

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

**Matter: Protest of CGH Technologies, Inc.  
Under Solicitation No. DTFWA-09-R-0004**

On October 20, 2010, CGH Technologies, Inc. (“CGH”) filed a post-award bid protest (“Protest”) with the Federal Aviation Administration (“FAA”) Office of Dispute Resolution for Acquisition (“ODRA”). The Protest challenges the award of Contract No. DTFAWA-10-C-00117 (“Contract”) to Enterprise Information Services, Inc. (“EIS”) under Solicitation DTFAWA-09-R-0004 (“SIR” or “Solicitation”) for Architectural System Engineering and Support Services (“ASESS”) in support of the development of the NextGen Air Traffic System. The SIR called for the award of a Cost Plus Fixed Fee (“CPFF”) term contract, with a base performance period of one year and six one-year renewal options, with all work being accomplished by Task Order. Award was to be

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made based on the determination of the best value to the Agency. The Awardee, EIS, timely exercised its right to intervene in these proceedings.

CGH's Protest generally challenges the fairness of the evaluation of its proposal and alleges that its debriefing was inadequate. Specifically, CGH identifies the following issues, among others, as not addressed adequately in its debriefing: (1) inconsistency between its proposal being rated first overall and a statement by the evaluators that "the CGH Team shows a lack of understanding of the SOW and contract scope;" (2) inconsistency of finding a key strength for CGH based on the number of key personnel exceeding the education and experience requirements, and evaluation statements that identified weaknesses on several resumes; (3) lack of a detailed explanation of discriminating award factors between CGH and EIS; (4) failure to answer questions regarding the finding of a deficiency relative to CGH's subcontracting strategy; and (5) failure to address CGH concerns regarding public comments of EIS stating that it would win the contract, and Agency's subsequent hiring of an EIS employee. *Protest* at 1-3.

By agreement, dated November 22, 2010, the Agency and the Protester attempted to resolve the Protest through the use of an Alternative Dispute Resolution ("ADR") process. That effort, however, did not resolve the Protest and the adjudication commenced on December 16, 2010. The Agency Response was filed on January 12, 2011. Following receipt of the Agency Response, CGH requested, and the ODRA granted two separate extensions of the due date for the filing of Comments. Subsequently, Comments on the Agency Response were filed by the Protester and Intervenor on January 28, 2011.<sup>1</sup>

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<sup>1</sup> CGH's Comments included what the ODRA concluded appeared to be a new ground of Protest. The ODRA sought and obtained briefings from the Parties on the issue and ultimately issued a decision holding that the Comments included a new and untimely Protest ground, which was dismissed. *See ODRA Decision on Timeliness of Protest Ground*, dated March 2, 2011.

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As discussed below, the ODRA recommends that CGH's Protest be denied in its entirety. CGH has failed to show that the decision to award the Contract to EIS lacks a rational basis or was arbitrary, capricious, or otherwise an abuse of discretion.

## **II. Findings of Fact**

### **A. Background and Solicitation Provisions**

1. On September 21, 2009, the FAA issued Solicitation No. DTFAWA-09-R-0004 for Architectural System Engineering and Support Services ("ASESS"). *Agency Response* ("AR"), Tab 1.
2. The SIR was amended four times as follows: Amendment 1 was issued on October 19, 2009, *AR*, Tab 2; Amendment 2 was issued on October 27, 2009, *AR*, Tab 3; Amendment 3 was issued on October 30, 2009, *AR*, Tab 4; and Amendment 4 was issued on November 4, 2009, *AR*, Tab 5; Declaration of John Gamble, dated January 11, 2011 ("*Gamble Decl.*") at ¶ 3.
3. The SIR further provided for the award of a Cost-Plus-Fixed-Fee ("CPFF") term (level of effort) contract, consisting of a base period of one year with six one-year option periods, for a total of 7 years or 84 months if all options are exercised. *AR*, Tab 3, Section B.1.
4. The Statement of Work ("SOW") for the ASESS Contract describes the services required in the System Operations Organizations for Programs, Planning and Procedures. These services include the design, development and deployment of concepts, products and services that move aircraft safely through the National Airspace System ("NAS") and the acquisition and maintenance of supporting equipment and software at FAA and military sites inside and outside the United States. *AR*, Tab 1, Section C.1. The SOW explains:

System Operations concepts, tools and services help create an infrastructure and architecture allowing controllers and others to

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view and manage the NAS with the location, name and flight number of all commercial and general aviation airplanes in the air at a specific time.

System Operations concepts, tools and services help the FAA manage airspace by directing planes around menacing or large weather fronts, reduce overloaded air space in specific sectors, along air routes, at airports as well as “work-arounds” involving broken equipment such as radars [and] ... also helps to support air security as part of Homeland Security operations such as re-routing questionable international flights or domestic flights.

*Id.*

5. The SOW specifies areas of technical engineering management guidance and assistance for which the Contractor must “provide a team of subject matter experts (SMEs) who will provide highly technical engineering management guidance and assistance to the FAA’s complex TFM and NEXTGEN system and software development activities.” *Id.* at Section C.4.1.3.

6. SIR Section H.14 identifies the labor categories and skill levels of those “key” personnel who are considered to be essential to the work being performed. The “key” personnel are as follows:

Program Manager  
Chief Engineer  
Human Factors Engineer  
Software Engineer  
System Engineer  
Air Traffic Analyst

*Id.* at Section H.14.

7. SIR Attachment J001, “Labor Category, Qualifications, and Skill Level Descriptions,” set forth the minimum experience and education requirements for each personnel labor category. *AR*, Tab 1, Section J.

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8. The SIR incorporates by reference Acquisition Management System (“AMS”) Clause 3.6.1-7, Limitations on Subcontracting (July 2008), which provides in part that by submitting an offer the Offeror agrees that in performance of a contract for services “at least 50 percent of the cost of contract performance incurred for personnel shall be expended for employees of the prime contractor.” *AR*, Tab 1, Section I.1.
9. The SIR contains Clause L.4 - 3.1.7-4 Organizational Conflict of Interest (February 2009), which provides in part:

The policy of the FAA is to avoid contracting with contractors who have unacceptable organizational conflicts of interest. An organizational conflict of interest means that because of existing or planned activities, an Offeror or contractor is unable or potentially unable to render impartial assistance to the agency, or has an unfair competitive advantage, or the Offeror or contractor's objectivity is, or might be, impaired....

*AR*, Tab 2.

10. Amendment 2 to the Solicitation revised Section L.9, entitled “Source Selection Process,” states as follows:

During the evaluation process, the FAA will evaluate each Offeror’s proposal, using information submitted to the FAA, presented in written form by each Offeror, or in the case of past performance/relevant experience, obtained from outside references and other points of contact. The FAA will evaluate each Offeror’s capability to perform the effort required by Section C of this SIR, as evidenced by the following:

Volume I – Offer and Other Documents  
Volume II – Technical Proposal  
Volume III – Past Performance Proposal  
Volume IV – Managerial Capabilities Proposal  
Volume V – Cost/Price Proposal

*AR*, Tab 3.

11. Solicitation Section L.13, entitled “Discussions with Offerors,” provides:

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Communications with potential Offerors may take place throughout the source selection process. The purpose of communications is to ensure there are mutual understandings between the FAA and Offerors on all aspects of this procurement. Information disclosed as a result of oral or written communication with an Offeror may be considered in the evaluation of an Offeror's submittal(s).

To ensure that Offerors fully understand the intent of the SIR, and the FAA's needs stated therein, the FAA may hold one-on-one meetings with individual Offerors. One-on-one communications may continue throughout the process, as required, at the FAA's discretion. In accordance with AMS policy, the FAA reserves the right to conduct discussions with specific Offerors only, with all Offerors, or with no Offerors as circumstances warrant. ....

*AR*, Tab 3.

12. In Section L.15, entitled "Completeness/Compliance with Instructions," the Solicitation states:

The FAA reserves the right to award a contract based on initial offers received, without discussions or negotiations of such offers. Therefore, it is critical that each offer is fully responsive to the SIR, without exception of any provision and the information must be clear and complete.

The FAA will review all proposals to ensure completeness, response to all elements, and adherence to section L (this section) of the solicitation. Those proposals that do not meet these requirements will be rejected. The resultant Contractor is responsible for compliance with the entire Statement of Work (Section C), and all attachments of the solicitation/contract. When evaluating an Offeror's capability to perform the prospective contract, the FAA will also consider compliance with these instructions. The FAA will consider an Offeror's noncompliance with all these instructions as indicative of quality of work the FAA may expect from the Offeror during contract performance. The noncompliance with these instructions may be considered indicative of a quality problem and assessed as a risk as provided for in Section M.3.2, Risk Assessment.

*AR*, Tab 3.

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13. In Section L.16, entitled “General SIR Instructions,” the SIR provides:

Replies to this SIR must be in conformance with the outlines or instructions as identified in this as well as other paragraphs of Section L. Offerors must submit factual and concise written information as requested in the SIR. Proposals should be specific enough to provide the FAA evaluators with enough information to be able to judge the capabilities of each Offeror to perform the requirements ....

*AR*, Tab 3.

14. Section L.18 of the SIR describes the contents of Volume I. In pertinent part, it cautions offerors:

Alternate proposals are not authorized to be submitted in response to this SIR. Therefore, with respect to specific terms or conditions of this SIR, any objection to any of the terms and conditions of this SIR may constitute a deficiency, which may make the offer unacceptable. In accordance with the FAAAMS, the FAA reserves the right to award a contract without discussions after evaluation of initial written submissions. Offerors are cautioned to consult with the Contracting Officer before submitting any offer that takes exception to any term or condition of this SIR. However, the FAA also reserves the right to conduct Offeror specific discussions or to conduct discussions and permit Offerors to revise their proposals, if the Contracting Officer deems these measures appropriate and in the best interest of the FAA.

*AR*, Tab 3, Amendment 2.

15. Section L.19 of the SIR instructs offerors to submit specific personnel labor information in Volume II, “Technical Expertise.” This information was to include resumes in the quantities indicated for each labor category identified. The SIR further required resumes to include the proposed position, education, experience, background, accomplishments, and other pertinent information for each individual. *AR*, Tab 3, Section L.19.

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16. Section L.21 of the SIR instructed offerors as to what information to provide in Volume IV, “Managerial Capabilities.” Volume IV was to consist of four tabs: Tab A – Program Management Plan, Tab B – Subcontracting Teaming Strategy, Tab C – Resumes of Key Managerial Personnel, and Tab D – Transition Plan. *AR*, Tab 3.

17. The SIR instructions for Tab A – Program Management Plan identified specific topics that offerors were required to address in their proposals. These topics included: Personnel Management, Relationships with Other Organizations, Performance Management, and Cost Management. *AR*, Tab 3, Section L.21.

18. The SIR instructions for Tab B – Subcontracting Teaming Strategy stated the following:

The following stipulations apply to the Offeror’s teaming/subcontracting arrangements in order to accomplish the requirements of the contract .... The plan must be submitted as part of each Offeror’s proposal and will be incorporated into the contract as **Section J-Attachment J004** at the time of contract award. The Offeror must describe its subcontracting teaming strategy to effectively integrate its overall planned teaming/subcontracting arrangements. This submission must describe an integrated, thoughtful, and effective approach the Offeror intends to employ during the contract period of performance. The Subcontracting Teaming Strategy must be presented in the Offeror’s format and will at a minimum address the following:

- Identify the anticipated participants and submit any final agreements that may be utilized to conduct routine interfaces, minimize disconnects, and maintain performance.
- Fully describe the duties, strengths, areas, and functions that the partner will play in performance of this requirement (i.e. the performance enhancements expected from the proposed arrangement.
- Describe in the approach the organizational relationship maintained between the prime and subcontractors and methods of requirement flow-down (i.e. distribution of work to various subcontractors) and subcontractor activity progress reports and invoice procedures contemplated.



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- Describe the mechanism proposed to distribute work to various subcontractors so as to achieve subcontracting goals while achieving staffing requirements.
- Describe the approach used to rate subcontractors/teammates to select subcontractors and to ensure subcontractors deliver the same high quality work effort expected of the prime.
- Describe initiatives to enhance communications, reduce the likelihood of misunderstandings and expeditiously resolve problems and disputes between the prime and its subcontractors.
- Describe how management and control policies will be implemented, and how work will be controlled, reported, and reviewed. The proposal must include a description of the accessibility and flow of relevant support from internal and external sources, such as parent organizations, teaming arrangements, and subcontractors. Any integration of team members or subcontractors into the management and supervisory hierarchy must be fully described.
- Describe the proposed strategies, processes, and procedures to establish and maintain an integrated, effective, and efficient work flow across team members and subcontractors in order to maintain the parallel flow of mission services and development activities.
- Describe any proposed management innovations that would result in project benefits, such as enhanced customer service, process improvements, accelerated schedules, cost reductions, and/or increased reliability.

*AR*, Tab 3, Section L.21.2.

19. The SIR instructions in Section L.21.3 for Tab C – Resumes of Key Managerial Personnel (revised in Amendment 3) stated the following:

The Offeror must provide a resume in the Offeror's format of no more than two pages for each person submitted as a Key Personnel in their proposal. For Key Personnel, who are not currently employed by the Offeror, a one page signed letter of intent is required, in addition to the resume. Section H, Key Personnel and Lines of Communication, identifies positions designated by the FAA to be filled by Key Personnel. The Offeror may determine the number of resumes and the mix of categories as provided in Section H, Key Personnel and Lines of Communication, deemed appropriate to manage the effort.

Particular emphasis should be placed on past and present experience of key personnel in the management of large, complex, multi-faceted, task order contracts employing significant numbers

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of personnel performing work of a similar nature to the work being proposed.

AR, Tab 4.

20. The SIR instructions for Tab D – Transition Plan stated the following:

.... The Offeror must provide a plan to transition to full performance under the Architecture and System Engineering Contract. A plan must be submitted as part of each Offeror's proposal and will be incorporated into the contract as **Section J-Attachment J003** at the time of contract award. Upon contract award, the Contractor must coordinate with the FAA and incumbent Contractor(s) to implement the approved Transition Plan. The objective of this plan is to describe the transition of support from the existing Contractor(s) to the Architecture and System Engineering Contractor. The plan must cover the period from contract award through the next 45 days. During this period the current contract and the Architecture and System Engineering Contract will overlap. This transition plan will describe in detail an integrated and comprehensive approach for the transition effort from the existing contract(s) to the Architecture and System Engineering effort. As a minimum, the Offeror's plan must provide the following:

- Establish an orderly and effective process for transitioning the required services within 45 days of contract award.
- Enable the ATO-R Support Services Contractor to assume responsibility with minimal disruption to the FAA daily activities.
- Demonstrate the ability to obtain required labor categories and skill levels and place them in the proper locations at the required times during the transition process. Discuss the transition of displaced employees, as needed and in accordance with Section I.3.6.2-40.
- Demonstrate the ability to coordinate effectively between key players, such as FAA personnel and key subcontractors, during the transition period.
- Demonstrate the ability to transition functions and work efforts from the outgoing Contractor(s) to the new with minimal disruption, minimal impact on FAA operations and productivity, minimal duplication of effort, and minimal additional cost to the FAA.
- Advise the FAA what types of information and assistance from the current Contractor(s) would be helpful in facilitating transition efforts.

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- Advise the FAA as to risks envisioned in the transition from one contract to another and how these risks will be mitigated.
- Advise the FAA as to any other concerns, issues, etc. involved in the transition from the existing contract(s) to the follow-on contract.
- Ensure adequate facilities are obtained within 30 days after contract award.

*AR*, Tab 3, Section L.21.4.

21. Section L.22 of the SIR instructed offerors as to how to prepare Volume V, “Cost/Price Proposal.” It states generally:

IT IS IMPORTANT THAT OFFERORS AND SUBCONTRACTORS READ AND FOLLOW THESE COST/PRICE PROPOSAL INSTRUCTIONS CAREFULLY. THE FAA RESERVES THE RIGHT TO CONSIDER AN INACCURATE OR INCOMPLETE COST/PRICE PROPOSAL INDICATIVE OF THE OFFEROR'S INABILITY TO PERFORM THE WORK REQUIRED UNDER THE CONTRACT.

The cost proposal is the Offeror's estimate of the cost and fee to perform the work described in this SIR. The FAA will use the cost proposal to determine the probable cost to the FAA, so it is important that the cost proposal be accurate and complete. Each Offeror must submit its cost proposal in a sealed package(s) plainly marked "VOLUME V - COST PROPOSAL." Cost information must not be shown in the technical proposal.

*AR*, Tab 1, L.22 (emphasis in original).

22. The SIR's Cost/Price Proposal preparation instructions sets forth mandated assumptions for offerors' pricing:

In order to promote fair and consistent pricing of this procurement, all Offerors must reflect certain assumptions in their cost proposals. Failure to comply with these assumptions could result in the determination that the proposal is non-responsive to the SIR and could be grounds for rejection of the proposal ....

*AR*, Tab 3, Section L.22.1.

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23. The SIR's Cost/Price Proposal preparation instructions also require certain cost exhibits to contain specific information. In pertinent part, it provides: "In addition to these cost exhibits, each Offeror must submit any additional data, supporting schedules or substantiation that will facilitate the Government's evaluation of the proposal. The Offeror is responsible for ensuring the accuracy and completeness of all subcontractor data." *AR*, Tab 3, Section L.22.2.
24. Section M.2 generally describes the basis for contract award. Specifically, Section M.2.1, "Award Selection," provides:

The Offeror(s) whose offer conforms to the requirements of the solicitation and provides the best value to the FAA will be selected for award(s). The best value is defined as the proposal that is the most advantageous to the FAA, based on the evaluation factors contained in Section M. Offerors are cautioned not to minimize the importance of a detailed adequate response in any one of the factors due to it not being numerically scored. The best value approach provides the opportunity for technical and cost/price trade-offs, and does not require that award be made to either the Offeror submitting the highest rated proposal or the Offeror submitting the lowest cost/price, although the ultimate award may be to either one of those Offerors. In evaluating the proposals, the FAA may conduct written or oral communications with any and/or all Offerors, and may reduce the firms participating in the competition to only those Offerors most likely to receive award. The FAA reserves the right to conduct discussions and negotiations with any individual competing Offeror, or all competing Offerors, as the situation warrants. Discussions with one or more Offerors do not require discussions with all Offerors. The FAA reserves the right not to make an award if such action is in its best interest. Offerors are cautioned not to minimize the importance of a detailed adequate response in any of the factors due to it not being numerically scored.

*AR*, Tab 1, Section M.2.1.

25. SIR Section M.2.2, "Evaluation Order of Importance," provides:

The basis for award will be made against the evaluation factors contained in Section M. The evaluation will consider the FAA's characterization of risk. All factors will be considered in the

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evaluation for award. Within each Factor, Section M.4 identifies the relative importance of each Sub-Factor. The following evaluation factors are listed in descending order of importance. Technical Expertise is the most important factor, followed by Managerial Capabilities, and then Past Performance. Cost/Price will not be numerically scored, but will be evaluated for reasonableness, completeness, realism, and consistency. The Technical Expertise, Past Performance, and Managerial Capabilities factors (except for the Subcontracting Teaming Strategy Sub-Factor) will be numerically scored. As overall differences in Technical Expertise, Past Performance, and Managerial Capabilities between offers become smaller, Cost/Price will become more important.

*AR*, Tab 1, Section M.2.2.

26. SIR Section M.2.4, "Evaluation of Alternatives and Exceptions," states:

Alternate proposals are not authorized to be submitted in response to this SIR, and will not be evaluated. Therefore, with respect to specific terms or conditions of this SIR, any objection to any of the terms and conditions may constitute a deficiency which may make the offer unacceptable. As the FAA reserves the right to award a contract without discussions, in accordance with FAA AMS, offerors are cautioned to consult with the Contracting Officer before submitting any offer that takes exception to any term or condition of this SIR. However, the FAA also reserves the right to conduct offeror specific discussions or to conduct discussions and permit offerors to revise their proposals, if the Contracting Officer deems appropriate and is in the best interest of the FAA. The FAA reserves the right to reject any exception for any reason.

*AR*, Tab 1, Section M.2.4.

27. SIR Section M.2.5, "Eligibility for Award," provides that "[t]o be eligible for award, the Offeror must meet all the requirements of the SIR." *AR*, Tab 1, Section M.2.5.

28. SIR Section M further states that "it is critical that each offer be fully responsive to this SIR and its provisions. All submittals in response to a SIR should contain the Offeror's best terms from a Technical, Past Performance, Managerial

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Capabilities, Cost/Price, and Small Business Subcontracting Plan (if applicable) standpoint.” Tab 1, Section M.2.6, “Award on Initial Offers.”

29. The SIR describes the evaluation process as follows:

During the evaluation process, the FAA evaluation teams will evaluate each Offeror using information submitted by the Offeror (or in the case of Past Performance, obtained from outside references and other points of contact) against evaluation factors contained in Section M. The Technical, Managerial Capabilities, Past Performance and Cost/Price proposals will be evaluated by assigned teams that will evaluate each offer against the evaluations factors established in this section and in accordance with a pre-established evaluation plans. The various evaluation teams will then compile the results from all evaluation factors and subfactors, and present their findings to the Source Evaluation Team (SET). The SET will present their recommendations to the Source Selection Official (SSO), who will select the offer(s) providing the best value to the FAA.

*AR*, Tab 1, Section M.3.1, Procedures.

30. The evaluation process included an evaluation of risk as follows:

The core substance of the evaluation will consist of an evaluation of risk – that is, the evaluator’s opinion of the degree to which an offeror would be successful if awarded the contract. The following definition below will assist in determining scores.

**Risk** – The degree of certainty (or uncertainty) in an evaluator’s assessment of a proposal when determining the ability, capability, or probability that the offeror can or will deliver all aspects of the required product or work effort without adversely impacting contract performance, quality of work, schedule, or actual costs to be incurred by the Government during the performance period. **Risk is an implicit part of each factor or subfactor evaluation and as such will not receive a separate score.**

**High Risk:** Great potential exists for serious work performance problems including, but not limited to, work schedule disruptions, degradation of performance or quality problems and increases in cost, even with special emphasis and close monitoring.

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**Medium Risk:** Some potential exists for work performance problems including, but not limited to, work schedule disruptions, degradation of performance or quality problems, and a commensurate increase in contract costs incurred by the Government. However, with special emphasis and close monitoring by the Government, the Contractor will probably be able to overcome the difficulties.

**Low Risk:** Minimal or no potential exists for work performance problems, including, but not limited to, work schedule disruptions, quality problems, and a limited or no increase in contract costs incurred by the Government. Any difficulties that may exist will be overcome with normal emphasis and monitoring.

*AR*, Tab 1, M.3.2, Risk Assessment.

31. The SIR provided that four evaluation factors would be used to evaluate the Offerors and the order of importance from highest to lowest is Technical Expertise, Managerial Capabilities, and Past Performance. The SIR also provided that the Cost/Price proposal would not be scored, but would become increasingly more important as overall scores on the other volumes drew closer together.” *AR*, Tab 1, M.4, Evaluation Factors.
32. SIR Sections M.4.1 and M.4.3, regarding the “Technical Expertise” and “Managerial Capabilities,” respectively, provide that these factors are to be evaluated under the following general criteria:

Approach – The degree to which the approach demonstrates comprehension of the requirements and the necessary resources to successfully satisfy the requirement.

Understanding – The degree to which the approach for implementing the requirements is logical, feasible, and achievable given the requirements. The degree that the technical performance and all risks are identified and mitigated.

Soundness/Substantiation – The validity and achievability of the selected approach. The degree to which the quality and thoroughness of the information provided supports the approach selected, and the degree to which the information is substantiated.

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*AR*, Tab 1, Sections M.4.1 and M.4.3.

33. Managerial Capabilities Sub-Factor (a) – Program Management Plan (PMP) provided:

The PMP will be evaluated as to the degree to which the offeror addresses an integrated, thoughtful, and effective approach for properly managing the work to be performed under this contract to include the following sub elements: Personnel Management, Relationships with other Organizations, Performance Management, and Cost Management as described/identified in Section L.

*AR*, Tab 1, Section M.4.3.

34. Managerial Capabilities Sub-Factor (b) – Subcontracting Teaming Strategy provided:

The Offeror must submit a proposed teaming arrangement and strategy. The Subcontracting Teaming Strategy will be evaluated as to the degree to which the Offeror addresses strategy to effectively integrate its overall planned teaming/subcontracting arrangements over the life of the contract as described/identified in Section L. The Subcontracting Teaming Strategy will be evaluated, not scored, on an Acceptable/Unacceptable basis as defined below:

Acceptable – The Offeror’s proposal represents an effective teaming arrangement which brings all of the skills and experience necessary for successful contract performance. In addition, at least 50 percent of the cost of contract performance incurred for personnel shall be expended for employees of the prime contractor.

Unacceptable – Offeror fails to propose an effective teaming arrangement which brings all of the skills and experience necessary for successful contract performance, or the Offeror does not allocate at least 50 percent of the cost of contract performance incurred for personnel to employees of the prime contractor.

*Id.*

35. Managerial Capabilities Sub-Factor (c) – Key Managerial Personnel provided:



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The Offeror will be evaluated as to the degree to which the qualifications of key personnel meet FAA minimum educational, experience, or other requirements. Experience includes the number of personnel supervised as well as their roles, duties and responsibilities in previous or current projects of a similar nature as described/identified in Section L.

*Id.*

### **36. Managerial Capabilities Sub-Factor (d) – Transition Plan provided:**

The Transition Plan will be evaluated as to the degree to which the Offeror addresses an integrated and comprehensive approach for the transition effort from the existing contracts in a timely manner as described/identified in Section L.

*Id.*

### **37. As for the evaluation of Cost/Price, SIR Section M.4.4 provided:**

Factor 4, Cost/Price will be evaluated, but not numerically scored. As overall scores for the other areas of the proposal draw closer together, the Cost/Price factor will become increasingly more important. The cost/price proposal will be evaluated by adding the total proposed figures for the base period and all of the option periods. .... The Government will use cost/price analysis to determine reasonableness, completeness, realism, and consistency .... The analysis will also determine the Offeror's understanding of the work and the Offeror's ability to perform the contract. The cost plus fixed fee percentage, labor rates, time and materials fee percentage, indirect rates, and sample task pricing will be evaluated ....

*AR*, Tab 1, Section M.4.4.

## **B. The Evaluation of Proposals**

38. On November 6, 2009, the FAA received proposal submissions from offerors, including CGH and EIS. *AR*, Tabs 7-16.

39. Past Performance Questionnaires were received at various times during the months of September through November 6, 2010. *Gamble Decl.* at ¶ 6.

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40. The non-price/cost evaluation of offers was performed by three teams, a Technical Evaluation Team ("TET"), a Management Evaluation Team ("MET"), and a Past Performance Evaluation Team ("PET"). *AR*, Tab 6 at 2.

41. During the evaluation, all evaluation reports and other materials generated by the evaluation teams used assigned labels in place of offeror names. The label "Danube" was assigned to Enterprise Information Services, Inc., and "Volga" assigned to CGH Technologies, Inc. ("CGH"). *Gamble Decl.* at ¶ 4.

**C. The Evaluation of Non-Price/Cost Factors: Technical, Past Performance and Managerial Capabilities**

42. From the TET, CGH received a score of 2.76 for its Volume II Technical Expertise submission and was assigned some weaknesses. *AR*, Tab 22.

43. In the Volume II Technical Expertise submission, CGH provided resumes for 9 individuals. *AR*, Tab 8 at II-57 - II-74. Examples of the type of weaknesses the TET assigned to the resumes of the individuals proposed by CGH for the following positions are as follows:

Position	Weakness
Chief Engineer/ Scientist	Failed to identify any relevant software engineering or software development in work history
System Engineer	Majority of experience comes from program management instead of direct development involvement/support. Limited and dated experience with procuring service organization.
System Engineer	Majority of experience comes from program management instead of direct development involvement/support. No real history relating to systems software development or engineering. Lack of familiarity with FAA-STD-026A NAS Software Development Standard or any equivalent
Human Factors Engineer	Contradictory information regarding work experience. No support for claim of being highly skilled in FAA HF design standards.
Software Engineer	Failed to mention any SW development/support IAW

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	any process standards or familiarity/use of software development tools.
Software Engineer	Failed to mention any SW development IAW any process standards and failed to meet education requirements for position/skill level required.
Performance Analyst	Degrees held determined not be applicable fields of study for position.

*AR*, Tab 22.

44. From the PET, CGH received a score of .90 for Volume III Past Performance, and was assigned a few minor weaknesses relative to the customer satisfaction subfactor. *AR*, Tab 20.
45. From the MET, CGH was assigned weaknesses and deficiencies and received a score of 1.0 for Volume IV Managerial Capabilities. *AR*, Tab 23.
46. Under Management Capabilities Subfactor A, Program Management Plan, CGH was found to “barely meet” the criteria set forth in Section M of the SIR. The MET found there to be an overall lack of detail and substantiation of approaches/capabilities, and noted the following weaknesses and deficiencies:

**1. Section L.21.1.1, (Weakness)** The Offeror does not sufficiently detail and substantiate approaches/capabilities to the following section L criteria:

- a. Manage fluctuations in work levels
- b. Recruit and retain personnel through life of program
- c. Recruit incumbent personnel (The Offeror provided some detail in the Transition Plan but not sufficient to substantiate approach.)

**2. Section L.21.1.1, (Deficiency)** The Offeror does not address "managing and training diverse personnel." The Offeror does not discuss a training program, frequency or types of training. There are no examples of what process or tools will be used to handle training. There is also no transparent mechanism to track the effectiveness of the training. This deficiency could cause a decline in productivity if employees are not properly trained.

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**3. Section L.21.1.2, (Weakness)** The Offeror provides a list of organizations in which they have established relationships and seem to indicate through Figure 3-1 that they are in a maintaining phase of those relationships. The Offeror does not provide details as to substantiate what those relationships consists of and does not describe how these relationships will work in the future as it relates to this contract. The Offeror did not address responsiveness to customer concerns. The Offeror does not explain how customer concerns are tracked, addressed, or resolved.

**4. Section L.21.1.3, (Weakness)** The Offeror does not substantiate an in place EVM System or skilled personnel. The Offeror presents contradictory information as noted below. Risk that the system will not be in place by contract start. The Earned Value Management System (EVMS) solution is proposed to measure actual performance of work and associated cost and schedule.

a. The Offeror states (page 24) that they will be "acquiring and training the appropriate schedulers, control account managers, and/or project control managers" to support this solution. This weakness could affect performance in that they do not have the trained personnel ready to go at time of contract award.

b. Yet, The Offeror mentions that they are establishing an EVM System for ATO-P which contradicts the above bullet "a".

**5. Section L.21.1.4, (Weakness)** The Offeror does not fully address Cost controls. Offeror employs SYMPAQ SQL, a client/server cost management system which is compliant with Federal Government reporting. Internal policies, procedures and process are noted as being a part of SYMPAQ SQL, but the Offeror does not mention the frequency of updates, audits, what controls are in place or other details in proposal to substantiate an understanding of system.

**6. (Weakness)** The Offeror lists activities not in scope of this contract (Figure 13.2-1) (such as typing, clerical support, mail distribution and managing personnel actions and official files). This demonstrates that the Offeror lacks an understanding of the scope of this contract.

*Id.*

47. Under Management Capabilities Subfactor B, Subcontracting Teaming Strategy, CGH was found unacceptable for failing to meet the 50% criteria and received a number of weaknesses that presented moderate to high risk. Specifically, the Team found:

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**1. Section L.21.2, (Weakness)** The Offeror does not address the requirement for 50% of the cost of contract performance. In accordance to Section M (Evaluation Factors for Award), "at least 50% of the cost of contract performance incurred for personnel shall be expended for employees of the prime contractor." The Offeror has not disclosed such an agreement. The Offeror only explains what the relationship and responsibilities are between the prime and subcontractors, but no reference to the 50% cost of contract performance (Pg IV-31 to IV-36). This weakness presents a risk to the small business set aside not being properly executed.

**2. Section L.21.2, (Weakness)** The Offeror proposes to use a Competition Model for assignment of work where subcontractors may overlap in capability. Although the Offeror claims their Competition Model saves government money, it's not clear how long the process will take or how this satisfies the 50%) prime contractor requirement.

**3. Section L.21.2, (Weakness)** The Offeror states that the FAA Task Order will be used as the mechanism to distribute work and develop a procurement package. Products listed from the package indicate a development effort which is not consistent with the SOW and thus suggesting a lack of understanding of the SOW.

**4. Section L.21.2, (Weakness)** The Offeror's Task order response process refers to stakeholders and current FAA end users as part of the task order team and planning process (pg 36). This indicates a lack of understanding and would introduce the possibility of direction being given by someone other than the CO [Contracting Officer] or COTR [Contracting Officer's Technical Representative]. FAA end users may be called on as SME's during task execution, but would not be part of the Offeror's Task Team as explained on page 36.

**5. Section L.21.2, (Weakness)** The Offeror shows a lack of understanding of contract scope. Rationale: a. Reference to prototyping in Figure B. 1 -2 when this contract scope does not include prototyping. Perhaps analysis of such, but not the development. Also, there is discussion of supporting administrative tasks such as maintaining personnel files and mail distribution (page 23, Figure 13 2-1).

b. Reference to documents delivered in initial task order review and planning that does not align with scope of contract. Specifically the Offeror references System Specification, Systems Requirements, make/ buy recommendations in context of delivery of those in initial program planning, Task Order review process and subcontractor requirement flow-down (Page 39 top).

*Id.*

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48. Under Management Capabilities Subfactor C, “Key Personnel and Lines of Communication,” CGH was found to “barely meet” the criteria set forth in Section M. The MET explained that although CGH presented “candidates for all 7 categories described in Section H.14 Key Personnel, some of the resumes do not meet Section J criteria.” The MET also indicated that “resumes were focused on alignment with the SOW and not criteria in section J.” Specifically, the MET found the following weaknesses and deficiencies:

1. **Section L.21.3, (Deficiency) Resume for Air Traffic Analyst** does not show current employment and no letter of intent is provided.
2. **Section L.21.3, (Deficiency) Human Factors** resume does not meet AAA level criteria due to insufficient years of relevant experience. Resume states 18 years of experience, but only substantiates details for 10 years of experience. Resume depicts limited experience in human factor's disciplines. Also, the resume does not address an understanding of FAA Human Factors Design Standards and MIL-STD-1472.
3. **Section L.21.3, (Deficiency) Software Engineer** does not meet AAA level criteria due to insufficient years of relevant experience. The candidate does meet AA level criteria. (The Master's degree is not in required discipline. Therefore, in order to meet AAA with a Bachelor's degree, 20 years of relevant experience is required. Candidate's experience goes back 16 years according to body of resume-note disconnect from the years listed at top of resume -14 years.)
4. **Section L.21.3, (Weakness) AAA Program Manager** does not reflect direct supervision and management of major projects
5. **Section L.21.3, (Weakness) Chief Engineer** resume lacks software development or software engineering experience as stated in Section J. (Strength) Candidate has strong management background and experience with Air Traffic (ie co-founder of CDM).
6. **Section L.21.3, (Weakness) Systems Engineering** resume does not provide an understanding of FAA Software Standard, FAA-STD-026A NAS and is weak in experience related to developing system requirements, documenting requirements, and formulating system scope.

*Id.*

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49. Under Management Capabilities Subfactor D - Transition Plan, CGH again was found to “barely meet” the criteria set forth in Section M. The MET explained that CGH “does not adequately address an integrated comprehensive plan to transition tasks in timely manner as required in section M” and “does not substantiate ability to meet proposed schedule.” The MET also found CGH “does not address some section L criteria and presents information that shows lack of understanding of transition requirements.” The MET found that the following weaknesses and deficiencies in CGH’s proposal would impact its performance and present a high risk to the Agency:

**1. Section L.21.4, (Deficiency)** The Offeror does not have arrangements in place to secure a facility within 30 days of contract award, as required in SIR, and no back-up plan in place. Only approach provided for obtaining facility is to coordinate with existing real estate agent.

**2. Section L.21.4, (Weakness)** The Offeror is proposing an aggressive schedule to "have all personnel entirely transitioned and the team fully staffed a full 15 days sooner that required by the solicitation." The Offeror does not substantiate that it has the ability to fulfill this plan

a. The transition schedules are inconsistent with the objective of fully staffed in 30 days. Schedule and activities in D.5-1 and D.5-2 (pgs 71 & 72) do not align with that objective. The incumbent hiring, which is cited at a critical success factor (pg 66) is not listed in Transition Activities in Figure D.3-1 on pg68.

b. The Offeror does not substantiate transition successes. Does not provide details such as past incumbent hire rates or past success measures. The Offeror only states that the PM/Transition Manager has previous transition experience, but does not provide details.

**3. Section L.21.4, (Weakness)** Lack of understanding of transition requirements:

a. (Weakness)The risks identified (Risk Chart pg 70) do not have sufficient mitigation. The Offeror also does not provide details for the risk process. For example: the Offeror sites that the recruitment of the majority of the incumbent staff as mitigation to loss of knowledge risk. The Offeror does not provide a mitigation if he is unable to recruit the majority of the incumbent staff. Especially since vendor states will recruit incumbent personnel to ensure the most successful low-risk transition and vendors past transition successes begin with obtaining incumbents (pg66).

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b. (Deficiency) The Offeror does not provide list of needs from current Contractor, which indicates an unclear understanding of transition requirements.

c. (Weakness) The Offeror does not fully advise the FAA as to any other concerns, issues, etc. involved in transition. The Offeror provides figure D.6- 1, Critical Success Factors where issues are listed, but what's written doesn't align with major issues presented.

d. (Weakness) The Offeror shows a lack of understanding of the key activities to be supported during transition period as they describe support for the budget cycle and JRC.

**4. Section L.21.4** (Weakness) The Offeror does not propose a separate transition manager. A risk is noted in that the PM's will be multi-focused which could risk transition/ task performance.

**5. Section L.21.4** (Weakness) There is no discussion of the transition of displaced employees in this section. The Offeror does mention first right of refusal in PMP but in this section yet states conducting a gap analysis of resources and eliminating redundancies.

**6. Section L.21.4** (Weakness) Spelling and grammar errors, shows lack of attention to detail and quality.

*Id.*

50. For Volumes II through IV, CGH's total score was 4.66 out of a possible 10, with CGH scoring higher than EIS for the Technical Expertise and Past Performance Factors. CGH's overall non-price/cost factor score was higher than that received by EIS. *AR*, Tab 25 at 3.

### **D. The Evaluation of Cost**

51. The CET Report found that CGH did not comply with the SIR Subcontracting Requirement:

AMS clause 3 6 1-7 Limitation of Subcontracting applies to all offeror's under this contract, as it is incorporated by reference in Section I under 3 6 1-7 - Limitations on Subcontracting (July 2008) The clause states that at least 50% of the cost of the contract performance incurred shall be expended by the prime contractor Specifically the AMS states that for service type contracts (except construction) At least 50 percent of the cost of contract



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performance incurred for personnel shall be expended for employees of the prime contractor.

.... The CET researched AMS to obtain clarification on the exact methodology in determining performance percentage expended by the prime contractors and their subcontractors. The CET found that AMS details the performance percentage expenditure calculation under AMS Clause 3.6.1-7 Limitations on Subcontracting (July 2008). The clause specifically states that to calculate the subcontracting percentage, one must include all Direct Labor and Allowable Overhead and G&A. ....

*AR*, Tab 24 at 4-5.

52. The CET Report states that the CGH total proposed price was [DELETED] and the EIS total proposed price was [DELETED] and that: “Upon reviewing all responses from offerors, the CET determined that all offerors provided adequate cost proposal information as required by the SIR to conduct a cost and price analysis for each offeror and their subcontractors.” *Id.* In this regard, CET essentially accepted CGH’s cost elements as proposed to be fair and reasonable, and to present little risk of being understated. *AR*, Tab 24 at 8 – 13, 33. The CET, however, identified a moderate risk due to possible cost increases resulting from the nature of its subcontracts, which were cost-plus-fixed-fee (“CPFF”). *Id.* The CET further identified what it described as a “major concern” in that CGH did not meet the SIR requirement that it perform at least 50% of the work as prime. *Id.* at 33.
53. The CET Report identifies “non cost related risks” that are not related to probable cost increases, but rather compliance with the SIR requirements. *Id.* at 30 – 31. The CET Report finds noncompliance by CGH with the Limitation of Subcontracting clause based on information contained in CGH’s cost proposal as to the percent of work to be performed by CGH relative to that performed by its subcontractors. *Id.* The expended amount was calculated using a total cost basis, using direct labor costs and indirect costs but not other direct costs (“ODCs”) and

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fee, as specified in AMS 3.6.1-7, Limitations on Subcontracting (July 2008). *Id.*

The percentage of prime and subcontractor work for CGH are as follows:

CGH	Cost	Percent
Prime	[DELETED]	48.22%
Subcontractors	[DELETED]	51.78%

*Id.*

54. In a memorandum, dated September 27, 2010, the Contracting Officer documented his determination that CGH was ineligible for award. He states:

CGH's ineligibility is based upon the Cost/Price Evaluation Team's ... determination that CGH's Cost/Price proposal shows that CGH would not be providing at least 50% of the overall effort required, which is in violation of AMS 3.6.1-7. [This failure] ... also resulted in a separate evaluation determination of "Unacceptable" under the Subcontracting Teaming Strategy Subfactor described in Section M.4.3 of the SIR ....

The SIR contains AMS Section 3.6.1-7 Limitations on Subcontracting (July 2008) which generally provides that the prime contractor must provide at least 50% of the effort (measured in cost) of the contract. The Cost/Price Evaluation Team ... determined that, based upon CGH's Cost proposal, CGH was proposing that it provide less than 50% of the overall effort in violation of AMS 3.6.1-7.

CGH was not contacted about the unacceptability of its award as the CET determined that other offeror(s) did satisfy the AMS 3.6.1-7 50% requirement. As such, communications with CGH on this topic would represent unfair communications with one offeror and create the appearance that I was favoring them over the other offerors.

Based on the foregoing, I have determined that CGH Technologies, Inc. is ineligible for award under the subject procurement.

*AR*, Tab 26.

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55. The Contracting Officer explained that communications with another unsuccessful offeror regarding its noncompliance with the Limitations on Subcontracting Clause confirmed that the CET's methodology for calculating the percentage of work to be performed by the prime contractor was accurate and proper. Applying the same calculation to the data in CGH's cost proposal, the Contracting Officer determined that the only way CGH could bring its offer into compliance with the Limitations on Subcontracting clause would be to reallocate work among the team members and that such a reallocation of work would constitute a major revision to an offeror's submission. On this basis, he determined that allowing such a revision would be unfair to any offeror whose proposal complied with the Limitations on Subcontracting Clause. He also indicated that CGH made no request during the competition for a waiver of the requirements of this Clause. *Gamble Decl.* at ¶¶ 9-10.

56. The Contracting Officer further explained how the CET analyzed CGH's prime and subcontractor cost allocations to determine that its submission did not comply with AMS Clause 3.6.1-7, Limitations on Subcontracting. Based on the allocations of prime contractor On-and off-site labor rates, and fringe and G&A overheads, as well as those of the subcontractors, he states that the CET found CGH proposing to perform approximately 48% of the work by cost, and proposing its subcontractors to perform approximately 52% of the work by cost. This percentage allocation showed that CGH's proposal was not in compliance with the Limitations on Subcontracting Clause. *Gamble Decl.* at ¶ 11.

**E. Source Selection Board Combined Technical/Cost/Price Evaluation Report**

57. Based on separate reports that were issued by the TET, PET, MET and CET, the Source Selection Board ("SSB") prepared a combined Technical/Cost/Price Evaluation Report. *AR*, Tabs 20, 22, 23, and 24. Specifically with respect to CGH, the SSB found its proposal to "present a major concern" for failing to meet

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the requirement that the prime contractor perform 50% of the work. *AR*, Tab 25 at 7.

58. The SSB Report states:

Offeror Volga [CGH] received an overall grade of "Barely Meets" on its Technical Expertise, Past Performance and Managerial Capabilities proposals. Offeror Volga [CGH]'s proposal contained several deficiencies.

- Offeror Volga [CGH] proposes a subcontracting strategy that does not support the requirement to perform 50% of the work. (See Cost Evaluation Section for additional information.)
- There were four resumes submitted with Offeror Volga [CGH]'s proposal that did not meet either the education or experience requirements as stated in Section J attachment 001 or other requirements as stated in Section L.21.3.
- Offeror Volga [CGH] does not have arrangements in place to secure a facility within 30 days of contract award, as required in SIR, and no back-up plan in place.
- Offeror Volga [CGH] did not address a training program for personnel.

Key findings for Offeror Volga [CGH] include:

- Expertise with full Suite of Oracle Products and Rational Tools
- Number of Key Personnel exceeds education and experience requirements in Section J attachment 001.

*AR*, Tab 25 at 9.

59. As for the results of the Cost/Price Evaluation, specifically the evaluation of Subcontracting Teaming Strategy, the SSB states:

The SSB notes that Section M.4.3, Subcontracting Teaming Strategy, tasks the Managerial Capabilities Team with making an acceptable or unacceptable determination on the individual offerors' proposals. Included in the definition of unacceptable or acceptable is the determination of whether the offeror meets AMS 3.6.1-7, Limitations on Subcontracting, which requires at least 50% of the cost of the contract performance incurred shall be expended by the prime contractor. The SSB also notes that this

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final 50% determination is one that can only be made using information contained within the Cost/Price Proposal, which was not accessible by the Managerial Capabilities Team. None of the offerors provided sufficient information within their Managerial Capabilities Proposal to allow the Managerial Capabilities Evaluation Team to make this determination ....

.... The Managerial Capabilities Evaluation Team also noted that even if Offeror Volga [CGH] met the 50% determination per AMS 3.6.1-7, Offeror Volga [CGH] would have been deemed unacceptable for reasons separate from the 50% determination due to a lack of understanding of SOW, contract scope, and contract authority restricted to CO/COTR for Offeror Volga [CGH].

*AR* Tab 25 at 10.

60. The SSB Report summarizes its conclusions regarding CGH as follows:

- Offeror Volga [CGH] was the highest in Past Performance and second highest in overall scores. Offeror Volga [CGH]'s cost was the 2nd lowest cost. Based upon the scoring system, Offeror Volga [CGH]'s 4.66 overall score reflects a high risk of unacceptable performance. Offeror Volga [CGH] was deemed as a moderate risk by the CET.
- The CET has determined that Offeror Volga [CGH] does not satisfy AMS Clause 3.6.1-7. Offeror Volga [CGH]'s proposal indicates the prime contractor will not perform at least 50% of the work. Offeror Volga [CGH] is unacceptable as their proposal is noncompliant with AMS Clause 3.6.1-7.

*AR*, Tab 25 at 12.

### **F. Source Selection Official Decision**

61. Among other things, the Source Selection Official (“SSO”) concurred with the SSB’s determination that CGH’s proposal was unacceptable as: (1) it was non-compliant with AMS Clause 3.6.1-7; and (2) it would have been “deemed unacceptable under the Subcontracting Teaming Subfactor for reasons separate from the 50% determination due to a lack of understanding of SOW, contract

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scope, and contract authority restricted to CO/COTR.” *AR*, Tab 27. The SSO also noted “many valid strengths” that demonstrate the value to the FAA of EIS and that EIS presented an acceptable performance risk. The SSO selected EIS for award as the only remaining eligible offeror and the best value to the FAA. *Id.*

**G. CGH Concerns Regarding Former Employee of Awardee who is Currently Employed by the FAA**

62. The Contracting Officer learned for the first time at the debriefing on October 14, 2010 of an issue regarding “John Raper” whose prior employment CGH believed was relevant to this competition. The Contracting Officer states that he has never met an FAA employee named John Raper, and to the best of his knowledge, “no such employee participated in any fashion or manner on this competitive procurement at any time or stage of the effort” and “no such person received any information about this procurement, selection sensitive or otherwise, except perhaps what was publically known.” *Gamble Decl.* at ¶ 14.

63. John Raper has been employed by the FAA as the program manager for the FAA's Center for Advanced Aviation System Development known as the CAASD, since October 19, 2010, and was hired into the FAA on May 10, 2010. He served as the SE-2020 SIR 2 Program Manager until October 19, 2010. *Declaration of John Raper*, dated January 11, 2011 (“*Raper Decl.*”), at ¶ 1.

64. He was employed by EIS from early July, 2009 until May 10, 2010. He recalled that in the March, 2010 timeframe, EIS was notified by DCAA that it would be performing a "pre-award" audit of EIS associated with its proposal submitted on the ASESS competition and representatives of DCAA told EIS that the audit had completed successfully with no significant negative findings. Mr. Raper states that EIS may have interpreted this "pre-award" audit to signify that it had won the ASESS competition, and made some public statements in that regard. *Raper Decl.* at ¶ 2. .

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65. Mr. Raper also declares that since becoming a Federal employee, he never has discussed the ASESS competition, the evaluation thereof, or EIS's proposal submitted, with any other Federal employee. *Raper Decl.* at ¶ 3.

66. The award of the Contract was made on September 27, 2010. *AR*, Tab 29.

67. CGH was debriefed on October 14, 2010, and filed the subject Protest with the ODRA on October 21, 2010. *AR*, Tab 28, and *Protest* at 1.

### **III. Discussion**

#### **A. Standard of Review**

The ODRA reviews protest allegations in accordance with the ODRA Procedural Regulations, 14 C.F.R. Part 17, and the FAA's Acquisition Management System ("AMS"). *Protest of Columbus Technologies and Services, Inc.*, 10-ODRA-00514; *Protest of Enterprise Engineering Services, LLC*, 09-ODRA-00490, citing *Protest of Carahsoft Technologies Corporation and Avue Technologies Corporation*, 08-TSA-034. The Protester bears the burden of proof by substantial evidence that the award decision lacked a rational basis or was otherwise improper. 14 C.F.R. §17.37(j). In addition, a protester must demonstrate a reasonable possibility of prejudice; specifically, that but for the Agency's improper actions that are alleged here, it would have had a substantial chance of receiving the award. *Id.* In "best value" procurements such as this one, the decisions of the designated evaluation and source selection officials must be consistent with the AMS and the evaluation and award criteria set forth in the underlying SIR. *Id.* As established previously, an offeror's mere disagreement with the Agency's judgment concerning the adequacy of its proposal is not sufficient to establish that the Agency acted irrationally. *Id.*

**B. CGH was Ineligible for Award for Noncompliance with the SIR's Limitation on Subcontracting Clause.**

Noting the order of importance of the evaluation factors in SIR Section M.2.2, and the fact that it scored higher than the Awardee on two of the three Non-Price/Cost Evaluation Factors, CGH argues that, given their “nearly identical” cost proposals, the SSB must have disregarded “its own scoring system” given the greater weighting of these factors, and consequently made an award decision that was arbitrary and an abuse of discretion. *Comments* at 2. In particular, CGH contends that the Agency treated CGH unfairly with respect to the Managerial Capabilities and Cost evaluations, and more specifically, the evaluation of its subcontracting strategy, which was evaluated under both. *Comments* at 3 and 8. CGH asserts that “[i]t is clear from the record that the primary basis for not awarding the contract to CGH was its alleged non-compliance with AMS Clause § 3.6.1-7, Limitations on Subcontracting.” *Comments* at 3. CGH contends that the SSB’s conclusion that CGH did not intend to comply with the clause is unsupported by the facts, and that its use of the clause to determine eligibility for award is arbitrary and capricious. *Comments* at 4. The ODRA, for the reasons discussed below, finds that the determination that CGH was ineligible for award for failure to comply with the Limitation on Subcontracting Clause was consistent with the AMS and the evaluation and award criteria set forth in the SIR.

**1. CGH’s Subcontracting Teaming Strategy Did Not Comply with the SIR**

Pursuant to the SIR, the Managerial Capabilities Factor included several subfactors to evaluate the Program Management Plan, the Subcontracting Teaming Strategy, the Resumes of Key Managerial Personnel, and the Transition Plan. Finding of Fact No. (“FF”) 16. The Subcontracting Teaming Strategy plan was to be incorporated into the contract at the time of contract award. FF 18. In that plan, the Offeror was to describe its “subcontracting teaming strategy to effectively integrate its overall planned teaming/subcontracting arrangements.” *Id.* More specifically, the SIR instructed offerors to explain the use of subcontractor agreements to address the distribution of work, the



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organizational relationship between the prime and subcontracts, and “to conduct routine interfaces, minimize disconnect, and maintain performance.” *FF* 18. Among other things SIR expressly instructed Offerors to describe “the mechanism proposed to distribute work to various subcontractors so as to achieve subcontracting goals.” *FF* 18. The SIR further provided that the Subcontracting Teaming Strategy was to be evaluated “as to the degree to which the Offeror addresses strategy to effectively integrate its overall planned teaming/subcontracting arrangements over the life of the contract,” and whether “at least 50 percent of the cost of contract performance incurred for personnel” would be expended for employees of the prime contractor. *FF* 34.

Consideration of subcontracting teaming strategy was not only part of the Management Capabilities Evaluation, but it also was part of the Cost Evaluation of information contained in Volume V Cost/Price Proposal. *FF* 16, 18, 34, 37, 47, and 51 – 53. In this regard, the SIR instructed offerors how to submit their cost proposals using specific information and certain assumptions. *FF* 21, 22 and 23. The SIR further advised that the cost evaluation would determine the reasonableness, completeness, realism, and consistency of the cost proposals, as well as the offeror’s understanding of the work and ability to perform the contract based on cost elements set forth in the proposal. *FF* 37.

The record contains substantial evidence in support of the evaluated weaknesses and deficiencies found in the evaluation with respect to CGH’s Volume IV Managerial Capabilities submission, including the finding that CGH failed to indicate compliance with AMS Clause 3.6.1-7, Limitations on Subcontracting. *FF* 46 - 49. Subfactor B of the Managerial Capabilities evaluation specifically required the submission of subcontracting teaming strategy, which would be evaluated as acceptable/unacceptable. *FF* 34. As for meeting subcontracting goals, the record shows that the evaluators could not determine whether CGH intended to comply with the Limitation on Subcontracting Clause because this requirement was not addressed in its Subcontracting Teaming Strategy. *FF* 47. Thus, for this subfactor, CGH’s proposal was found unacceptable for failing to demonstrate that it would meet the 50% criteria with respect to the percentage of subcontracting.

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The cost evaluation of CGH's Volume V submission found that CGH did not comply with AMS Clause 3.6.1-7. *FF* 51 – 52. Specifically, the CET found that CGH did not comply with the SIR requirement for subcontracting because it calculated the performance percentage expended by CGH to be 48.22%. *FF* 53. The CET explained its methodology, noting that the clause “specifically states that to calculate the subcontracting percentage, one must include all Direct Labor and Allowable Overhead and G&A.” *Id.*

The Product Team's Agency Response asserts that with respect to the Management Capabilities Factor “CGH made no affirmative statement as to meeting the 50% cost allocation in its submission under this volume, nor provided any other information from which the evaluation team could make such an affirmative determination.” *AR* at 12, *citing* Tab 23, Subfactor B, Subcontracting Teaming Strategy. CGH in its Comments, essentially agrees with the Product Team, that its proposal “did not make an explicit reference to its intention to comply with AMS Clause § 3.6.1-7,” but argues essentially that the Product Team should not have assumed that CGH did not intend to comply with the clause. CGH further asserts that the “Product Team attempts to employ AMS Clause § 3.6.1-7 as a criterion for proposal acceptability for the ultimate award of the contract,” but that CGH's proposal never represented that it took exception to, or intended not to comply with AMS Clause § 3.6.1-7. *Comments* at 4.

Here, the SIR expressly provides that the Offeror's capability to perform the effort would be evaluated based on written information contained in the proposal submissions. *FF* 10. The SIR advises offerors that proposals “should be specific enough to provide FAA evaluators with enough information to be able to judge the capabilities” to perform the requirements. *FF* 13. The SIR further informs offerors that “it is critical that each offer is fully responsive to the SIR, without exception of any provision and the information must be clear and complete” and noncompliance with the SIR instructions would be considered as “indicative of the quality of work the FAA may expect from the Offeror during contract performance” or of a “quality problem and assessed as a risk ....” *FF* 12

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and 21. Notably, the SIR highlights the need for offerors to submit their best terms with respect to their submissions regarding Technical, Past Performance, Managerial Capabilities, Cost/Price, and *Small Business Subcontracting Plan*. FF 28.

Additionally, with respect to the Cost/Price Proposal, the SIR states that the “Offeror is responsible for ensuring the accuracy and completeness of all subcontractor data.” FF 23. The SIR further cautions offerors that “[a]lternate proposals are not authorized” and “to consult with the Contracting Officer before submitting any offer that takes exception to any term or condition of this SIR.” FF 26. Moreover, to be eligible for award, the SIR provides that “the Offeror must meet all the requirements of the SIR.” FF 27.

In its Comments, CGH essentially admits that it failed to address the 50% requirement in its Subfactor B submission, and there is no evidence in the record that the CET’s calculation of CGH’s subcontracted work as greater than 50% was erroneous. *Comments* at 4. In the ODRA’s view, the Product Team is not required to assume compliance with the Limitation on Subcontracting Clause, especially where the Management Capabilities submission does not indicate an intent to comply and the data in the Cost Proposal clearly indicates noncompliance. Ultimately, it is the offeror who bears the risk of, and is responsible for, its failure to clearly and fully provide information expressly required by the SIR. *Protest of International Services, Inc.*, 02-ODRA-00224. CGH did not meet its responsibility in this regard and cannot now shift the burden of its failure on to the Agency.

### **2. *The Product Team Was Not Required to Open Communications with or Seek Proposal Revisions from CGH***

CGH further contends that the Product Team should have given CGH an opportunity during the source selection process to confirm its intention to comply with AMS Clause § 3.6.1-7, like it did for another offeror [not the Awardee] who was given the opportunity to revise its cost proposal to attempt to comply with the limitations on subcontracting. *Comments* at 4, *citing AR*, Tab 29 at ¶ 29. The record shows that communications with another unsuccessful offeror regarding its noncompliance with the Limitations on

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Subcontracting Clause confirmed to the Contracting Officer that Cost Evaluation Team's methodology for calculating the percentage of work to be performed by the prime contractor was accurate and proper. *FF 55*. Applying the same calculation to the data in CGH's cost proposal, he determined that the only way CGH could bring its offer into compliance with the Limitations on Subcontracting Clause would be to reallocate work among the team members and such a reallocation of work would constitute a major revision to an offeror's submission and be unfair to any offeror whose proposal complied with the Limitations on Subcontracting Clause. *Id.* In this regard, the Contracting Officer explained that such a reallocation of work would also constitute a major revision to an offeror's submission. *FF 55*. He also noted that CGH made no request during the competition for a waiver from the requirements of this clause. *Id.* On that basis, he determined allowing such a revision to an offeror's proposal to be unfair to any other offeror which had presented an offer that complied with the Limitations on Subcontracting clause. *Id.*

Communications with offerors regarding their proposals are conducted at the discretion of the contracting officials, provided that such communications are consistent with fundamental AMS principles that promote sound business judgment, fairness and integrity. *Protest of Columbus Technologies and Services, Inc.*, 10-ODRA-00514, citing AMS § 3.1.3. Under the AMS and ODRA case law, communications are proper when they are used to ensure mutual understandings without providing unfair competitive advantage, but are not proper when they provide an offeror with the opportunity to submit needed detail that is absent in its initial proposal, or substantially supplement or rewrite aspects of its proposal to the prejudice of other offerors. *Id.*; *Protest of Enterprise Engineering Services, LLC*, 09-ODRA-00490; *Consolidated Protests of Consecutive Weather, Eye Weather, Windsor Enterprises and IBEX Group, Inc.*, 02-ODRA-00250, 251, 252, and 254. Here, the ODRA finds that the Contracting Officer properly exercised his discretion not to allow revisions to a proposal that did not fully respond to the SIR requirements.

**3. CGH Lacks Standing to Maintain Further Grounds of Protest**

As discussed above, the ODRA finds that CGH has not shown that either the Product Team's evaluation of CGH's Subcontracting Team Strategy, or its decision not to permit revisions, lacked a rational basis or was arbitrary, capricious or an abuse of discretion. The ODRA therefore recommends that this ground of the Protest be denied. Moreover, given CGH's ineligibility for award for failure to comply with the Limitation on Subcontracting Clause, it is not an "interested party" with standing to maintain further grounds of protest. 14 C.F.R. §§ 17.3(k) and 17.15(a); *Protest of Rocky Mountain Tours, Inc.*, 01-ODRA-00183.

**C. Product Team Response to CGH Debriefing Complaints Reflects a Rational and Proper Evaluation of its Proposal**

CGH's Protest follows the debriefing it received for the ASESS SIR on October 14, 2010. Specifically, the Protest states: "Unfortunately ... the debriefing did not instill the requisite degree of confidence in us that CGH's overall evaluation was fair, as many of our pertinent questions were left unanswered." *Protest* at 1. The Protest identifies eleven subject areas and associated questions that were not answered by the Product Team during the debriefing. In this regard, the Agency Response notes "[a]s an initial matter, complaints as to the quality and completeness of a debriefing are not of themselves grounds for a protest." *AR* at 3 *citing Protest of Adsystech, Inc.*, 09-ODRA-00508. Nevertheless, the Agency Response treats CGH's specific allegations of inadequate debriefing responses as grounds of protest, stating: "While the Protest is couched in terms of questions left unanswered at the debriefing, this Response addresses each question as a challenge to the Product Team's actions, and to the Source Selection Official's Award Decision." *AR* at 3. The Agency Response proceeds to address the following points: (1) the total score received by CGH; (2) the evaluation of CGH's technical expertise and managerial capabilities; (3) the rationale as to why CGH was not selected for award; (4) CGH's failure to comply with AMS Clause 3.6.1-7, Limitation on Subcontracting; (5) the risk ratings assigned to CGH by the Cost and Management

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evaluation teams; and (6) CGH's concerns regarding an Organizational Conflict of Interest. The Agency Response argues that even if these points were considered as grounds of protest, they would lack merit. *Id.*

In its Comments, the Intervenor agrees with the Product Team that the CGH Protest is without merit and adopts the Agency Response in its entirety. *Intervenor Comments* at 1. The Intervenor's Comments also argue that, to the extent CGH's Protest concerns the adequacy of the debriefing, such issues should be dismissed by the ODRA. *Id. citing Healthcare Technology Solutions International*, B-299781, July 19, 2007, 2007 CPD ¶132 at 5; *The Ideal Solution, LLC*, B-298300, July 10, 2006, 2006 CPD ¶101 at 3 n. 2; *Symlicity Corp.*, B-297060, Nov. 8, 2005, CPD ¶203 at 3n. 4.

While the purpose of a debriefing is to instill confidence that an offeror was treated fairly and to reduce the risk of protest, the failure to provide a meaningful debriefing is not, in and of itself, an independent basis for protest. *Adsytech, supra*. The ODRA Rules with respect to the requirements for filing a bid protest require, among other things, that a protest include a detailed statement of both the legal and factual on which it is based, as well as the remedy sought. 14 C.F.R. § 17.15(c)(7) and (8). Here, however, CGH's Protest filing simply challenges the adequacy of the debriefing, and within that context, identifies the areas in which it believes the explanations by the Product Team were deficient. In spite of the procedural defects embodied in CGH's Protest, the Agency Response proceeds to address the substance of CGH's complaints as grounds of protest, and CGH filed Comments to the Product Team's statement of facts and position in that regard.

As discussed above, the ODRA has found that CGH was ineligible for award for failing to comply with the Limitation on Subcontracting Clause, and therefore lacks standing to pursue as protest grounds the other issues addressed in the Agency Response. Nonetheless, the ODRA finds that even if CGH had not been found ineligible for award, its remaining evaluation challenges lack merit.

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CGH asserts that the SSO and the SSB had no basis to conclude that CGH's proposal was "unacceptable" due to a lack of understanding of the SOW and contract authority of the CO/COTR, and as such, the evaluation of its proposal was arbitrary, capricious and an abuse of discretion. *Comments at 7 citing AR, Tab 27 at 2.* Specifically, CGH argues that:

CGH has been contracting with the FAA for over 21 years. It certainly understands the legal authority and scope of responsibility of the Contracting Officer and Contracting officer's Technical Representative. This point is borne out by the fact that CGH received the highest score of all Offerors on "past performance" which was determined on the basis of interviews with Contracting Officers and Contracting Officers' Technical Representatives with whom CGH had previously worked. The fact that CGH's submission makes reference to the fact that communications with the FAA end users may be in order during task execution hardly suggests that CGH does not understand and respect the legal authority of Cos and COTR's.

The record does not support a conclusion that the SSO and the SSB disregarded the SIR evaluation criteria, made unsupported findings or otherwise conducted an improper evaluation with respect to CGH's proposal. Rather, the record shows that the SSB's recommendation for award and the Source Selection Official award determination are based squarely on the findings contained the Technical, Past Performance Managerial Capabilities and Cost Evaluation Reports. *FFs 57 – 61.* As discussed below, the ODRA finds the evaluation findings, and the ensuing recommendation of the SSB, and ultimately, the SSO award decision, to be rational, supported by the record and consistent with the SIR evaluation criteria.

CGH received higher scores than the Awardee for the Technical Expertise and the Past Performance factors. *FF 52.* Specifically, CGH scored 2.76 for its Volume II Technical Expertise submission which was the highest weighted Factor. *FF 44.* With respect to the resumes submitted by CGH, however, the evaluators found numerous weaknesses relative to the labor categories of Chief Engineer/Scientist, System Engineer, System Engineer, Human Factors Engineer, Software Engineer, and Performance Analyst. *FF 45.* Despite concerns identified in the Protest that the evaluation of Key Personnel was inconsistent as to the finding of strengths and weaknesses, CGH's Comments do not cite

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to any evidence in the record, or otherwise demonstrate that the evaluators' conclusions with respect to the personnel labor category weaknesses lack a rational basis or are inconsistent with the SIR requirements set forth in Section M.4.1. *FF 33.*

CGH scored .90 for its Volume III Past Performance submission which was the second highest weighted factor. In assigning that score, the evaluators found no weaknesses under the relevant experience subfactor and just a few minor weaknesses in the customer satisfaction subfactor. *FF 46.* These findings also were not challenged by CGH in its Protest filing.

As for the Management Capabilities submission, the record shows that under Subfactor A, Program Management Plan, CGH was found to "barely meet" the evaluation criteria and the evaluation found a number of weaknesses and deficiencies pertaining to overall lack of detail and substantiation of approaches/capabilities. *FF 46.* Also, under Subfactor B, CGH was assigned weaknesses relative to use of a "Competition Model" for assignment of subcontractor work and a perceived lack of understanding of the SOW, the task order response process, the authority of Contracting Officer and Contracting Officer Technical Representative, and scope of the contract. *FF 47.* Additionally, under Subfactor C, CGH was found to barely meet the evaluation criteria due to a number of weaknesses and deficiencies relative to the resumes of Key Personnel. *FF 48.* The evaluators found weaknesses and deficiencies in that submission, which included, among others, a failure to submit a letter of intent and to possess sufficient years of relevant experience. *Id.* Similarly, under Subfactor D, CGH was found to barely meet the evaluation criteria for failing to address criteria specified in the SIR and to demonstrate sufficient understanding of transition requirements; thereby presenting a high risk to the Agency of performance problems. *FF 49.* CGH does not show that the evaluated weaknesses and deficiencies found with respect to the evaluation of its Management Capabilities submissions were in any way irrational, inconsistent with the SIR, or contrary to the information contained in its proposal.

As for CGH's concerns regarding an allegedly inconsistent risk rating, the SIR provides that the failure to comply with proposal instructions could be evaluated as presenting a



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degree of risk, *FF* 12, and that a finding of risk depended on the potential for work performance problems. *FF* 30. In this regard, the CET assigned CGH a low risk and moderate risk for different aspects of its cost proposal. *FF* 52. The record shows that, although the CET considered CGH's proposed cost elements to present a low risk of being understated, it identified a moderate risk due to potential cost increases that could result from its cost-plus-fixed-fee subcontracts. *Id.* In its Comments, CGH presented no evidence that these assessments were irrational, inconsistent with the SIR, or otherwise improper.

In the final analysis, the record indicates that the evaluation of CGH's proposal with respect to the above factors had a rational basis and was proper. CGH has not identified any substantial evidence to the contrary. 14 C.F.R. §17.37(j). Lacking evidentiary support, the ODRA considers CGH's evaluation challenges to amount to no more than "mere disagreement" with the evaluator's conclusions. *Protest of Global Systems Technologies, Inc.*, 04-ODRA-00307, *Protest of Universal Systems & Technology, Inc.*, 01-ODRA-00179; *Protest of Crown Consulting, Inc.*, 01-ODRA-00181; *Consolidated Protests of Consecutive Weather, Eye Weather, Windsor Enterprises and IBEX Group, Inc.*, 03-ODRA-250, *et al.*; *Protest of IBEX Group, Inc.*, 03-ODRA-00275; and *Protest of Glock, Inc.*, 03-TSA-003. Under such circumstances, and based on a well established ODRA precedent, the ODRA will not recommend that an award decision be overturned.

CGH finally asserts that an "Organizational Conflict of Interest" exists relative to a former employee of EIS who is currently employed by the FAA, which would have rendered EIS ineligible for award. *Comments* at 6 and 8; *FF* 9. In this regard, CGH states:

John Raper [a former EIS employee] is currently an FAA Program Manager and has been since May 10, 2010 when he served as the SE-2020 SIR 2 Program Manager. Between July 2009 and May 10, 2010, Mr. Raper was employed by the Awardee and was listed in the Awardee's November 6, 2009 submission as a proposed "chief engineer." .... Prior to July 2009, Mr. Raper had also been employed by the FAA ....

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At the same time Mr. Raper returned to the FAA in May 2010, the Awardee made a number of public statements that it had won the ASESS competition – some five months before the actual contract award.

*Comments* at 6, *citing AR*, Tab 15 at 32 and Tab 30.

CGH's arguments confuse the concept of an Organizational Conflict of Interest (as defined in SIR Section L.4) on the part of an FAA contractor with a Personal Conflict of Interest on the part of an FAA employee. *FF* 9; *See Protest of Carahsoft Technologies Corporation and Avue Technologies Corporation*, 08-TSA-034. As explained by the ODRA in *Carasoft Technologies Corporation*, *supra*:

An OCI centers upon the conflicts of interest of the *contractor*. For example, whether a contractor is in a position to grant itself an unfair competitive advantage based on its performance on an existing contract (e.g. establishing the rules or requirements for a future acquisition, or having access to “nonpublic information.”), or the contractor is unable to provide the agency with objective evaluations over itself, another division, subsidiary, or any entity in which it has a significant financial interest. ....

In contrast, a personal conflict of interest centers upon the *individual*. A personal conflict of interest addresses whether the acts of the individual working on the acquisition affect his or her personal financial interest.

*Carahsoft*, *supra* (emphasis in original).

Under AMS § 3.1.5, Personal Conflict of Interest, any FAA official who has “a real or apparent conflict of interest” must withdraw from participating in an acquisition when required by law (18 U.S.C. 208) or regulation (5 CFR Part 2635). *See Carahsoft*, *supra*. If a personal conflict of interest is found to exist with respect to an acquisition official who does not withdraw from participating in an acquisition, the law requires that the resulting contract be voided without any need to show harm. *Id.*

A presumption of regularity and good faith attaches to the actions of government officials. *Carahsoft*, *supra*. In its Comments, CGH alleges, without citing to any material evidence, that a personal conflict of interest on the part of Mr. Raper

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compromised the integrity of this procurement, or alternatively, that CGH has been prejudiced as a result of bias on the part of source selection officials stemming from the employment of Mr. Raper by the FAA. Bias on the part of a government official is defined to be the existence of prejudice against a protester or for the awardee, which is translated into action that unfairly affects the protester's competitive position. *Carahsoft, citing Protests of Camber Corporation and Information Systems & Networks Corporation (Consolidated)*, 98-ODRA-00079 and 98-ODRA-00080. Bias must be proved with "clear and convincing" evidence. *Id.* The record, however, provides no support for finding a personal conflict of interest, or prejudicial bias, relative to Mr. Raper's former employment with EIS and current employment with the FAA.<sup>2</sup>

Rather, the evidence in the record reflects that Mr. Raper did not participate "in any fashion or manner on this competitive procurement at any time or stage of the effort" and "no such person received any information about this procurement, selection sensitive or otherwise, except perhaps what was publically known." *FF* 62-64. The record also indicates that since being employed by the FAA, Mr. Raper has never discussed the subject competition, the evaluation thereof or EIS's proposal with any other federal employee. *FF* 65. In sum, there simply is no evidence that Mr. Raper participated to any degree in this acquisition since becoming an FAA employee or was in a position to take any action that could benefit EIS or prejudice CGH in terms of competing for the award of this contract; or that he has any financial interest in EIS. CGH's allegations, unaccompanied by supporting evidence, amount to sheer speculation of a personal conflict of interest or bias. *Carahsoft, supra.*

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<sup>2</sup> CGH's request for depositions, which was made in an untimely manner in its Comments, fails to proffer any justification for its request. *Comments* at 7. The ODRA rules contemplate limited and focused discovery in bid protests and will not sanction fishing expeditions. See 14 C.F.R. §17.37(f); *Protest of Hi-Tec Systems, Inc.*, 08-ODRA-00459 (Decision on Protester's Motion to Compel), *citing Protest of MAXIMUS, Inc.*, 04-TSA-009 (Decision Denying Motion for Reconsideration, dated November 29, 2004).

#### **IV. CONCLUSION**

As discussed above, the ODRA finds that the Product Team's determination that CGH was ineligible for award had a rational basis and was not arbitrary, capricious or an abuse of discretion. The ODRA further concludes that CGH lacks standing to pursue the remainder of its protest grounds and finds such grounds to be meritless, in any event.

-S-

Marie A. Collins  
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

March 25, 2010