

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

On January 12, 2010, Columbus Technologies and Services, Inc. (“Columbus”) 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 a contract (“Contract”) to Advanced Science and Technologies, Inc. (“AS&T”) under Solicitation DTFAC-09-R-00023 (“SIR”) for technical services in support of facilities operations, software maintenance and development support, as well as for library and laboratory support at the William J. Hughes Technical Center, Atlantic City International Airport in New Jersey (“Center”).

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The SIR was set aside for small business and called for the award of a fixed price Indefinite Delivery, Indefinite Quantity (“IDIQ”) time and materials contract, with a base performance period of one year and four one-year renewal options. Award was to be made based on the determination of the overall best value to the Agency, with technical factors more important than cost. The awardee, AS&T, exercised its right to intervene in these proceedings following its notification of the Protest.

The Columbus Protest challenges the award to AS&T as irrational because: (1) the Center’s communications with offerors were improper and unnecessary, as Columbus was the clear winner at the initial stage of the evaluation; (2) the Center conducted improper and disparate communications that amounted to technical leveling, giving AS&T an unfair competitive advantage; and (3) the Center erroneously evaluated the past performance of AS&T by giving significant credit to AS&T for work performed by a completely separate company. *Protest* at 2, 9 -12, 13-16. The Center filed its Agency Response to the Protests on March 4, 2010, and Comments on the Agency Response were filed by the Intervenor on March 12, 2010, and by the Protester on March 15, 2010.

As discussed below, the ODRA recommends that the Protest be sustained in part and denied in part. The ODRA finds that the Center’s evaluation of AS&T’s corporate experience and past performance deviated from the SIR evaluation criteria, and communications regarding technical factors lacked a rational basis and were contrary to the Acquisition Management System (“AMS”) and the SIR.

## **II. Findings of Fact**

1. On June 30, 2009, the Center issued Solicitation No. DTFAC-09-R-00023 for technical support services in the areas of “Computer Facilities Operations, Software Maintenance and Development Support, Library Services and Laboratory Scheduling” for the Center’s Laboratory Services Group. *Agency Response* (“AR”), Tab 1, page 5. The Laboratory Services Group is responsible for the maintenance and operation of the Center’s National Airspace System

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(“NAS”) laboratories and supporting facilities. *Id.* The independent government cost estimate for these services is [DELETED]. *AR*, Tab 4.

2. The SIR was set aside for small business under North American Industry Classification System (NAICS) code 541513, Computer Facilities Management Services, which sets forth a size standard of \$25.0 million. *AR*, Tab 1, pages 27 and 45.
3. The SIR further provided for the award of an Indefinite Delivery, Indefinite Quantity (“IDIQ”) time and materials contract with fixed, burdened hourly rates. *AR*, Tab 1, pages 27 and 45.
4. The SIR contemplated one base year with four option years. *Id.* The SIR was amended five times before September 4, 2009, the date when initial offers were due. *AR*, Tab 1.
5. Section B of the SIR provided a matrix for the base and option periods’ labor categories, staffing numbers and estimated labor hours for each labor category. *AR*, Tab 1, § B.3. Offerors were required to multiply loaded labor rates by the estimated hours for each period. The sum of these amounts equaled the Direct Labor Cost for each period, to which overtime (not to exceed 10% of the Total Price of Labor) was added. Travel costs in the amount of \$25,000 were used for proposal purposes. *Id.* at Section B.5.
6. Section C.2 set forth the personnel requirements of the SIR. The personnel requirements included those of the Program Manager and Senior Systems Analyst (“SSA”), which are identified as Key Personnel, *i.e.*, considered essential to the work being performed and may not be replaced without the consent of the Contracting Officer. Section H, Clause 3.8.2-7. Specifically, the qualifications requirement for the SSA are:

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Position requires a minimum of a Bachelor's Degree in Computer Science or related field from an accredited institution and a minimum of five (5) years experience in systems analysis and design. Experience for Task 2 includes but is not limited to UNISYS 2200 Operating Systems, System Analysis and System Administration. Experience for Task 1 includes but is not limited to Windows Server 2000/2003, and LINUX operating systems.

*AR*, Tab 1, Section C.2.2.3.

7. Section L.2 of the SIR set forth "General Proposal Instructions," which provided in part:

Proposals shall meet the requirements of the Section C, Statement of Work, and these instructions to offerors. Proposals are to be submitted in two separate parts: (Volume 1) Technical and (Volume 2) Price following the outline below. Offerors shall propose on all items in the Schedule in Section B, complete all required "fill-in" clauses, and submit all documents required by this SIR to meet the requirements for this effort.

*AR*, Tab 1, page 45.

8. Section L.4 of the SIR provides instruction as to the submission of the Technical Proposal as follows:

The technical volume shall define the Offeror's technical approach to the items identified in the attached Statement Of Work. Responses shall provide adequate details to define and quantify all aspects discussed. A table of contents shall be included. The technical proposal shall be bound and the pages numbered. **No pricing detail should be included in the technical proposal.**

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The Technical Proposal shall include information/documentation in sufficient detail to clearly identify the offeror's overall qualifications and be subdivided into the following sections, in the order listed, and shall include the following information:

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Technical Proposal- The technical evaluation criteria include four (4) factors:

1. Program Management Plan
2. Corporate Experience/ Past Performance
3. Key Personnel
4. Transition Plan

The Technical Evaluation factors are listed in descending order of importance. FACTORS 1, 2, & 3 will be graded using an adjectival rating and FACTOR 4 will be graded as Pass or Fail.

*AR*, Tab 1, page 46 (emphasis in original).

9. With respect to the portion of the technical proposal that addresses Factor 1, Program Management Plan, the SIR states:

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

### a) Program Management Approach

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

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

### b) Employee/Subcontractor Recruitment/Retention

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

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

### c) Employee Training/Educational Benefits.

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

Provide a narrative explaining employee training and educational benefits. Explain planned approaches to technical refresher/currency training, backfill training and individual development plans.

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

The above sub-factors are all of equal importance.

*AR*, Tab 1, Section L, page 47 and Section M, page 51.

10. With respect to the portion of the technical proposal that addresses Factor 2, Corporate Experience/Past Performance, the SIR states:

In this section you must describe the company's experience in providing similar work in size (Hours/FTEs) and scope (type of effort) as that described in the SOW to show the competency to succeed on this effort. Charts and Tables are permitted but must be backed up with a supporting narrative ....

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Greater weight will be awarded for experience gained as a prime compared with similar experience gained as a subcontractor.

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

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

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

Contract #

Prime or Subcontractor

Name of the company or government agency

Total value of the work performed by the offeror

Type of contract – i.e., Time and Materials or Cost Plus Fixed Fee

Offeror's period of performance

The percent of work performed by the offeror over the total life of the contract

Reference, including personnel name, telephone number, and email address

Brief synopsis of the work performed by offeror

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

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

*AR*, Tab 1, Section L, page 48 and Section M, page 52 (emphasis added).

11. With respect to the portion of the proposal that addresses Factor 3, Key Personnel, the SIR states:

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A resume must be provided for the labor category that demonstrates the person's expertise relevant to the SOW. In addition, the person must satisfy the appropriate labor skill requirement....

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

<u>Labor Category</u>	<u>Number of Resumes</u>
Program manager	1
Senior Systems Analyst	1

The resume should include in this order the following:

**Education:** Include, in reverse chronological order, colleges and/or technical schools attended (with dates), degree(s)/certification(s) received, major field(s) of study, and approximate number of total class hours in non-degreed/non-certified areas of study. Include Military education, if applicable.

**Experience:** Include in reverse chronological order, relevant work experience, company and title of position, approximate starting and ending dates (month/year), specific experience on projects of similar size/ scope/ complexity/ functionality, and specific experience related to the SOW. Include Military experience, if applicable.

**Certification:** Certify the information contained in the resume is correct and accurate (including signature of the person and an accompanying signed letter of intent to be employed with the offeror). The letter of intent must be dated after the issuance of the SIR.

*AR*, Tab 1, Section L, pages 48-49 and Section M, page 53.

12. With respect to addressing Factor 4, the SIR provides that the Transition Plan in the technical proposal will be graded on a Pass or Fail basis and no adjectival rating will be assigned. *AR*, Tab 1, Section L, page 49 and Section M, page 53.
13. Section M of the SIR governs the evaluation of proposals and describes the basis for award as follows



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The Government intends to evaluate proposals and award one contract in response to this SIR to the responsive/responsible offeror whose proposal provides the best value to the Government using the evaluation criteria identified below. Technical is more important than price, therefore, the successful offeror may not be the lowest priced proposal. However, price will become more important as the difference between competing technical scores decrease. The burden of providing thorough and complete information rests with the offeror. Only information supplied in full text in the proposal will be evaluated. Offerors are cautioned that failure to provide all the required information may result in elimination of the offeror from further consideration for award.

The Government reserves the right to award a contract immediately following conclusion of all the evaluations, and may or may not require communications or negotiations with the successful offeror. Therefore, it is critical that each offer be fully responsive to this SIR and its provisions.

Additionally, the Government reserves the right to conduct communications and negotiations with any competing offeror, or all competing offerors as the situation warrants....

*AR*, Tab 1, page 50.

14. Section M.3 of the SIR provides that Technical Factors 1, 2, and 3 will be graded in descending order of importance. *AR*, Tab 1, page 50.
15. Section M of the SIR also provides scoring definitions for the purposes of the evaluation of proposals. The definitions are as follows:

**Strength:** Any aspect of the proposal when judged against a stated evaluation criteria, which enhances the merit of the proposal or increases the probability of successful performance of the contract. A significant strength appreciably enhances the merit of a proposal or appreciably increases the probability of successful contract performance.

**Weakness:** A weakness is “a flaw that increases the risk of unsuccessful contract performance.” A significant weakness is “a flaw that appreciably increases the risk of unsuccessful contract performance.”

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**Deficiency:** A deficiency is “a material failure of a proposal to meet a government requirement or a combination of significant weaknesses in a proposal that increases the risk of unsuccessful contract performance to an unacceptable level.”

*AR*, Tab 1, page 54.

16. Section M of the SIR also provided adjectival descriptions and a grading scheme to be used to evaluate proposal responses to the Evaluation Factors 1, 2 and 3: The specific definitions are as follows:

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

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

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

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

**Pass:** A response that meets the requirements of the SIR as measured by the stated evaluation criteria.

**Fail:** A response that does not meet the requirements of the SIR as measured by the stated evaluation criteria.

*AR*, Tab 1, page 54.

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17. As for the evaluation of the price, the SIR stated that the evaluation of price proposals will consider the total price offered for the base and four 1-year option periods. *AR*, Tab 1, Section M.4. Price Evaluation, page 54.

18. The SIR incorporates by reference clause 3.2.4-31, Evaluation of Options (April 1996), which states:

Except when it is determined not to be in the Government's best interests, the Government will evaluate offers for award purposes by adding the total price for all options to the total price for the basic requirement. Evaluation of options will not obligate the Government to exercise the option(s).

*AR*, Tab 1, page 50.

19. The Center issued five amendments to the SIR. An amendment issued on August 3, 2009, corrected the specifications with respect to proposal page limitations and font size. *AR*, Tabs 1 and 4. On August 18, 2009, a second amendment provided an updated Statement of Work (“SOW”) and extended the proposal due date until September 4, 2009. Amendment 3, issued on August 19, 2009, changed a reference in the SOW from “National Airspace Systems” and to state that “the experience required under the System Analyst and Sr. System Analyst positions may be either ‘National Airspace Systems’ (NAS) or Aviation Systems experience.” *AR*, Tab 1.

20. Amendment 4, issued on August 25, 2010, deletes and replaces the qualification requirements for the positions of Program Manager, Senior System Analyst and Systems Analyst. These changes were intended to relax the requirements. *AR*, Tab 4. Specifically regarding the Senior System Analyst, it states:

Under C.6.2.3 Senior Systems Analyst, delete the following paragraph

Qualification Requirements: Position requires a minimum of a Bachelor’s Degree in Computer Science or related field from an

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accredited institution and a minimum of five (5) years experience in systems analysis and design of which three (3) years must be National Airspace Systems. Experience includes but is not limited to Windows Server 200/2003 operating systems. In the absence of the required undergraduate degree, a successful candidate for the position can substitute eight (8) years experience in addition to the five (5) years experience, for a total of 13 years experience.

All qualifications for the Senior Systems Analyst are as set forth in C.2.2.3.

*AR*, Tab 1.

21. Amendment 5, issued on August 26, 2009, amended the qualifications for the Senior Systems Analyst, stating “[i]n paragraph C.2.2.3, the words ‘of which 3 years must be in Aviation systems’ is hereby deleted.” The final version of the Senior Systems Analyst qualifications reads as follows:

Qualification Requirements: Position requires a minimum of a Bachelor’s Degree in Computer Science or related field from an accredited institution and a minimum of five (5) years experience in systems analysis and design. Experience for Task 2 includes but System Analysis and System Administration.

In the absence of the required undergraduate degree, a successful candidate for the position can substitute eight (8) years experience in addition to the five (5) years experience, for a total of 13 years experience.

22. On September 4, 2009, the Center received proposals from ten small business offerors, including Columbus and AS&T. *AR*, Tabs 3 and 4.
23. A Technical Evaluation Team (“TET”) was convened to review and score the technical proposals in accordance with the Technical Evaluation Plan and Section M of the SIR. *AR*, Tabs 2 and 3.
24. In pertinent part, the Technical Evaluation Plan provides that the Chairperson of the TET “must prepare an Offeror Technical Evaluation Report and Offeror

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- Narrative Reports to be submitted to the CO [Contracting Officer] and/or the CS [Contract Specialist].” *AR*, Tab 2, page 6. The Technical Evaluation Plan further provides that the Chairperson will prepare an overall evaluation report that, among other things, identifies “proposal areas which are in need of clarification, substantiation, or are deficient. These areas will be the basis for a determination by the CO/CS as to the need for discussions/negotiations; and thereafter, transmitted to the offeror during written or oral discussions.” *AR*, Tab 2, page 11.
25. The TET documented its findings in a Technical Evaluation Report (“TET Report”), dated October 14, 2009. *AR*, Tab 3.
26. The TET Report indicates that the proposal of AS&T received ratings of Excellent for Factors 1 and 2, with every sub factor there under stating “no weaknesses found.” AS&T received a rating of Good for Factor 3, however, with one weakness noted: “The Technical Evaluation Team has determined that the Senior System Analyst has not earned a BA or BS degree from an accredited college or university and has been in the job for less than a year. SSA resume is good in meeting the requirements as per the SOW.” AS&T received a rating of “Pass” for Factor 4. *AR*, Tab 3.
27. The proposal of Columbus received ratings of “Excellent” for all 3 Factors and for every sub factor there under the TET report stated “[n]o weaknesses found.” Columbus received a rating of “Pass” for Factor 4. *AR*, Tab 3.
28. Specifically, with respect to AS&T’s initial technical evaluation of Factor 2, the TET Report identified strengths in support of the Excellent rating are as follows:
- Offeror presents an extensive list of corporate experienced [sic] as outlined on pg 11 – 15. Offeror presents various examples and offers a vast array of present contract experience (section 2.2, 2.2.1)

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- Offeror demonstrates an extensive understanding of relevant contract corporate experience and past performance. (pg 12)<sup>1</sup>
- Offeror presently identifies various FAN & HOST support task which extensively demonstrates performance ability.
- Offeror provides extensive corporate experience and past performance. Pg 11 – 15.
- No weaknesses found.

*AR*, Tab 5.

29. Specifically, with respect to Columbus' initial technical evaluation of Factor 2, the strengths identified in support of the Excellent rating are as follows:

- Strength: Offeror shows extensive corporate experience/past performance as shown on (Pg #13 Figure 2.1)
- Strength: Offerors shows an adequate contract similar to SOW in (Pg #12 Table #6); job with NASA JPL Technical Effort includes "job scheduling" but doesn't elaborate. Our FAN System is a scheduling tool.... Is their "scheduling" of similar type and on what kind of scheduling tools were used?
  - I see scheduling experience in 1 of the 3 contracts shown. Scheduling experience found in (Pg #16 #2.3 Raytheon Data Systems)
- Strength: Scheduling experience is adequate.
- Strength: Offeror has extensive corporate experience and past performance.
- No weaknesses found.

*AR*, Tab 3.

30. The TET's findings were provided to the Contract Specialist on October 1, 2009, and summarized in the Contracting Officer's Pre-Negotiation Business Clearance document, dated November 2009. *AR*, Tab 4.

31. Upon review of the report by the Contract Specialist, "it did not appear the report included enough information to substantiate the adjectival scores assigned by the

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<sup>1</sup>The first two bullets cite specifically to Sections 2.2 and 2.2.1 on page 12 of AS&T's proposal, where it refers to the FAA Laboratory Maintenance Support Services (WJHTC) contract, and states: "AS&T, and its predecessor company, bring an 18-year track record of continuous superior performance to the Laboratory Maintenance Group. **We have been providing directly relevant ... services to the FAA's Laboratory Support Group at the WJHTC since 1989 under this and its predecessor contracts.**" *AR*, Tab 8 (emphasis in original).

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- team” and the team was asked “to re-convene to collectively go over their findings, and include more information to support their determinations.” *AR*, Tab 4. The TET subsequently provided a revised report to the Contract Specialist on October 14, 2009. *Id.*
32. The Pre-Negotiation Business Clearance document states: “After reviewing the technical report, the Contract Specialist performed an independent evaluation of the technical proposals and measured them against the team’s scores” and agreed with the TET’s technical findings with respect to Columbus and AS&T. *Id.* The Contract Specialist, however, disagreed with the TET’s findings as to another offeror’s evaluation and increased it, so as to “err on the side of caution.” *AR*, Tab 4.
33. With respect to the pricing proposals, as required by the SIR, each offeror provided a cost breakdown that included fully burdened rates for direct labor. Six price proposals were within two percent of each other and considered to reflect “excellent price competition.” *Id.*
34. The Contract Specialist, however, was “unable to make a recommendation for award on initial proposals” because “technical was more important than price and the technical evaluation did not produce a clear winner.” *AR*, Tab 4. Specifically, she explains that four offerors all received a combination of Good and/or Excellent for Factors 1, 2, and 3, all received a “pass” for Factor 4, and they are all priced within 2% of each other, all of which, combined is the basis for the down selection. *AR*, Tab 4
35. Subsequently, a decision was made to “err on the side of caution” and allow a fifth offeror, whose proposal did not receive any excellent ratings but was among the proposals priced within 2% of each other, to be included in the final offer discussions. *AR*, Tab 4.

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36. The Pre-Negotiation Business Clearance document states: “It is noted that some contractors included a figure for overtime (Schedule B included a line indicating ‘not to exceed 10% of direct labor’) and others did not. For purposes of initial price analysis, [the] Contract Specialist added 10% for overtime to each offeror’s direct labor figures. In keeping with this analysis, [the] Contract Specialist will send a spreadsheet to all offerors who will be included in discussions ... which is designed to automatically calculate the figure for overtime using the government’s pre determined percentage rate (10%) once the offeror inputs their direct labor rates.” *AR*, Tab 4. Offerors were instructed to insert their fully burdened hourly wage rates for all labor categories under the base year along with an escalation rate. Based on this information, the spreadsheet software automatically calculated the appropriate escalation and populated labor rates for the four option years *for the non-SCA labor categories only*, while the SCA labor categories wages remained constant over the option years.<sup>2</sup> *AR*, Tab 8, AS&T Final Offer, page 1 of 6, Instructions for Attachment 1 - BAFO\_v.2 (emphasis added).

37. Five offerors were selected to be in the competitive range for purposes of discussions and allowed to submit revised offers. The competitive range consisted of offers priced from [DELETED]to [DELETED], evaluated as follows:

	Program Management	Corporate Experience	Key Personnel	Transition Plan	
[DELETED]					
Columbus	Excellent	Excellent	Excellent	Pass	[DELETED]
AS&T	Excellent	Excellent	Good	Pass	[DELETED]
[DELETED]					
[DELETED]					

*AR*, Tab 4.

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<sup>2</sup> After contract award, the rates for SCA labor categories would be adjusted as required by any applicable Collective Bargaining Agreement or Department of Labor Wage Determinations, which would establish a floor below which the SCA wages could not fall. However, the price proposal’s total contract price would include any proposed amounts which exceed the minimum wages for the SCA labor categories, along with the applicable escalation rate.



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38. Letters requesting final offers were sent to all five competitive offerors, including Columbus and AS&T, on November 5, 2009. The text is identical in the letters, except that the first paragraph in each is tailored to identify the offeror and provide a summary its initial proposal ratings on all four factors. The letter to Columbus stated that its “proposal was determined to be Excellent in Factors 1, 2, and 3” and passed Factor 4, while the letter to AS&T stated that its “proposal was determined to be Excellent in Factors 1 and 2, and Good in Factor 3” and passed Factor 4. *AR*, Tab 5.

39. In pertinent part, the second and third paragraphs of both letters state:

At this time, the FAA is requesting final offers from several offerors. The Schedule B included in the SIR did not perform calculations for travel, overtime, etc. The attached spreadsheets include a fixed amount (\$25,000) for travel and formulated cells to determine your proposed overtime.

You are requested to resubmit your price proposal using the corrected Schedule B. We encourage your to provide your most competitive pricing.

*AR*, Tab 5.

40. The only attachments expressly referenced in the November 5, 2009 letters are spreadsheets for Schedule B. *AR*, Tab 5. The Agency Response, however, includes along with the letter addressed to AS&T, a copy of its initial evaluation for Factors 1 – 4. *AR*, Tab 5.<sup>3</sup>

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<sup>3</sup> In this regard, AS&T provided a declaration from one of its principals indicating that it had not received a copy of its initial technical evaluation along with the November 5, 2009 letter, but that it recognized that its “less than ‘excellent’ rating for ‘Key Personnel’ was based upon its proposed Sr. Systems [A]nalyst, given the extensive qualifications of AS&T’s proposed Program Manager.” *Intervener Comments, Declaration of [DELETED]*, ¶ 5, dated March 10, 2010. Regardless of whether AS&T received a copy of its initial technical evaluation with the November 5, 2009 letter, it would have been apparent to AS&T from Amendment 4, which affected Factor 3, given the relaxation of the original requirements for the SSA position, a candidate with more extensive qualifications would be more competitive, and could increase its rating of “Good” for that factor.

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41. The record, however, does not show that a comparable document showing the result of the initial evaluation was provided to Columbus along with its copy of the November 5, 2009 letter, even though the Post Negotiation Memorandum indicates that it was, stating “each offeror was provided with a copy of the Technical Evaluation Team’s (TET) notes regarding their own proposal.” *AR*, Tab 7. The Post Negotiation Memorandum further indicates that “[s]ince Columbus Technologies initially submitted an excellent technical proposal, additional technical information was not requested.” *Id.*

42. The document attached to the November 5, 2009 letter that was addressed to AS&T contains the overall rating for the factors, along with bulleted descriptions of the strengths found specific to each sub factor. The only factor that received less than the highest rating was Factor 3 which identified one “Weakness” as being:

The Technical Evaluation Team has determined that the Senior System Analyst has not earned a BA or BS degree from an accredited college or university and has been in the job for less than a year. SSA resume is good in meeting the requirements as per the SOW.

*AR*, Tab 5.

43. As for this weakness relative to the SSA position, the record indicates that several of the offerors proposed the same candidate who was employed in the SSA position at the time by the incumbent. *AR*, Tab 7. This particular candidate had been permitted to serve as a replacement for the SSA who left the position in February of 2008, despite her lack of a degree from an accredited college or university. In the SIR for the follow-on contract, the minimum requirements were relaxed pursuant to Amendments 3, 4 and 5; thereby allowing her to qualify for the position. The TET was instructed by the Contract Specialist to give proposals that proposed this particular candidate a score of “Good” and offerors being considered for award would have the opportunity to submit another candidate when submitting final offers. *AR*, Tab 7.

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44. Final offers were submitted by Columbus and AS&T, as well as three other offerors in the competitive range. AS&T transmitted its final offer, which states, in pertinent part: “We are submitting our price proposal using the corrected pricing schedules and providing a replacement resume for the Senior Systems Analyst category.” *AR*, Tab 8. The letter further states: “upon reviewing the technical grades given to AS&T’s Technical Proposal, AS&T is submitting a replacement resume for the Senior Systems Analyst Labor category. AS&T believes this new resume provides the government with a candidate that far exceeds the minimum qualifications and would result in a higher score for Factor 3, Personnel.” *Id.*
45. AS&T’s final price proposal decreased from its initial price proposal from [DELETED] to [DELETED]. In its initial pricing proposal, AS&T provided for [DELETED] overtime and escalated both the SCA and non-SCA labor rates at [DELETED] in the option years. In its final pricing proposal, AS&T proposed the same labor rates and a yearly escalation rate of [DELETED], but the spreadsheets applied the escalation rate only to the non-SCA wage categories. *AR*, Tab 8, AS&T Pricing Proposal Sections 2 and 5; Final Pricing Proposal Spreadsheets, page 4 of 6.
46. Columbus’ final price proposal increased from its initial price proposal from [DELETED] to [DELETED]. In its initial pricing proposal, Columbus provided for [DELETED] overtime and escalated rates for both SCA and non-SCA labor categories. In its final pricing proposal, Columbus proposed essentially the same labor rates and a yearly escalation rate of [DELETED], but the spreadsheets applied the escalation rate only to the non-SCA labor categories. *AR*, Tab 9. Columbus Pricing Proposal Section B; Final Pricing Proposal Spreadsheets.

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47. Following the submission of final offers, the technical evaluation was revised on November 25, 2009. *AR*, Tab 6. The final technical scores and pricing of the final offers are summarized below:

	Program Management	Corporate Experience	Key Personnel	Transition Plan	
[DELETED]					
<b>Columbus</b>	<b>Excellent</b>	<b>Excellent</b>	<b>Excellent</b>	<b>Pass</b>	[DELETED]
<b>AS&amp;T</b>	<b>Excellent</b>	<b>Excellent</b>	<b>Excellent</b>	<b>Pass</b>	[DELETED]
[DELETED]					
[DELETED]					

48. The Post Negotiation Memorandum documents the decision to award the contract to AS&T, stating that both Columbus and AS&T received the highest possible ratings in all factors and finding no significant difference in the technical scores awarded to both. Columbus' initial technical ratings did not change in the final evaluation. AS&T's rating of Good, however, was changed to Excellent for Factor 3. Specifically, with respect to AS&T, the increased rating was explained as follows: "Offeror's Senior Systems Analyst resume meets and exceeds the SOW requirements. SSA has the required years of experience which meets and exceeds the SOW requirements. Candidate has earned a degree from an accredited college/university." *AR*, Tab 6.
49. The Post Negotiation Memorandum explained that as this requirement was competed as a best value procurement with technical being more important than price and price becoming more important only as the difference between completing technical scores decreases, the decision to award the contract to AS&T was made on the basis that its price was [DELETED] lower than that of Columbus for the five year period. *AR*, Tab 6.
50. With respect to the decision to award the contract to AS&T, the Post Negotiation Memorandum also reflects a cost technical tradeoff performed with respect to the proposal of AS&T and two other proposals with lower prices and lower technical

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ratings. In this regard, the Contract Specialist determined that AS&T's cost premium was warranted by its superior technical ratings in all three factors. *Id.*

51. The Post Negotiation Memorandum further highlights the strengths found in AS&T's proposal:

Specifically, the technical evaluation report stated that this offeror demonstrates an extensive Program Management Plan, including well defined Program Manager duties, with **no weaknesses found** in the first and most important technical factor. In addition, the report states that offeror presents an extensive list of corporate and past experience, providing examples, including present work they are performing with the FAN- which is the Technical Center's scheduling network/tool. This work demonstrates solid performance ability. **It is noted that some of the experience represented in the proposal dates back to when AS&T was known as Atlantic Sciences and Technology.** The present company and proposed awardee, Advanced Sciences and Technologies, is comprised of the same "key players" that directed Atlantic Sciences and Technology ([DELETED]). The TET and Contract Specialist have considered experience included in the technical proposal that was attained when AS&T was known as Atlantic Sciences and Technology. Advanced Sciences and Technology also included a significant amount of current experience attained as **Advanced** Sciences and Technology in their proposal, including the DTFAC-07-D-00013, a \$9.3 million vehicle which provides lab support, engineering/technical and scheduling services for the Technical Center. **No weaknesses were found for factor 2**, the second most important technical factor. The one and only weakness that was set forth in factor 3 of the original technical evaluation report was that they were given a score of "good" because they proposed [DELETED] for the SSA position. AS&T took advantage of the final offer process and submitted another candidate for the SSA position, and the new candidate's resume was scored as "excellent."

*AR*, Tab 7 (emphasis in original).<sup>4</sup>

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<sup>4</sup> Notably, AS&T's technical proposal identified [DELETED], as its Program Manager, in response to the most important Factor, Program Management Plan. FF 9, *supra*. The SIR seeks information about the proposed Program Manager and distinguishes that position from corporate management in the SIR instructions where it instructs offerors to address the duties, responsibilities and authorities of the Program Manager and the relationship of that position to "corporate management," [DELETED], however, is not

52. The reference to Atlantic Science & Technology in the Post Negotiation Memorandum was in the context of the evaluation of AS&T's (*i.e.*, "Advanced Science and Technology") corporate and past experience. The company Atlantic Science & Technology, which was formed in 1984, however, is not a predecessor company to the awardee, AS&T, which was established in 2005. The only connection between Atlantic and AS&T is that the principals of AS&T, *i.e.*, [DELETED], were previously high level officials with Atlantic. When AS&T was formed in 2005, managerial personnel from Atlantic moved to AS&T to serve as its core management. [DELETED] also served as a principal with Atlantic Science & Technology Corp. Atlantic provided services to the FAA from approximately 1984 through 1999, when it was purchased by L3 Communications ("L3"). As a wholly owned subsidiary of L3, Atlantic continued to provide services to the FAA, and ultimately was merged into another subsidiary of L3. *Declaration of* [DELETED], dated March 10, 2010.

53. In its proposal, AS&T indirectly references Atlantic with respect to Factor 1, Program Management Plan, under the subheading of "Executive Summary/Introduction." That section states:

AS&T, a direct successor company, is an **independent** [DELETED] **small business whose corporate officers and senior management have over** [DELETED] **years of prime contractor experience on many FAA Programs.** ... AS&T's long-term commitment to successfully partnering with the FAA at the WJHTC resulted in our management *re-establishing* AS&T in 2005 as a small business.

*AR*, Tab 8, page 1 (bold emphasis in original; italicized emphasis added).

54. This indirect reference to Atlantic's prime contract experience at the WJTC and the re-establishment of AS&T as a small business in 2005 was highlighted in the section of AS&T's proposal which addressed Factor 2, describing its corporate

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mentioned in the Post Negotiation Memorandum, which instead identifies by name the corporate managers of AS&T as being the same "key players" that directed Atlantic. FF 9.

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and past experience. There, AS&T cites to an FAA Laboratory Maintenance Support Services Contract awarded by the Center in August of 2007. AS&T's proposal indicates that it performs 58% of the work on this contract, while L3 provides support as a subcontractor. *AR*, Tab 8, page 12. In this regard, the AS&T proposal states: "AS&T, and its predecessor company, bring an 18-year track record of continuous superior performance to the Laboratory Maintenance Group. **We have been providing directly relevant [DELETED] services [DELETED] at the WJHTC since 1989 under this and its predecessor contracts.**" *Id.* (emphasis in original).

55. The Post Negotiation Memorandum also reflects that an analysis of overall price was performed of the Columbus proposal in comparison to that of AS&T using information from the Independent Government Cost Estimate ("IGCE"). The price analysis includes a comparison of "selected key personnel" loaded labor rates (non-SCA):<sup>5</sup>

	Program Mgr.	System Analyst	Sr. Librarian	Tape
IGCE	[DELETED]			
AS&T				
Columbus				

I requested FAA cost analyst ... to identify what comprised the delta between the IGCE and the two closely priced offerors. He

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<sup>5</sup> The record contains no explanation why the other non-SCA labor category of Senior Systems Analyst was not "selected" for comparison, given the fact that AS&T's rate is approximately [DELETED] lower than the IGCE and Columbus' rate is approximately [DELETED] higher than the IGCE:

	Senior Systems Analyst
IGCE	[DELETED]
AS&T	
Columbus	

Columbus Comments, Exhibit B. The record shows, however, that the labor rate AS&T proposed in its initial proposal for the SSA position did not change when it substituted a more qualified candidate for the position. FF 45. Columbus points out that over the life of the contract, AS&T proposed [DELETED] for the SSA position while Columbus proposed [DELETED]. *Comments* at 14. More specifically, over the life of the contract, the difference between their pricing for the SSA position is [DELETED], while the difference in their evaluated total overall price is [DELETED]. The record further shows that AS&T's proposal indicates that it has a line of credit of at least [DELETED], FF 8, and the Contract Specialist determined AS&T to be responsible in accordance with the AMS. *AR*, Tab 8.

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advised that the IGCE cost elements were [DELETED] of direct labor costs while both vendors in the analysis averaged around [DELETED]. Thus every dollar of direct labor translates into [DELETED] in the IGCE and roughly [DELETED] in the proposals. If we use a [DELETED] cost element on direct labor under the IGCE, the estimated IGCE amount would fall closer in line with the offerors' figures.

AR, Tab 7.

56. Based on the above, the Post Negotiation Memorandum recommended that the award be made to AS&T:

Based on the information contained herein, it is recommended that an IDIQ labor hour contract be awarded to AS&T of Berlin, New Jersey. The estimated price of the contract, if all options are exercised is [DELETED] ([DELETED] FO [Final Offer] proposal plus [DELETED], representing a [DELETED] escalation for the SCA categories for the option years of the contract).

*Id.*<sup>6</sup>

### 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"). In so doing, the ODRA will recommend that a post-award protest be sustained where a contract award decision lacks a rational basis, is arbitrary, capricious, or an abuse of discretion and is not supported by substantial evidence. *Protest of Enterprise Engineering Services, LLC*, 09-ODRA-00490, citing *Protest of Carahsoft Technologies Corporation and Avue Technologies Corporation*, 08-TSA-034. In "best value" procurements such as this one, the record must demonstrate that the decisions of the

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<sup>6</sup> As for the addition of [DELETED] for the [DELETED] escalation for the SCA categories for the option years of the contract, the resultant award price still is less than the amount offered by Columbus before adding in its [DELETED] escalation for SCA labor categories.



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designated evaluation and source selection officials satisfy the above test, and are 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.* 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, Columbus must show that but for the Center's improper actions that are alleged here, it would have had a substantial chance of receiving the award. *Id.*

### **B. Evaluation of AS&T's Corporate Experience and Past Performance**

Columbus' Protest alleges that the Center erroneously evaluated the past performance of AS&T by giving significant credit to AS&T for work performed by a completely separate company, Atlantic Science and Technology ("Atlantic"). *Protest* at 2, 9 -12, 13-16. In its Comments, Columbus further argues that the Center's past performance evaluation was arbitrary and capricious in that the Center improperly considered Atlantic's experience in contravention of the SIR, and that AS&T's experience does not warrant the "Excellent" rating that it received. *Comments* at 16 – 23. In response, the Center contends that it did not consider, or credit to AS&T, the corporate experience of Atlantic for Factor 2. *AR* at 6. The Center explained in its Agency Response that:

*Atlantic Science and Technology* was a company providing technical support to various Technical Center programs from 1989 to 1999, at which time the firm was sold to L3 Corporation. *Advanced Science and Technology*, the offeror here, was incorporated in 2005, and has also been providing technical support services to the Center. *Advanced* is comprised of essentially the same owners, managers, and employees as was *Atlantic*. However, neither the TET nor the CO confused the two companies or improperly credited *Advanced* with the work of *Atlantic*.

*AR* at 6 (emphasis in original).

The ODRA recognizes that:

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

*Protest of Enterprise Engineering Services, LLC*09-ODRA-00490, citing *Protest of Information Systems & Networks Corporation*, 98-ODRA-00095. The ODRA finds based on the record here that the Center improperly deviated from the SIR in two fundamental ways. First, it credited AS&T with the work of Atlantic in its evaluation of Corporate Experience/Past Performance in contravention of the stated evaluation criteria of the SIR. Second, it improperly considered the individual experience of AS&T's principals.

### 1. Improper Crediting of Atlantic's Corporate Experience/Past Performance

The SIR instructs offerors to submit a technical proposal that includes Corporate Experience/Past Performance. Finding of Fact ("FF") 8. The SIR instructs offerors to describe the company's experience in providing work similar in size and scope as that described in the statement of work ("SOW"). FF 10. The SIR further provides that with respect to the evaluation of Corporate Experience/Past Performance, greater weight will be given to experience gained as a prime as opposed to a subcontractor. In support of the demonstration of Corporate Experience/Past Performance, the SIR requires offerors to submit information regarding at least two contracts and/or subcontracts which must be "currently ongoing" or which have **"been performed within the last five years."** FF 10 (emphasis in original). Additionally, the SIR expressly states that the offeror will be evaluated under this factor **"based primarily on the extent and quality of its own corporate past performance as a prime or subcontractor"** and *"[e]xperience of key personnel will not be considered for this factor."* FF 10 (bold emphasis in original and italicized emphasis added).

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In addressing all the information required by the SIR, AS&T's proposal indirectly refers to and intentionally relies on the corporate experience and past performance of another company, Atlantic, in support of its own qualifications to perform the contract. Atlantic, which was formed in 1984, provided services to the FAA from approximately 1984 through 1999, when it was purchased by L3 Communications ("L3"). As a wholly owned subsidiary of L3, Atlantic continued to provide services to the FAA, and later was merged into another subsidiary of L3. FF 52. Subsequently, AS&T was established in 2005 as a small business. The principals of AS&T, *i.e.*, [DELETED], were previously high level officials with Atlantic. [DELETED] also previously served as a principal with Atlantic. When AS&T was formed in 2005, managerial personnel from Atlantic moved to AS&T to serve as its core management. FF 52.

The indirect references in AS&T's proposal to Atlantic's prime contract experience at the Center are highlighted in the section of AS&T's proposal which addressed Factor 2, describing its corporate and past experience. There, AS&T cites to an FAA Laboratory Maintenance Support Services Contract awarded in August of 2007 and states: "AS&T, and its predecessor company, bring an 18-year track record of continuous superior performance to the Laboratory Maintenance Group. **We have been providing directly relevant [DELETED] services [DELETED] at the WJHTC since 1989 under this and its predecessor contracts.**" *Id.* (Emphasis in original). Moreover, under the subheading of "Executive Summary/Introduction," under the Program Management Plan section of the proposal, AS&T describes itself as a "direct successor company" to Atlantic which was re-established by management in 2005, and goes on to highlight the fact that its corporate officers and senior management have over twenty years of prime contractor experience on many FAA programs. FF 53.

The record reflects that the Center gave consideration and weight in the Post Negotiation Memorandum to these indirect references to the corporate experience and past performance of Atlantic in AS&T's proposal, evidently failing to distinguish AS&T as a separate entity from Atlantic for purposes of the technical evaluation. As a result the Center improperly credited AS&T in its evaluation with the corporate experience and

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past performance of Atlantic. This is demonstrated in the Center's Post Negotiation Business Clearance Memorandum, which expressly extols the virtues of Atlantic's experience and corporate management in justification of its award to AS&T as follows:

It is noted that some of the experience represented in the proposal dates back to when AS&T was known as Atlantic Sciences and Technology. The present company and proposed awardee, Advanced Sciences and Technology, is comprised of the same "key players" that directed Atlantic Sciences and Technology. ([DELETED]). *The TET and Contract Specialist have considered experience contained in the technical proposal that was attained when AS&T was known as Atlantic Sciences and Technology.*

FF 51; AR, Tab 7, page 3 (emphasis added). Also, consistent with the above quote, the narrative in the TET report expressly cites to sections of AS&T's proposal that reference the experience of AS&T's "predecessor company." FF 28, FN 1.

AS&T and Atlantic are separate companies and thus cannot share the same corporate experience, even though they may share some of the same owners, managers and employees. FF 52. Additionally, given that Atlantic was sold in 1999 to L3, the corporate experience and past performance information referenced in AS&T's proposal relating to Atlantic is stale. *Id.* Thus, any consideration thereof deviates from the evaluation criteria of the SIR, which provides for the evaluation of experience and past performance within the past 5 years. FF 10.

Moreover, there is no indication in the record that Atlantic is the legal successor to AS&T as a result of a merger, sale of assets, or other transaction. FF 52. The only link between these two companies is that the former corporate officers and managers of Atlantic regrouped after it was sold in 1999 and formed AS&T as a small business in 2005. This situation is distinguishable from that in the *Protest of Enroute Computer Solutions*, 02-ODRA-00220, where this Office found the consideration of the experience of the predecessor company of the awardee to be proper. There, the record showed continuity of operations between the awardee and the predecessor company via a sale of assets and contract novation in connection with the performance of an FAA contract. Moreover,

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unlike here, the SIR did not expressly prohibit consideration of personnel experience in the evaluation of past performance. FF 10.

### **2. Improper Consideration of “Key Players” from Atlantic**

Contrary to the SIR, the Center relied upon the experience of “key players” as partial justification for the award. FF 10. Consideration of the experience of individual “key players” or corporate officers is nowhere contemplated under any evaluation factor in the SIR. While evaluation of the experience of key personnel is contemplated in the context of Factor 3, those positions are expressly defined as the Program Manager and the Senior Systems Analyst. FF 6. Only under the Program Management Plan Factor is corporate management *generally* considered as part of the technical evaluation. Even so, under that factor, offerors were instructed only to identify “the program manager’s duties, responsibilities, and authority” in relationship to corporate management. FF 9.

It is well established that failure to follow stated evaluation criteria constitutes an impermissible departure from the SIR. *Protest of Evolver, Inc.* 09-ODRA-00495; *citing* AMS 3.2.2.3.1.2.3; *Protest of Deloitte Consulting*, 08-TSA-036. If the evaluation deviates from the criteria set forth in the underlying SIR, the award lacks a rational basis and the protest will be sustained where the failure results in prejudice to the protester. *Id.*

Even AS&T acknowledges that “[t]he Government and the FAA are infinitely familiar with AS&T, the prior Atlantic, and the relationship of AS&T’s current owners and management staff to the prior company.” *Intervenor Comments* at 6. This familiarity evidently played a role in the Center’s failure to follow the stated evaluation criteria with respect to its evaluation of AS&T. Although in its proposal, AS&T provided the information required by the SIR regarding its Corporate Experience/Past Performance, FFs 28 and 51, the record reflects that the Center justified the award to AS&T in part by directly relying on the corporate experience and past performance of Atlantic and the individuals who had worked for both companies. The ODRA cannot determine, on the present record, how this factor would be rated if the Center based its evaluation solely on

the contracts identified in AS&T's proposal, without any consideration of Atlantic and its "key players".

The ODRA notes that the Corporate Experience/Past Performance Factor was the second most important of the four technical factors, and the extent to which the Center relied on the experience of Atlantic in recommending award to AS&T was substantial. FFs 8 and 51. 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 Optical Scientific, Incorporated*, 06-ODRA-00365. The ODRA therefore finds that the Columbus has demonstrated a reasonable possibility of prejudice and sustains this ground of protest.

### **C. Communications Regarding Pricing and the Technical Evaluation**

Columbus alleges that the award to AS&T was irrational because: (1) the Center's communications with offerors were improper and unnecessary, as Columbus was the clear winner at the initial stage of the evaluation; and (2) the Center conducted improper and disparate communications that amounted to technical leveling, giving AS&T an unfair competitive advantage. *Protest* at 2, 9-12, 13-16. Columbus also challenges the Center's communications with offerors as arbitrary and capricious, arguing that: (1) the Center did not need to open discussions regarding the technical proposals; (2) the Center's communications with offerors were disparate and unfair; (3) the Center's discussions with AS&T resulted in technical leveling; and (4) Columbus was prejudiced by the unequal treatment. *Comments* at 8-15.

The AMS defines communication as "any oral or written communication between the FAA and an offeror that involves information essential for understanding and evaluating an offeror's submittal(s) and/or determining the acceptability of an offeror's submittal(s)." The purpose of communications, among other things, is to ensure mutual understandings between the FAA and offerors about all aspects of their proposals. AMS 3.2.2.3.1.2.2. In this regard, the AMS provides:

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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 [and] ... may continue through out the process, as required, at the discretion of the service organization. Communications with one offeror do not necessitate communications with other offerors, since communications will be offeror-specific. Regardless of the varying level of communications with individual offerors, the CO should ensure that such communications do not afford any offeror an unfair competitive advantage.

*Id.*

The exercise of discretion in conducting communications must be consistent with fundamental AMS principles that promote sound business judgment, fairness and integrity. AMS 3.1.3.

### **1. Communications Requesting Revised Price Proposals**

Columbus' Comments challenge the Center's communications with offerors as arbitrary and capricious, and allege that Columbus was prejudiced by the unequal treatment. *Comments* at 8–15. The Center asserts that a round of discussions was necessary because Section B of the original SIR provided no standardized basis for the offerors to price overtime usage and travel. *AR*, Tabs 1 and 4. Columbus further asserts that the Center should have conducted discussions with it regarding its pricing for the SSA position following the submission of the revised spreadsheets, given the significant price disparity between Columbus and AS&T with respect to the Senior System Analyst position. *Comments* at 14.

The record shows that the November 5, 2009 letter to Columbus and AS&T, which requested final offers, contained identical language as to resubmission of the price proposal using the corrected Schedule B. The reason for requesting resubmission of the price proposal, as explained by the Center, was that it was critical to establish through discussions a common baseline to evaluate price because:

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[T]he SIR inadvertently omitted the 10% estimated hours of overtime for competition purposes that the CO intended to use, and that omission prompted the competitors to devise their own estimates. The result was chaos, featuring an array of estimated overtime from zero to ten percent, which completely distorted the competitive baseline for pricing purposes.

*AR* at 2. The Center further explained that the Contracting Officer could not assume that the standardized 10% overtime rate would allow her to unilaterally adjust their pricing, since it did not affect all the offerors evenly. *AR* at 2, F.N. 1. To address this issue, the November 5, 2009 letter transmitted electronic spreadsheets, which included a fixed amount for travel and formulated cells that served to standardize the pricing proposals so that they could be compared “apples to apples.” Specifically, the spreadsheets automatically calculated the proposed overtime and totaled the fully burdened hourly rates for the base and option years, with the proposed escalation rates applied only to non-SCA labor categories. FF 36. Given its purpose, the ODRA finds that the November 5, 2009 discussion letter treated both Columbus and AS&T equally and fairly with regard to the request to submit prices in the revised format. *See Protest of Jo-Ja Construction*, 97-ODR-00024 (The importance of enhancing competition through a solicitation clarification outweighs the potential prejudice or inconvenience to offerors).

Columbus further asserts that following the submission of final offers, the Center should have conducted further discussions with it regarding the “significant price disparity between Columbus and AS&T for the SSA Position.” *Comments* at 14. Columbus compares its base hourly rate of [DELETED] for the Senior Systems Analyst position to AS&T’s base hourly rate of [DELETED], and to the FAA’s independent estimate for the position, which is [DELETED]. *Comments* at 14, *citing Exhibit B*.

Under the AMS, the CO has discretion to decide whether to conduct a cost analysis. *Protest of Evolver*, 09-ODRA-00495, *citing* AMS 3.2.3.2. Essentially, Columbus is questioning the failure of the Center to request cost-based data for the purpose of performing a cost analysis under a SIR that did not contemplate a cost analysis and contained no mandatory AMS cost data clauses. Columbus is arguing that the Center



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should have conducted discussions so that it could perform a cost analysis to determine the reasonableness of AS&T's labor rate for the Senior Systems Analyst position.

In *Evolver*, the ODRA found that the contracting officer rationally elected to not undertake a cost evaluation since the record showed adequate price competition, noting that the AMS grants the CO discretion in electing and conducting price evaluations and cost evaluations. AMS 3.2.3.2. In this regard, the ODRA stated: "The AMS favors price evaluation, and discourages cost evaluation, as the preferred method for insuring that rates are fair and reasonable. .... The AMS further discourages COs from requesting cost data where adequate price competition exists." *Id.* (*internal citations omitted*).

Here, the record shows that the SIR contemplated the award of an IDIQ time and materials contract with fixed, burdened hourly rates. FF 3. The SIR also provided that the evaluation of price proposals will consider the total price offered for the base and four 1-year option periods. FF 17. The SIR did not contemplate that a cost analysis would be performed on proposals; nor did it contain any mandatory AMS cost data clauses. FF 17-18. Moreover, the record showed adequate price competition based on overall total pricing. FF 33.

The record further shows that the Center's communications regarding proposal pricing treated AS&T and Columbus fairly and equally. Given that the initial pricing proposals varied in terms of estimated overtime, it cannot be said that the Contract Specialist's determination to conduct communications with offerors to standardize the overtime rate lacked a rational basis or constituted an abuse of discretion. Moreover, the fact that further communications were not conducted specifically with respect to the Senior Systems Analyst labor rate was not arbitrary, capricious, or an abuse of discretion on the part of the Center, given the nature of the solicitation and the existence of adequate price competition based on overall total pricing. Mere disagreement with a decision not to conduct a cost analysis does not, standing alone, constitute sufficient grounds for sustaining the protest. *Evolver*, citing *Protest of Grayhawk Construction, Inc.*, 08-ODRA-00475. The ODRA therefore finds the ground of Protest challenging the Center's

request for revised price proposals to be without merit and denies that portion of the Protest.

## **2. Communications Regarding the Technical Evaluation**

The Center asserts that it was within the Contracting Officer's discretion and "completely rational" for her to allow the offerors to address the technical weaknesses that had been identified by the TET. *AR* at 3. The ODRA finds, however, that the record is devoid of any justification for allowing the offerors to revise their proposals to address the non-price-related evaluation results. The ODRA therefore finds that the Center's actions in this regard lacked a rational basis and were not in accordance with the AMS and the SIR.

Although the SIR states that the Government reserves the right to award a contract immediately following conclusion of all the evaluations, it does not obligate the Center to do so. Rather, the SIR provides for the exercise of discretion as to whether "communications and negotiations" with any or all competing offerors as warranted. FF 13. In this regard, the Technical Evaluation Plan contemplated that the Contract Specialist would determine whether communications need to be conducted regarding those areas of proposals that need *clarification, substantiation, or are deficient*. FF 24 (emphasis added).

The record shows that after the initial evaluation, the Contract Specialist identified five offerors to be included in final offer discussions. FF 37. These offerors consisted of those whose prices were within two percent of each other, and whose technical proposals received a combination of Good and/or Excellent for Factors 1, 2, and 3, and a Pass for Factor 4. FF 34. The record further shows that the Contract Specialist decided that she could not recommend an award based on initial proposals because she believed that the technical evaluation did not produce a clear winner. FF 34. The record does not explain adequately the basis for this belief in light of the technical ratings assigned to AS&T and Columbus. FF 34, 35 and 37.

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The record plainly shows that the technical proposal of Columbus was superior to all the others. The technical evaluation results show that Columbus was the highest rated offeror, receiving the highest possible rating of Excellent in technical evaluation factors 1 through 3. FF 37. The record also shows that AS&T was the second highest rated offeror, receiving Excellent ratings in the two most important technical evaluation factors, Factors 1 and 2, and receiving a “Good” for Factor 3.<sup>7</sup> All the other offerors in the competitive range received only “Goods” in the most important Technical Factor 1, Program Management, and “Goods” in Factor 3, Key Personnel. *Id.*

Following the Contract Specialist’s identification of five offerors to be included in final offer discussions, both Columbus and AS&T received letters requesting final offers on November 5, 2009. FFs 38 and 39. The letters follow a standard format, summarizing the results of their technical evaluations, and providing spreadsheets to calculate and resubmit, as necessary, travel and overtime pricing. FF 39. Although the letters do not expressly invite technical clarifications, they request final offers, while at the same time conveying the technical ratings of each offeror. The effect of the letter was to provide a broad opportunity for offerors to address any aspect of their technical approach that could be revised to increase their technical ratings.<sup>8</sup>

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<sup>7</sup> The record shows that with respect to AS&T’s evaluation for Factor 3, even though the individual proposed for the position of Senior Systems Analyst was currently employed in that position by the incumbent and met the minimum requirements of the SIR for that position, the Technical Evaluation Team gave AS&T a weakness because that individual had not earned a BA or BS degree from an accredited college or university and had been in the job for less than a year. FF 26. This finding comports with the SIR’s definition of a “Weakness” as being “a flaw that increases the risk of unsuccessful contract performance,” FF 15, and is consistent with the SIR’s grading scheme for evaluating proposals. FF 16.

<sup>8</sup> Columbus’ Protest alleges that technical discussions were unequal and unfair because, unlike AS&T, it did not receive a copy of the Technical Evaluation Team’s evaluation summary with its copy of the November 5, 2009 letter, and thus could not address questions or concerns regarding its proposal. *Comments* at 12; *AR*, Tabs 3 and 5. The record is not clear, however, whether AS&T actually received a summary of its evaluation for Technical Factors 1 through 4. The letters do not reference any such attachment. *Id.* AS&T also indicates that it does not recall its portion of the technical evaluation being attached to the November 5, 2009 letter and believes that it was omitted. [DELETED] *Decl.* at par. 5. Even so, AS&T asserts that it was aware that it would receive a reduced rating for Factor 3 based upon its proposed Senior System Analyst, and consequently substituted another individual for that position, along with its final cost proposal, when it submitted its final offer. *Intervenor Comments* at 9. Nevertheless, it is not necessary to address this factual issue, or its impact, in light of the ODRA’s findings and recommendation in this case.

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As discussed above, under the AMS and ODRA case law, communications are proper when they are used to ensure mutual understandings without providing unfair competitive advantage. Communications are not proper, however, when they serve to provide an offeror the opportunity to submit needed detail that is absent in an initial proposal. The point at which communications turn into a “second bite of the apple” necessarily is dependent on the circumstances. ODRA cases, however, have stated that a “second bite” results from holding discussions with offerors who are not in the competitive range, or whose proposals are considered deficient because of an absence of detail as to how the SIR requirements would be satisfied. A “second bite” also would result from discussions that allow substantial supplementation or a rewrite of various aspects of the proposals that would have been prejudicial to other offerors. *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.

The record in this case does not support the Center’s position that it had a rational basis to conduct communications with AS&T regarding the technical factors.<sup>9</sup> Rather, the record shows that AS&T had been identified by the Contract Specialist as being in the competitive range. FF 37. There is no aspect of AS&T’s proposal that is identified as deficient, or in need of clarification or substantiation, in accordance with the Technical Evaluation Plan. FF 24. The record further shows that AS&T received nearly perfect scores and its “Good” rating for Factor 3 was the result of one “weakness” found with respect to its proposed Senior Systems Analyst. FF 42.

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<sup>9</sup> The ODRA notes that nothing was inherently improper with the Center’s goals of improving the proposals it received. The AMS, however, provides for mechanisms in the screening process other than mere communications that can accomplish these goals. Specifically, AMS 3.2.2.3.1.2.5 (entitled “SSO Decision”) describes the FAA options. When, as in the present Protest, an evaluation reveals problems with the SIR itself, the Product Team should “[a]mend and re-open to initial offerors.” *Id.* Moreover, the Product Team is permitted to conduct direct negotiations when there has been a down-select to one offeror. *Id.* Alternatively, when a sub-group of offerors (i.e., the “competitive range”) is selected for further consideration, the expected course of action is to issue another SIR. *Id.*

## **PUBLIC VERSION**

In the ODRA's view, the Center's communication of evaluation information to AS&T for the *sole* purpose of allowing it an opportunity to increase its technical rating for Factor 3 when its technical proposal was not unclear, unsubstantiated, or deficient, provided AS&T with an unfair competitive advantage. As a consequence of this improper communication, AS&T was allowed to revise its proposal and substitute a resume for a *key evaluated technical position*.<sup>10</sup> Under the circumstances, the ODRA considers the substitution of the resume for this key position as constituting a substantial supplementation of AS&T's technical proposal. This further is evidenced by the fact that as a result of the revision, AS&T's technical score became equal to that of Columbus which resulted in the award of the contract to AS&T.

## **IV. CONCLUSION AND RECOMMENDED REMEDY**

In light of the findings discussed above, the ODRA recommends that Columbus' Protest be sustained in part based on the Center's deviation from the stated evaluation criteria in evaluating Corporate Experience/Past Performance, and for conducting communications on technical aspects of AS&T's proposal contrary to the AMS and the SIR.

The ODRA has broad discretion to recommend remedies for sustained protests. In this case, the ODRA recommends as a remedy that the Center be directed to take corrective action limited to the following:

- (1) With respect to the technical proposal of AS&T, the Center should reinstate the results of its original technical evaluation for AS&T for Factors 1, 3 and 4, and re-evaluate Factor 2, Corporate Experience/Past Performance, in light of the findings herein, without considering the experience of Atlantic or its principals.
- (2) The Center should prepare a New Post Negotiation Memorandum incorporating the results of the above re-evaluation of AS&T's technical proposal.

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<sup>10</sup> Even considering the history of the requirements for the Senior Systems Analyst position and the amendments, FF 19, 20 and 21, which resulted in a relaxation of the minimum requirements, we note that these amendments were known and acknowledged by AS&T at the time of proposal submission. *AR*, Tab 8.

**PUBLIC VERSION**

(3) As part of that New Post Negotiation Memorandum, the Center should perform a new cost/technical tradeoff analysis with respect to AS&T and Columbus only.

(4) The above cost/technical tradeoff analysis will take into account the revised pricing submitted by AS&T and Columbus in response to the November 5, 2009 letter.

5) The Center should make a new award recommendation based on the information contained in the New Post Negotiation Memorandum.

If the Center concludes that AS&T remains the best value, no further action is required. If, however, Columbus is determined to represent the best value, the ODRA further recommends: (1) that Columbus be awarded a contract under the Solicitation, subject to the availability of funds and continuing need for services by the FAA; and (2) that the existing contract with AS&T be terminated for the convenience of the FAA within a reasonable period, allowing for transition of work from AS&T to Columbus without interruption of the services involved. The Center also should be directed to report to the Administrator through the ODRA every 60 days on the status of the implementation of the remedy.

-S-

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May 7, 2010