12.

³ The text was identical to those in the Technical Proposal Evaluation Report found in *AR* Tab 11.

PUBLIC VERSION

60. The SSO Award Decision, the Cost & Price Analysis Report, and the Technical Evaluation Report – Phase 1 & 2, all provided to Adsystech at the debriefing, were so heavily redacted that they failed to provide any further relevant information. *See Protest* Exhibits 10, 11, and 13.

G. The Protests

61. Adsystech filed its Initial Protest containing Counts One through Eight on December 9, 2009. *Protest* at 1.

62. Adsystech filed a Supplemental Protest containing Counts Nine through Eleven on February 8, 2010. *Supplemental Protest* at 1.

63. Adsystech relied on the February 8, 2010 Affidavit of [Former Employee] to support its Supplemental Protest. [Former Employee] spoke with Mr. Koch, Adsystech's counsel, on January 28, 2010. *See Adsystech Response to Request to Dismiss*, Attachment 1.

64. [Former Employee]'s Affidavit indicates that she is a former FAA employee who had a role in drafting the statement of work for this Solicitation and preparing the independent government cost estimate. *Adsystech Comments*, [DELETED] *Aff't* ¶ 3. [Former Employee] raises several issues regarding the actions of various FAA personnel who were involved in this procurement, or whose offices would benefit from the resulting contract. Generally speaking, she includes:

- Assertions that a senior official, whose organization would use the services under this contract, is a close friend of an individual working for [DELETED], one of JTA's subcontractors (*Id.* at ¶ 10);
- Indications that the award was being steered through undue influence toward any offeror using [DELETED] as a subcontractor (*Id.* at ¶¶ 12-15, 18, and 25);

PUBLIC VERSION

- Suspensions regarding the evaluation of offerors' ability to comply with subcontracting limitations (*Id.* at ¶¶ 16-21); and
- Statements that suggest improper negotiations for post-government employment (*Id.* at ¶ 24).

Aside from noting the allegations in [Former Employee]'s Affidavit, the ODRA *does not* make findings regarding her specific allegations. As analyzed in the Discussion, *infra*, the ODRA does not need to reach these matters.

65. The record includes Declarations filed by the Product Team in response to [Former Employee]'s allegations. Generally speaking, they describe steps taken to avoid personal conflicts of interest, denials, and contradictory statements. Again, as analyzed in the Discussion, *infra*, the ODRA does not need to reach these matters. *See Product Team Reply*.

H. The Product Team Lost Significant Portions of its Files

66. [The Acquisition Manager] indicates that "after completion of the Oral Briefings in February 2009,"⁴ he moved all of the evaluator notes, evaluator worksheets, score sheets, copies of the briefing materials, and a computer to an office in the Portals Building, located on 12th Street, SW, in Washington, DC. *AR* Tab 43, [DELETED] *Second Decl.* ¶ 1. He indicates that a contractor's employee, [DELETED], assisted him in this move. *Id.* at ¶ 2.

67. [DELETED] and [DELETED] provide inconsistent statements regarding the dates and locations, but at some point [DELETED] was forced to vacate the Portals Building, and he took the evaluation documents with him. *Compare AR* Tab 43, [DELETED] *Second Decl.*, ¶ 3, with Tab 44, [DELETED] *Decl.* ¶¶ 7-10.

⁴ [The Acquisition Manager]'s other declaration states that the oral presentations concluded in March of 2009. *See FF* 37.

PUBLIC VERSION

68. [DELETED] states that on October 8, 2009, he and [DELETED] transported the documents from the Portals Building to FAA Headquarters building FOB 10A, and stored them in the “Contracts Library.” *AR* Tab 44, [DELETED] *Decl.* ¶12. [DELETED], however, indicates that he was unable to participate in this move due to other commitments. *AR* Tab 43, [DELETED] *Second Decl.*, ¶ 4.

69. [DELETED], one of the evaluators, declared that she learned prior to the debriefings that some of the evaluation documentation was missing. *AR* Tab 44, [DELETED] *Second Decl.* ¶ 2. She discovered two boxes relating to the FASS competition in the “Contracts storage/filing room,” but could not find the missing evaluation documents despite searching every shelf. *Id.* at ¶ 3.

70. [DELETED] and [DELETED] describe in detail the significant effort they made to locate the lost score sheets, notes, and related evaluation documents, but they could not locate them to file for these Protests. *AR* Tab 43, [DELETED] *Second Decl.*, ¶ 8-12; 44, [DELETED] *Second Decl.* ¶ 3-6.

71. Of all of the witnesses, [DELETED] saw the documents last, on October 9, 2009. *AR* Tab 44, [DELETED] *Decl.* ¶¶ 7-10.

III. DISCUSSION

The full record for the competition under this Solicitation is missing. *Findings of Fact (“FF”)* 66–71. Based on the remaining record, Adsystem has shown that the Product Team failed to adequately evaluate the offers and document its award decision to the prejudice of Adsystem and possibly other offerors. Before explaining why the Protests should partially be sustained on the merits, the ODRA must consider the standard of proof and the Product Team’s request to dismiss Counts Nine, Ten, and Eleven found in the Supplemental Protest.

PUBLIC VERSION

A. The Standard of Proof vs. the Standard of Review

A protester “bears the burden of proof, and the ODRA will not recommend that a post-award protest be sustained where a contract award decision has a rational basis and is neither arbitrary, capricious, nor an abuse of discretion and is supported by substantial evidence.” *Protest of Sentel Corporation*, 09-ODRA-00512 (citing *Protest of Ribeiro Construction Company, Inc.*, 08-TSA-031). Although Adsystech recognizes that it bears the burden of proof, it argues that “substantial evidence” means the appellate standard of review for agency decisions. *Adsystech Comments* at 8 (citing *Richardson v. Pearles*, 402 U.S. 389 (1971); *Dickinson v. Zurko*, 527 U.S. 150 (1999)). According to Adsystech, “substantial evidence” is only “more than a mere scintilla,” and “means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Id.* Other authorities, not cited by Adsystech, articulate the appellate review standard in a similar manner, explaining that it is “more than a ‘scintilla,’ but less than preponderance of the evidence.” *Evans Fin. Corp. v. Director, Office of Workers Compensation*, 161 F.3d 30, 34 (DC Cir. 1998). By implication,⁵ Adsystech argues that the ODRA should sustain its Protests if simply more than a scintilla of evidence supports its case, regardless of whether the preponderance of the evidenced actually favors the Product Team.

Adsystech errs by not recognizing the distinctly different meanings of the phrase “substantial evidence” when applied to an administrative adjudication versus judicial review of an administrative order. As explained below, and consistent with the Administrative Procedure Act (“APA”), the phrase “substantial evidence” means that the ODRA weighs whether the preponderance of the evidence shows a failure to comply with the AMS. A Product Team will fail to comply with the AMS when the substantial evidence (*i.e.*, a preponderance of the evidence) shows that its decisions were rendered without a rational basis, or were arbitrary, capricious, or an abuse of discretion.

⁵ After defining “substantial evidence” to be simply more than a “scintilla” of evidence, Adsystech, “submits that [its evidence] constitute[s] substantial evidence to sustain this protest, ...” *Adsystech Comments* at 8.

PUBLIC VERSION

The ODRA has exclusive authority to conduct adjudications of bid protests for acquisitions conducted under the AMS. 49 U.S.C. § 40110(d)(2) and (4). On behalf of the Administrator, the ODRA conducts its adjudicatory function pursuant to 49 U.S.C. § 46102, which requires a record and invokes the procedures found in the APA.⁶ ODRA proceedings are formal adjudications,⁷ which place the burden of proof on the proponent of an order, and are judged “by and in accordance with the reliable, probative, and substantial evidence” in the record. 5 U.S.C. §§ 554(a) and 556(d). As interpreted by the United States Supreme Court, “substantial evidence” in this administrative context refers to the traditional “preponderance of the evidence” test. *Steadman v. SEC*, 450 U.S. 91, 101, 101 S.Ct. 999, 1008 (1981).⁸

The role of the ODRA in a protest is to ensure that the agency complies with the AMS and other applicable authorities. *Protest of MAXIMUS, Inc.*, 04-TSA-009. The AMS:

... is the collective body of information within the FAA Acquisition System Toolset (FAST). FAST is the official record of the AMS, which consists of “acquisition management policy” and “acquisition management guidance.”

*FAST, Statement of Policy vs. Guidance.*⁹ The AMS defines the authority of acquisition personnel, and gives them considerable latitude by promoting “discretion, sound business judgment, and flexibility at the lowest levels while maintaining fairness and integrity.” *AMS Policy § 3.1.3* (“Fundamental Principles”). To these ends, the standard in the AMS for acquisition award decisions depends on presence of a documented “rational basis.”

⁶ 49 U.S.C. § 46102 states that such adjudications are “subject to subchapter II of chapter 5 of title 5.” The relevant portions of the APA, therefore, are found in at 5 U.S.C. §§ 554, 556, and 557.

⁷ Formal adjudications are on the record and serve as the basis for final agency actions that are subject to judicial review. 5 U.S.C. § 554.

⁸ The *Steadman* decision further clarified that the phrase “substantial evidence” at the administrative adjudication level under 5 U.S.C. § 556(d) is necessarily different from the meaning of “substantial evidence” on appellate review under 5 U.S.C. § 706. According to the Court, “[I]t is implausible to think that the drafters of the APA would place a scope-of-review standard in the middle of a statutory provision designed to govern evidentiary issues in adjudicatory proceedings.” *Steadman*, 450 U.S. at 100 and n. 20, 101 S.Ct. at 1007 and n. 20.

⁹ Available at <http://fast.faa.gov/toolsets/policy.htm>.

PUBLIC VERSION

See e.g., *AMS Policy* §§ 3.2.2.3.1.2.5 (“Source Selection Official’s Decision”), 3.2.2.4 (“Single-Source Selection”). Accordingly, if a protest arises:

[T]he ODRA will review such a protest to determine whether a product team has complied with the AMS, *i.e.*, whether the Product Team’s actions in awarding the contract had a rational basis, and were not arbitrary, capricious, or an abuse of discretion.

Protest of MAXIMUS, Inc., 04-TSA-009 (Denial of Motion to Dismiss) (citing *Protest of Crown Consulting, Inc.*, 01-ODRA-00181; *Knoll, Inc.*, 99-ODRA-00122; and *A&T Systems, Inc.*, 98-ODRA-00097). Put another way, the ODRA reviews compliance with the AMS, and using the preponderance of the evidence standard, decides as an ultimate fact whether there was a rational basis for the challenged action such that it was neither arbitrary, capricious, nor an abuse of discretion.

While the ODRA uses the preponderance of evidence standard of proof in its cases, subsequent judicial review of FAA orders uses the appellate meaning of “substantial evidence.” The orders of the Administrator adopting the ODRA’s Findings and Recommendations are subject to judicial review in the United States Court of Appeals for the District of Columbia Circuit, or in the court of appeals in the circuit in which the protester has its principal place of business. 49 U.S.C. § 46110(a). Like judicial review under the APA, the Administrator’s Orders adopting the ODRA’s Findings and Recommendations are conclusive if “supported by substantial evidence.” *Compare* 5 U.S.C. § 706, *with* 49 U.S.C. § 46110(c). In this appellate context, the Court of Appeals for the DC Circuit explained,

[Appellant’s] contention that ODRA’s findings are not supported by substantial evidence also fails. Substantial evidence is defined as “more than a ‘scintilla,’ but less than a preponderance of the evidence.” *Evans Fin. Corp. v. Director, Office of Workers Compensation Programs*, 161 F.3d 30, 34 (D.C.Cir.1998) (citations and internal quotation marks omitted). Again, Jones provides useful guidance. “[T]he question [the court] face[s] is ‘not whether [petitioner’s] view of the facts supports its version of what happened, but rather whether the [agency’s] interpretation of the facts is reasonably defensible.’ *Harter Tomato Prods. Co. v. NLRB*, 133 F.3d 934, 938 (D.C.Cir.1998) (internal quotation marks omitted).”

PUBLIC VERSION

Multimax, Inc. v. FAA, 231 F.3d 882, 887 (D.C. Cir. 2000), (citing *J.A.Jones Management Services v. FAA*, 225 F.3d 761 (D.C. Cir. 2000)).

The foregoing discussion shows that administrative fora (like the ODRA) and appellate courts historically have used distinctly different meanings of the phrase “substantial evidence.” Although the courts of appeals review the ODRA’s factual findings based on their highly deferential interpretation of “substantial evidence,” the ODRA itself weighs the evidence of compliance with the AMS in light of the “substantial evidence” standard that equates to the preponderance of the evidence standard of proof. As the ODRA has stated before, this means that in “best value” procurements, as contemplated by this Solicitation, the ODRA will not substitute its judgment for those of the designated evaluation and source selection officials as long as the record demonstrates that their decisions had a rational basis, were consistent otherwise with the AMS, the evaluation plan, and the award criteria set forth in the underlying solicitation. *Protest of Ribeiro Construction Company, Inc.*, 08-TSA-031 (citing *Protest of PCS*, 01-ODRA-00184). Additionally, Adsystech must show prejudice by demonstrating that, but for the improper actions in this competition, it would have had a substantial chance of receiving the award. *Protest of Ribeiro Construction Company, Inc.*, 08-TSA-031 (citing *Protest of Optical Scientific Incorporated*, 06-ODRA-00365).

B. The Product Team’s Motion To Dismiss Counts Nine, Ten, and Eleven

Adsystech filed its Supplemental Protest containing Counts Nine through Eleven, on Monday, February 8, 2010. In the Supplemental Protest, Adsystech stated, “This protest is timely, because Adsystech is filing this protest within seven business days after Thursday, January 28, 2010, which was the date on which Adsystech first learned the information presented in this supplemental protest.” *Supp. Protest* at 2. The Supplemental Protest did not elaborate on the facts, sources, or circumstances supporting this statement.

PUBLIC VERSION

On February 16, 2010, the Product Team filed a Request to Dismiss (“Request”) the Supplemental Protest. The Product Team argues that the ODRA Procedural Regulation, at 14 C.F.R. § 17.5(c)(5), requires far more specificity in pleading, and that the “appropriate response is to dismiss the Protestor’s Supplemental Protest as improperly filed.” *Request* at 2. Noting that the Request was not dispositive of all counts in the Protests, the ODRA reserved its ruling until it prepared these Recommendations and Findings, but additionally, directed Adsystech to respond to the Request. *ODRA Letter of February 16, 2010*.

Adsystech responded on February 18, 2010 (“*Adsystech Response*”) by analogizing the Supplemental Protest “to a complaint in a judicial proceeding, which [merely] defines the nature of the claims and legal theories.” *Adsystech Response* at 1. Adsystech further asserts that a “protester normally submits its evidence, by affidavit, in protester’s comments on the Agency Response.” *Id.*

Adsystech’s analogy to a complaint in a judicial proceeding is unpersuasive, and the Product Team is correct that a Protest requires more factual support than what is found in Adsystech’s Supplemental Protest. The ODRA Procedural Regulation requires:

- (c) A Protest shall be in writing, and set forth:
 - (1) The protester's name, address, telephone number, and facsimile (FAX) number;
 - (2) The name, address, telephone number, and FAX number of a person designated by the protester (Protester Designee), and who shall be duly authorized to represent the protester, to be the point of contact;
 - (3) The SIR number or, if available, the contract number and the name of the CO;
 - (4) The basis for the protester's status as an interested party;
 - (5) The facts supporting the timeliness of the protest;
 - (6) Whether the protester requests a protective order, the material to be protected, and attach a redacted copy of that material;
 - (7) A detailed statement of both the legal and factual grounds of the protest, and attach one (1) copy of each relevant document;
 - (8) The remedy or remedies sought by the protester, as set forth in Sec. 17.21;
 - (9) The signature of the Protester Designee, or another person duly authorized to represent the protester.

PUBLIC VERSION

14 C.F.R. § 17.5(c) (emphasis added). Unlike the standard for notice pleading found in Fed. R. Civ. P. 8, this ODRA regulation sets forth detailed pleading requirements aimed at early disclosure of relevant facts, evidence, and legal positions, which therefore belies Adsystech's analogy to notice pleading in a judicial proceeding. Other sections of the ODRA Procedural Regulation further justify rejecting Adsystech's analogy. In particular, rather than filing an Answer subject to the relatively sparse requirements in Fed. R. Civ. P. 8, the Product Team in an ODRA protest files a "Response" that affirmatively must include chronological statements of fact, citing to relevant documents attached to the filing. 14 C.F.R. § 17.17(f). Furthermore, unlike the detailed discovery provisions found in Fed. R. Civ. P. 26 to 37, the ODRA Procedural Regulation "does not contemplate extensive discovery." 14 C.F.R. § 17.37(f). Indeed, when read together, the various sections of the regulation work together to impose a burden of production that requires early disclosure of relevant facts and evidence in order to fulfill the "FAA policy of providing fair and expeditious dispute resolution" in bid protests. *Id.*

Although Adsystech's analogy to notice pleading must be rejected, the Product Team's request to dismiss the Supplemental Protest should also be rejected. The ODRA Procedural Regulation gives the Dispute Resolution Officer ("DRO") authority to issue "orders for the proceedings as deemed appropriate," including requiring "additional submissions for the parties." 14 C.F.R. § 17.37(c). DROs must exercise this authority "in a way conducive to justice" 49 U.S.C. § 46102(a). Thus, if a lesser remedy alleviates any prejudice the Product Team might suffer from procedural improprieties, the ODRA then favors reaching the merits of the protest rather than granting a motion to dismiss. *See Protest of Water & Energy Systems Technology, Inc.*, 06-ODRA-00373.

Regarding the Supplemental Protest, the Product Team merely alleges as prejudice that it was "unable to determine [prior to filing the Agency Response] that the Protester is, in fact, timely in raising these additional grounds of protest." *Request* at 1. While the Product Team's concerns are well taken, the procedural defect was not so insurmountable as to warrant dismissal. Indeed, the ODRA granted the Product Team an unusual

opportunity to file a “Reply” to any new information presented in Adsystech’s comments. In that Reply, the Product Team acknowledged that the information supplied “met the terms” of the ODRA regulation (other than the fact that it was not contained in the Supplemental Protest). *Reply* at 1. Although depositions are available in protests, the Product Team did not request a deposition of [Former Employee], and instead submitted [DELETED]. Thus, the record establishes that despite Adsystech’s procedural irregularity, the ODRA remedied any perceived prejudice through adequate procedural adjustments.¹⁰

The Product Team’s Request for Dismissal of the Supplemental Protest, therefore, is denied.

C. Counts Four and Five: The Product Team Lacked a Rational Basis for the Evaluation and Award.

1. The Debriefing does not Articulate a Rational Basis for the Evaluation

In Count Four, Adsystech complains in part that “the debriefing conveyed very little useful information,” and “suggests that the FAA’s evaluation of [Adsystech’s] Phase 1 Technical Proposal is erroneous and invalid.” *Protest* at 7-8. Citing the written debriefing slides, Adsystech states:

At the “debriefing” the FAA supplied huge quantities of paper, perhaps designed to create the impression of a true debriefing, but the multiple handouts had little content. For example, the introductory package of 29 slides consists mostly of definitions, restating the SIR and defining adjectival categories; and though it proceeds to reveal the Phase 1 factor weights, there are only sketchy evaluation comments on the five Phase 1 evaluation factors, one page for each factor. The numerous other reports consisted of mostly pages of redacted charts. The FAA refused to answer questions submitted by Adsystech in response to the FAA’s solicitation of questions from offerors, assumed to assist the FAA in its preparation for the debriefings (Exhibit 12).

¹⁰ This conclusion does not suggest that dismissal would be inappropriate in all cases, nor does it create an opportunity for future protesters to obtain a tactical or economic advantage in other cases by omitting required information. In reality, the need for additional procedures has the net effect of delaying resolution of a protest.

PUBLIC VERSION

The FAA revealed only one part of Adsystech's overall Phase 1 scoring. Despite written and verbal requests for its scores on each technical evaluation factor, the FAA refused to provide them, let alone provide the subfactor scores. Nor did the FAA reveal factor or subfactor scores for Adsystech's Phase 2 technical evaluation.

Protest at 7.

The AMS Policy requires the Product Team to provide debriefings that provide “meaningful feedback” to unsuccessful offerors. *AMS Policy* 3.2.2.3.1.4. To be meaningful, a debriefing is to include the “offeror’s evaluated standings relative to the successful offeror(s),” and a “summary of the evaluation findings (excerpts from evaluation summary documentation relating to the specific offeror).” *Id.* Using mandatory language, the AMS Guidance elaborates on these points by explaining:

In a post-award debriefing, you must disclose the evaluation ratings of the debriefed offeror and awardee to the subfactor level of evaluation; and all significant weaknesses and strengths of the debriefed offeror’s proposal. If the weakness was of significant enough concern to warrant mentioning it during discussions, it is significant for debriefing purposes as well.

AMS Guidance, T3.2.2., D. Appendix 1, Source Selection Guide, at 1.9. The FAA conducts debriefings to instill “confidence in the offeror that it was treated fairly,” and to reduce the risk of protests to the award. *Id.* While product team’s failure to provide a meaningful debriefing is not an independent ground for a protest, the debriefing materials are relevant as part of the whole body of evidence in determining whether a rational basis supported the Product Team’s actions. *See e.g., C-Cubed Corporation*, B-272525, n. 3 (October 21, 1996).¹¹

A “meaningful” debriefing in the present competition and under the AMS standards above, would have required an extensive discussion of sub-factor evaluations for both JTA and Adsystech. Indeed, both the Phase 1 and Phase 2 evaluations in this competition

¹¹ Although the FAA is not bound by the decisions of the Comptroller General, the ODRA has held that decisions in GAO bid protests may be viewed as persuasive authority insofar as the principles and rules announced in such cases are consistent with the AMS and ODRA case precedent. *See e.g., Protest of International Services, Inc.*, 02-ODRA-00224.

PUBLIC VERSION

had factors and sub-factors. To be specific, Phase 1 had six factors, broken down into a total of sixteen sub-factors. *FF* 11 and 20. Phase 2, on the other hand, had three factors, broken down into a total of ten sub-factors. *FF* 11 and 21. The complexity of this evaluation scheme, and therefore the level of debriefing expected, is also shown in the various evaluation worksheets that are contained in the Agency Response. *FF* 20 and 21. The debriefing received, however, fell far short of the AMS standard.

Adsystech correctly criticizes the debriefing slides as huge quantities of paper with little meaningful content. While the slides address Phase 1 evaluation factors in narrative form, they do not address the actual score assigned for each factor, nor do they address the evaluations of the sixteen sub-factors as required by the AMS (discussed above). *FF* 56. The debriefing slides reveal only that Adsystech was rated overall as “[DELETED]” with a final Phase 1 score of [DELETED]. *Id.* The debriefing slides hardly discuss Phase 2 other than to indicate that Adsystech scored a [DELETED] for its oral presentation. *FF* 57. The briefing slides utterly lack any information regarding the evaluation and rating of the successful proposal from JTA. The Product Team also provided Adsystech with versions of SSO Award Decision, the Cost & Price Analysis Report, and the Technical Evaluation Report – Phase 1 & 2. *FF* 60. Nevertheless, the Product Team redacted these additional documents to such an extent that they failed to provide any further relevant information, and certainly not the level of detail expected under the AMS. *Id.*

Contrary to the purposes of a debriefing, *i.e.*, to instill confidence in the fairness of the evaluation and to provide meaningful feedback regarding the basis for the award, Adsystech has shown through the debriefing slides and associated materials that the Product Team did not (or was unable to) provide any meaningful insight into a rational basis for its award to JTA. In the absence of evidence to the contrary, this inadequate debriefing, coming relatively soon after award, is part of the body of evidence supporting a finding that the Product Team lacked a rational basis for the evaluations and ultimate award to JTA. Moreover, as discussed in the next two sections, nothing in the non-

PUBLIC VERSION

redacted materials produced by the Product Team supports a finding that a rational basis existed.

2. The Product Team's Duty to Maintain and Produce Relevant Records Documenting the Award

While the debriefing materials do not reveal a rational basis for the evaluation and award, the ODRA is bound to consider the whole record. *See* 5 U.S.C. § 556(e). To develop a complete record, the ODRA Procedural Regulation places upon the Product Team a burden to produce relevant documents showing the basis for the evaluation and award. *See* 14 C.F.R. § 17.17(f). The Product Team, however, lost significant documentation pertaining to the technical evaluation and deviated from the Solicitation by failing to videotape the oral presentations during Phase 2 of the competition. The result is that the Product Team has failed in its burden of production (as distinguished from a burden of persuasion) to create a record sufficient for the ODRA to find a rational basis for the award decision to JTA.

a. The Product Team's Duty to Document and Retain Records Supporting the Award

The AMS and the Evaluation Plan for this procurement required the Product Team to adequately document its conclusions. Indeed, one “fundamental principle” under the AMS is that the “FAA procurement system will ...[r]equire appropriate file documentation to support business decisions.” *AMS Policy* § 3.1.3; *see also, Protest of Enterprise Engineering Services, LLC*, 09-ODRA-490 (citing *Protest of Raytheon Technical Services Corp.*, 02-ODRA-00210). More specifically, in regards to the evaluation report itself, the AMS Policy states, “The service organization shall document the results of the evaluation, including recommendations, if applicable.” *AMS Policy* 3.2.2.3.1.2.3. Elaborating on this point, the AMS Guidance states in mandatory terms:

It is **imperative** that there be an orderly method for the identification, reporting, and tracking deficiencies, strengths, and weaknesses. Using evaluation forms can ease the administrative burden associated with these tasks. Whatever method you use, it is important that you support the evaluation findings with narrative statements. All evaluations **must**

PUBLIC VERSION

be documented. Ratings alone are not conclusive data upon which to make a source selection decision. Also, all determinations relating to changes in requirements after release of the SIR **must** be documented in the evaluation report.

AMS Guidance, T3.2.2, Appendix (Source Selection Guide), § 1.7 (Revision 17, January 2009) (emphasis added). One implicit purpose in the requirement for documentation is to ensure that a sufficient record is available in the event of a protest to the ODRA. Regarding oral presentations, the Guidance states in part:

g. Recording the Presentations. **Having an exact record of the presentation could prove useful both during the evaluation process and in the event of a protest or litigation.** You can record the oral presentations using a variety of media; e.g., videotapes, audio tapes, written transcripts, or a copy of the offeror's briefing slides or presentation notes. The SSO is responsible for determining the method and level of detail of the record. If you use videotaping, allow for the natural behavior of the presenters. If slides or view graphs are used, the camera should view both the podium and screen at the same time. Place the microphones so that all communications can be recorded clearly and at adequate volume. Every effort should be made to avoid letting the recording become the focus of the presentation. **The recording, which is considered source selection information, will become part of the official record. Provide a copy to the offeror and seal and securely store the master copy of the recording to ensure there are no allegations of tampering in the event of a protest or court action.**

AMS Guidance, T3.2.2, Appendix (Source Selection Guide), § 1.11 (Revision 17, January 2009) (emphasis added).

The record before the ODRA demonstrates that the Product Team certainly understood the requirements for documenting the award decision. The Evaluation Plan stated with regard to Phase 1 of the evaluation, "All pertinent aspects of the evaluation will be documented via the guidance and forms provided in this plan, and provided to the Contracting Officer (CO)." *FF* 14. Similarly, regarding Phase 2 the plan stated, "Again, all pertinent aspects of the evaluation for Phase 2 will be document via the guidance and forms provided in this plan and provided to the CO." *Id.* The plan specifically required the technical evaluators to "complet[e] individual worksheets and assign[] an adjectival

PUBLIC VERSION

rating for the evaluation factors,” and to “submit[] documentation to substantiate findings for each Offeror evaluated.” *FF* 16. The individual evaluators were to “take great care to assure that key findings, issues, strengths, or weaknesses [were] also transcribed to their score sheets for individual offerors.” *FF* 17. The plan included provisions for documenting minority viewpoints. *Id.* Amendment 000002 to the Solicitation, and page 29 of the Evaluation Plan, indicted that the Product Team intended to videotape the Phase 2 oral presentations. *FF* 8 and 21. While the list of examples could continue, the overall conclusion is that the Evaluation Plan provided detailed evaluation worksheets, and directed the evaluators to document their findings as individuals and in a collective report.

Aside from their duty to *create* a sufficient record documenting the oral presentations, the evaluation, and the award, the Product Team also had a duty to *retain* the documents it created. Every team member was responsible for “ensuring that due precaution [was] taken to safeguard all notes and proposal information bearing on this evaluation,” and “assisting in maintaining strict accountability of all documentation.” *FF* 18. Each evaluator was charged to “maintain strict accountability for all documentation used and created by the evaluator.” *FF* 18. The Evaluation Plan also had an unusual warning in boldfaced capital letters:

**NOTE TO EVALUATORS: ALL SCORING SHEETS WILL
BECOME PART OF THE OFFICIAL CONTRACT FILE, AND
INPUTS WILL BE USED IN THE SELECTION OF AN
OFFEROR FOR AWARD OF A CONTRACT AND
DEBRIEFING OF UNSUCCESSFUL OFFERORS.**

FF 19. The retention period for these various contract records is “6 years and 3 months after final payment.” *AMS Guidance* T3.13.1.7, citing the FAA’s records retention schedule in item number 4400, *Acquisition and Procurement*, of *FAA Order 1350.15C*.

The foregoing demonstrates that the AMS obliges a Product Team to document the basis for its evaluation and awards. Moreover, the Solicitation and Evaluation Plan acknowledged the obligation with exceptional detail. As discussed in the next section,

PUBLIC VERSION

the Agency Response in the present Protests nevertheless contains insufficient documentation supporting the evaluations conducted in this acquisition.

b. The Inadequate Documents in the Agency Response

The ODRA Procedural Regulation requires the Agency Response to include all of the relevant documentation pertaining to an award decision. 14 C.F.R. § 17.17(f). While this burden of production does not shift the ultimate burden of persuasion that is placed on the protester, the production process typically produces the contemporaneous documents that show the basis – rational or otherwise – of a Product Team’s evaluation and award decisions. Regrettably, several declarations submitted by the Product Team indicate that much of the documentation required under the Evaluation Plan has been lost, which leaves the ODRA with a relatively sparse record. *FF* 66-71.

The loss of the documents came to light as a result of Adsystech’s March 8, 2010 Motion to Compel (“Motion”), filed shortly after the Product Team submitted its Agency Response. The ODRA gave the Product Team the opportunity to respond to the Motion, but subsequently directed in part that the Product Team produce:

All records that reflect the details of the evaluation of technical proposals for Phases 1 and 2 for the awardee and Adsystech, to include individual and consensus evaluator worksheets, score sheets, notes, and any other similar records.

ODRA Letter of March 11, 2010, at 2. The Product Team produced typed evaluation forms for Phase 1 used by the leader of the Evaluation Team. *AR* Tab 42. It also produced under the same tab,¹² several spreadsheets providing the numeric scores for Phases 1 and 2, as assigned by the five evaluators. The spreadsheets, however, do not have narrative comments or notes that explain the basis for the individual or collective score. The record is further void of other notes, evaluation forms completed by other evaluators, or other similar materials. *See AR* Tab 42.

¹² ODRA Procedural Regulation requires relevant documents to be “chronologically indexed and tabbed.” 14 C.F.R. § 17.17(f). Tab 42 contains multiple documents created at different times. This disorganized supplement creates citation difficulties for the parties, the ODRA, and potentially, any United States Court of Appeals reviewing the Administrator’s Order.

PUBLIC VERSION

To explain this paltry production, the Product Team provided declarations from three people. *FF* 66-71. While the circumstances are detailed in the findings, for the purposes of this discussion, it suffices to say that [DELETED], a support contractor, last saw the missing documents on October 9, 2009 when he and [the Acquisition Manager] transported them to the “Contracts Library” at the FAA Headquarters. *FF* 68, 71. Despite an intensive search, the evaluation documentation was not found. *FF* 70.

Adsystem’s counsel encourages the ODRA to form an adverse inference that the missing materials would support sustaining these Protests. *Adsystem Comments* at 10. A trier of fact retains discretion over whether to draw an adverse inference. *See generally*, M. Graham, *Federal Practice and Procedure: Evidence* § 7003, n. 12 (2010 Supp.), available at 30B Fed. Prac. & Proc. Evid. § 7003 (1st ed.), n. 12 (Westlaw 2010). In the present Protests, however, the ODRA does not need to draw an adverse inference in Adsystem’s favor because the ODRA is persuaded that the remaining record does not support the evaluations of any proposal in this competition.

As explained in the Findings of Fact, *supra*, this procurement involved a two-phased evaluation. Phase 1 was worth 40% and considered written technical proposals. Phase 2 was worth 60% and considered oral presentations of sample tasks. The evaluations in each of the Phases are discussed below.

i. The Evaluation under Phase 1 Lacked a Rational Basis

Phase 1 of the evaluation considered the initial technical proposals submitted in response to the Solicitation. *AR* Tab 11. After an initial review, the offerors were advised in writing of weaknesses, and given an opportunity to address any problems noted. *See AR* Tabs 19 through 24. Adsystem has challenged the basis for the Phase 1 evaluation in Count Four by noting that only “limited information was provided in the debriefing” (*Protest* at 7), and asserting that the evaluation was “irrational, arbitrary or capricious.” *Adsystem Comments* at 16.

The Technical Proposal Evaluation Report contains the results of the initial evaluation under Phase 1. *FF 24*. Although the report reiterates the five factors and sixteen sub-factors required under the Solicitation and the Evaluation Plan, the only numeric ranking it provides is a single “final weighted overall score” for each offeror. *FF 25*. The report describes the strengths and weaknesses for each offeror, but contains only narratives at the “factor” level, without disclosing any assigned numeric scores. The report does not contain either scores or narratives at the sub-factor level. *Id.* Indeed, standing alone, this report does not satisfy the requirements of the AMS Guidance, which states,

c. Result of Proposal Evaluation. At the end of an evaluation, the result **must** be that each factor and sub-factor are evaluated, the merits and risks of a proposal are documented and numerical or adjectival ratings, when appropriate, are assigned.

AMS Guidance, T3.2.2, Appendix (Source Selection Guide), § 1.6(c) (boldface added).

The other documents in the record do not sufficiently fill the gaps in the Technical Proposal Evaluation Report. Tab 42 contains several numeric tables, including one called “Phase 1 – Rescore Results.” While it does provide numeric scores at the sub-factor level associated with each of the five evaluators, it does not contain explanations for the stated scores. *FF 31* In fact, the present record does not contain a consensus narrative for the sub-factors, and therefore, nothing to suggest that the Phase 1 evaluation was rationally conducted in an impartial manner consistent with the evaluation factors in the Solicitation or Evaluation Plan.¹³ Indeed, the ODRA cannot accept as a matter of faith that a table of numeric scores necessary renders the evaluation rational.¹⁴ Finally, the documents pertaining to the rescoring of one minor weakness, do not reveal further insights into the overall Phase 1 evaluation. *FF 31-33*.

¹³ The record also contains typed “Phase 1, Technical Proposal Evaluation Score Sheet(s),” with notes, from [the Acquisition Manager]. *AR* Tab 42. But he is only one of the five members of the evaluation team. The notes of one evaluator do not represent the final consensus determination, much less demonstrate the rational basis for the evaluation.

¹⁴ “Ratings alone are not conclusive data upon which to make a source selection decision.” *AMS Guidance*, T3.2.2, Appendix (Source Selection Guide), § 1.7 (Revision 17, January 2009) (emphasis added).

PUBLIC VERSION

The ODRA, therefore, finds that the Phase 1 was not completed in accordance with the AMS and the evaluation lacked a rational basis.

ii. The Evaluation under Phase 2 Lacked a Rational Basis

Count Five charges that the debriefing materials lack details regarding the Phase 2 evaluation, and did not conform to the evaluation criteria. As discussed above, the debriefing stated only that the oral presentation score was [DELETED] for Adsystech. In fact, the *entire* recorded narrative evaluation for Phase 2 is found in the Oral Presentation Evaluation Report. That narrative consists solely of three cells of a table, with each cell addressing one of the three sample tasks at the oral presentation:

Contractor E [Adsystech]			
Task Order	Description	Average Score/Rating	Comments
1	Reimbursables	[DELETED]	[DELETED]
2	Business Process Reengineering	[DELETED]	[DELETED]
3	Capitalization	[DELETED]	[DELETED]
Overall	Rating for Phase 2 Portion	[DELETED]	

PUBLIC VERSION

FF 42. The text in these cells do not reference specific language in the presentation slides, and do not give quotes from the oral briefing that could be used to determine the rationality of the stated conclusions. *Id.* Moreover, although required by the Solicitation, the record does not contain a transcript or video recording of the oral presentation that would allow the ODRA to compare the stated conclusions with the actual presentation. FF 8 and 21. Further, the record does not contain the expressly required individual evaluators' completed oral evaluation forms, called "expectations lists." FF 43. Further still, the tables used to average the individual scores assigned by each evaluator show only numeric scores, and not *any* statement showing a rational basis for the evaluation at the factor and sub-factor levels. Compare AR Tabs 10 at pages 29 to 30, with Tab 42. The necessary documentation, quite simply, does not exist.

As explained in the *Protest of Team Clean, Inc.*, 09-ODRA-00499, the ODRA "is not precluded from considering post-protest explanations that provide a detailed rationale for contemporaneous conclusions."¹⁵ The ODRA has considered paragraphs 18 and 19 of [the Acquisition Manager]'s Declaration, and concludes that he merely restates the sparse narrative quoted in the table above from the Oral Presentation Evaluation Report. AR Tab 38, [DELETED]Decl., at ¶¶ 18 and 19. The ODRA also has considered and gives little weight to the rote and conclusory statements in the declarations by other evaluators attached to the Product Team's Reply. See *Product Team Reply*, [DELETED] ¶ 2; [DELETED] Decl. at ¶ 2; and [DELETED] Decl. at ¶ 3. Nothing in these declarations adequately explains the basis for the Phase 2 evaluation, nor do they adequately fill unrecorded or lost details in the documentation.

¹⁵ As recently explained in the *Protest of Team Clean, Inc.*, 09-ODRA-00499:

As a general matter, when faced with *post hoc* justifications, the ODRA accords greater weight to contemporaneous evaluation and source selection material than to arguments and documentation prepared in response to protest contentions. *Protest of Enroute Computer Solutions*, 02-ODRA-00220. The ODRA, however, is not precluded from considering post-protest explanations that provide a detailed rationale for contemporaneous conclusions, as such explanations can simply fill in previously unrecorded details. *Id.*

Protest of Team Clean, Inc., at n. 2.

PUBLIC VERSION

The foregoing analysis demonstrates that there was no rational basis in the record for the evaluation results under Phase 2.

3. Prejudice

The ODRA will not sustain a protest unless the protester can demonstrate that but for the agency's inappropriate action or inaction, the protester would have had a substantial chance of receiving the award. *See e.g., Protest of Enterprise Engineering Services, LLC*, 09-ODRA-490; *Protest of Optical Scientific Inc.*, 06-ODRA-00365; *Protest of Enroute Computer Solutions*, 02-ODRA-00220. In the present Protests, the record does not reveal a rational basis for the evaluations of the JTA, Adsystech, or any other offeror. Moreover, the evaluated prices between the JTA and Adsystech differed by less than five percent. "When an Agency violates its procurement requirements, any doubts concerning the alleged prejudicial effect of the Agency's action will be resolved in favor of the Protester." *Protest of Columbus Technologies and Services, Inc.* 10-ODRA-00514 (citing *Protest of Optical Scientific, Inc.*, *supra*). In these circumstances, had a properly documented evaluation been conducted, Adsystech may have had a substantial chance of receiving the award.

D. Limitations on Subcontracting

In Count Nine of the Supplemental Protest, Adsystech contends that JTA's proposal did not demonstrate that it would comply with AMS Clause 3.6.1-7, "Limitation on Subcontracting (August 1997)," which was set out in full in Section I of the original Solicitation. *FF* 4. According to Adsystech, [DELETED]. *Supplemental Protest* at 12, (citing *AMS Clause 3.6.1-7(a)* (August 1997)). The Product Team's first defense rests on the fact that Amendment 000001 deleted AMS Clause 3.6.1-7, and replaced it with a special clause H.18 that changed "the percentage from 50 to 51, and more importantly, remove[ed] the phrase 'employees of the prime contractor' and replaced it with 'eligible small businesses as identified by the NAICS size standard associated with this procurement.'" *AR* at 12. The Product Team also argues that Adsystech's Count Nine

PUBLIC VERSION

concerns compliance with a contract administration clause, which is not the appropriate subject of a bid protest. *Id.* at 13.

The Product Team's second defense, regarding contract administration, is well taken. The ODRA will not address matters of contract administration in the context of a bid protest, and this includes speculating whether an awardee will comply during performance with the Limitation on Subcontracting Clause. *See Midwest Weather, Inc.*, 98-ODRA-00070. For this reason, the ODRA recommends that Count Nine be denied. Nevertheless, the record before the ODRA shows that the Product Team did not obtain the requisite waiver from the FAA Acquisition Executive¹⁶ that would permit a deviation from the mandatory AMS Clause 3.6.1-7, "Limitation on Subcontracting (August 1997). *FF* 5-7. Without a doubt, the remedial actions arising out of this Protest must conform to the requirements of the AMS, and the best interests of the FAA will not be served by perpetuating the unauthorized deviation from the AMS. Therefore, as stated in the

¹⁶ The AMS Statement regarding Policy vs. Guidance, found at <http://fast.faa.gov/toolsets/policy.htm>, states in crucial part:

The following terms, when used throughout AMS, shall be interpreted as follows:

Shall, Must, and Mandatory. The terms "shall," "must," and "mandatory" indicate requirements where it is necessary to comply. **Waivers are required from the FAA Acquisition Executive in advance if there is intent to not abide by the requirements.**

Should. The term "should" indicates requirements or procedures that allow discretion to adopt different approaches consistent with applicable law and AMS policy. Acquisition personnel are expected to use principles of reasoned decision making and to document, to an appropriate extent, the rational basis for adopting a different approach.

May. The term "may" confers authority to exercise full discretion by the user in implementing the applicable part of AMS where the term is used.

AMS Statement regarding Policy vs. Guidance § 2 (italics in the original, boldface added). Further, "The Acquisition Management System (AMS) is the collective body of information within the FAA Acquisition System Toolset (FAST)." *Id.* As the boldface in the inset quote shows, the rule of construction established under the AMS is that the words "shall," "must," or "mandatory," regardless of whether they appear in policy or guidance, signals requirements which only the FAA Acquisition Executive may waive. Although the Product Team points to the general "should" language in the AMS Policy (at § 3.13.2.1) regarding the use of clause, the specific prescription for AMS Clause 3.6.1-7, "Limitation on Subcontracting (August 1997)" used "shall." *See FF* 5 (prescription quoted). The specific requirement necessarily overrides the general rule, and any other conclusion would render all mandatory prescriptions for AMS clauses illusory. *See e.g., Long Island Care at Home, LTD v. Coke*, 551 U.S. 158, 170, 127 S.Ct. 2339, 2348 (2007).

PUBLIC VERSION

recommendations below, the ODRA recommends that the FAA Acquisition Executive should review the business case for relaxing the requirements of AMS Clause 3.6.1-7, “Limitation on Subcontracting (August 1997),” and determine whether to ratify, disapprove, or otherwise modify the unauthorized deviations found in Amendment 0002.

E. Other Alleged Defects In this Competition

The allegations in Adsystech’s Protests are presented thematically to create an impression that the host of missteps in this competition were intentional acts, orchestrated to steer the award to any offeror (like JTA) proposing to use [DELETED] as a subcontractor. According to Adsystech, the sample tasks under Phase 2 were unrepresentative of the overall scope of work and selected to favor [DELETED]’s skill set. *Protest* at 4-5 (Count Two); *Adsystech Comments* at 5. Further, Adsystech charges that JTA was given an unfair advantage by having more time to prepare for the oral presentations. *Protest* at 9-10 (Count Seven). More explicit charges are made in Counts Ten and Eleven, which respectively allege affirmative misconduct by the evaluators, and supervisory pressure on the evaluators, to favor Ascent Consulting. *Supplemental Protest*, at 2-3 (Counts Ten and Eleven).

The ODRA may review evidence of motivation, conflicts of interest, or malfeasance, as necessary to rebut the rational basis of awards as proffered by the Product Team. *See e.g., Protests of Global Systems Technologies, Inc.*, 06-ODRA-00396 and 07-ODRA-00405 (Consolidated) (alleged intent to eliminate an offeror). In the present case, however, neither the Product Team’s debriefing nor the documents produced in the Protest support finding a rational basis for the Phase 1 and Phase 2 evaluations. Absent a rational basis for the evaluations and award, the ODRA’s analysis need go no further.¹⁷ *See* 14 C.F.R. § 17.37(j).

¹⁷ The ODRA recommends referring the allegations in [Former Employee’s affidavit], which suggest criminal activity and violations of the regulations issued by the Office of Government Ethics, to appropriate authorities for investigation and disposition. *See* FF 64, 28 U.S.C. § 208, and 5 C.F.R. Part 2635.

IV. CONCLUSION

The ODRA recommends denying the Product Team's Request to Dismiss Counts Nine, Ten, and Eleven on the grounds that sufficient procedural steps were taken to alleviate any prejudice. On the merits, the ODRA recommends sustaining the Protest in part under Counts Four and Five to the extent they assert that the Product Team lacked a rational basis for the conclusions reached during the Phase 1 and Phase 2 evaluations. The absence of a rational basis for both the Phase 1 and Phase 2 evaluations, and the failure by the Product Team to document the evaluations, renders the best value determination flawed, and necessitates re-opening the competition. The ODRA further recommends denial of Count Nine as a matter involving contract administration. The ODRA recommends dismissing the remaining counts as unnecessary in light of the foregoing conclusions.

AMS Policy § 3.9.3.2.2.4 and the ODRA Procedural Regulation give "broad discretion" to the ODRA to recommend remedies. The ODRA therefore recommends: (1) the Solicitation should be reviewed and amended as necessary to ensure that it accurately describes the needs of the FAA; (2) the FAA Acquisition Executive should review the business case for relaxing the requirements of AMS Clause 3.6.1-7, "Limitation on Subcontracting (August 1997)," and determine whether to ratify, disapprove, or otherwise modify the unauthorized deviations found in Amendment 0002; (3) a new competition, not restricted to the original offerors, should be conducted; (4) the Evaluation Plan should be modified as necessary to ensure a prompt and timely evaluation of proposals; (5) if oral presentations are used again, they must be videotaped; and (6) award a new contract. The current contract with JTA should continue only so long as is reasonably necessary to expeditiously complete the recompetition under steps (1) through (6) above. Upon award of the new contract, the current contract with JTA should be terminated for the convenience of the Government.

Additionally, the ODRA recommends appointing a new Contracting Officer and Evaluation Team due to the findings in this case. In particular, the ODRA observes that:

PUBLIC VERSION

(a) it took 20 months to evaluate proposals and award the contract; (b) without good cause or explanation, the Product Team lost substantial documentation that it was obligated to create, retain, and submit in the Agency Response; (c) also without explanation and contrary to the Solicitation and Evaluation Plan, the Product Team failed to videotape the oral presentations that otherwise could be used for a reevaluation; and (d) the CO exceeded her authority by deviating from known mandatory AMS clauses without obtaining the requisite approval from the FAA Acquisition Executive. The new Contracting Officer and Evaluation Team should have no prior involvement with this procurement.

Finally, counsel for the new Product Team should be directed to report back to the Administrator through the ODRA every 90 days regarding the progress and outcome of the recommended action.

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

APPROVED:

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

July13, 2010