PUBLIC VERSION

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

Protest of	)	
	)	
Concur Technologies, Inc.	)	Docket No. 14-ODRA-00708
	)	
Pursuant to Solicitation DTFAAC-14-R-04718	)	

DECISION ON REQUEST FOR RECONSIDERATION

I. INTRODUCTION

This matter currently is before the Federal Aviation Administration ("FAA") Office of Dispute Resolution for Acquisition ("ODRA") on a request for reconsideration ("Request") filed by Concur Technologies, Inc. ("Concur" or "Protester"). The Request arises from the Administrator's Final Order issued in this pre-award bid protest ("Protest") on August 25, 2014. The Final Order adopted and incorporated the ODRA's Findings and Recommendations ("F&R") and denied the Protest in its entirety.[1] The Protest had challenged the competitive process that the FAA's Enterprise Services Center ("ESC") planned to use for FAA Solicitation DTFAAC-14-R-04718 ("Solicitation"). The Solicitation was issued pursuant to the FAA's Acquisition Management System ("AMS"). The Solicitation contemplated the award of a task order for the management of internet-based travel services for employees at the FAA, the Department of Transportation ("DOT") and other federal agencies, under the General Services Administration ("GSA") multiple-award, indefinite delivery indefinite quantity ("IDIQ") E-Gov Travel Services-2 ("ETS-2") master contract.

[1] Familiarity with the Final Order and the F&R is assumed for purposes of this Decision.

Concur identifies two grounds for the Request as follows:

> (1) It was clear error for the ODRA to conclude that the Product Team had a rational basis for overhauling the SIR, including abandoning any consideration of the contractors' respective technical approaches and capabilities and raising past performance from the least important evaluation factor (by a significant margin) to the most important evaluation factor (by a significant margin), based on allegedly increasing costs under the incumbent ETS-1 contracts; and
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> (2) New evidence, previously unavailable to ODRA, in the form of the Product Team's award to CWT on August 29, 2014 and its subsequent debriefing of Concur (Exhibits A and B hereto) proves beyond any doubt that the Product Team's removal of consideration of technical merit and reversing the value of the evaluation factors prejudiced Concur.

Request at 2. The Request elaborates on these bases, *id.* at 3-16, as discussed further in the Discussion portion of this Decision. *See infra* Part IV. The ESC filed its Opposition to the Request on September 30, 2014 ("ESC Opposition"). On the same date, CW Government Travel, Inc. ("CWT"), which had intervened in the Protest, also filed an Opposition to the Request ("CWT Opposition").

The ESC opposes the Request on several grounds. Principal among these is the assertion that:

> Concur makes the same basic assertions that it made in its initial Protest, namely, that the Product Team did not have a rational basis to eliminate the technical evaluations contained within the original Solicitation…. Concur's claims amount to nothing more than mere disagreement with the ODRA's findings.

ESC Opposition at 2-3. The ESC Opposition elaborates on this basic point by noting that the ODRA relied on evidence that supports the rational basis for the ESC's decision to "expedite the acquisition due to time and monetary considerations." *Id.* at 4. Additionally, the ESC notes that the F&R was consistent with ODRA precedent which, "clearly permits post-protest explanations that provide a detailed rationale for the contemporaneous conclusions…." *Id.* at 5 (quoting *F&R* at 26). The ESC further notes that "Concur is essentially disagreeing with the ODRA's interpretation of ODRA's own precedent and nothing more." *Id.* at 6.

With respect to Concur's argument challenging the ODRA's finding of lack of prejudice, ESC states:

> Concur's argument is an improper attempt to use post-award events to support its pre-award protest and subsequent request for reconsideration. Concur's introduction of post-award evidence amounts to an improper filing of a post-award protest of which the filing deadline has passed. Such introduction of post-award material should be denied by the ODRA.

Id. at 8. Finally, the ESC Opposition notes that the ODRA found that the Solicitation criteria applied to both offerors, *id.*, and that the Request should be denied as failing to meet the burden established under the ODRA Procedural Regulation at 14 C.F.R § 17.47.

CWT's Opposition similarly is centered on its assertion that:

> Concur's request is based only on its "mere disagreement" with the ODRA's judgment. Although it characterizes its request as such, Concur has not identified any "clear errors of fact or law" or "new evidence" that should have been considered as part of the ODRA's original, pre-award decision.

CWT Opposition at 1. CWT further points out that:

> In seeking reconsideration, Concur ignores the ODRA's most important findings of fact and conclusions of law—that is, that the AMS does not mandate the use of a technical evaluation factor in solicitations (under either complex or simplified methods), that the master ETS2 contracts do not require the use of a technical evaluation factor in ETS2 task order solicitations (issued under the authority of the ETS2 master contract), and that the GSA ETS2 Ordering Guide identified price as the only mandatory evaluation factor. These conclusions are critical because they confirm that the revised SIR, standing alone, was lawful and therefore presumptively rational.

Id. at 2. CWT goes on to note that, while the Concur Request disagrees with the above ODRA conclusions, the Request provides no legal rationale or support for Concur's position. *Id.*

Finally, CWT opposes the Request on grounds that: there was a rational basis for the Solicitation; the ODRA addressed all issues that it was required to address in response to the Protest; the ODRA properly relied in part on post-protest declarations in reaching its

conclusion that the time impact provided the necessary justification for the acquisition approach; and no new evidence has been proffered that properly would support reconsidering the lack of prejudice conclusion. *CWT Opposition* at 5-20.

For the reasons discussed herein, the ODRA denies the Request and will not recommend that the Administrator reconsider the Final Order.

II. FACTUAL BACKGROUND

Detailed findings relevant to the Request at issue here are fully set forth in the F&R, and are incorporated herein. *See F&R, Finding of Fact Numbers ("FF")* 1-50. Concur's four specific grounds of protest, A through D, were identified in the Discussion section of the Findings and Recommendations. *Id.* at 19-20 (summary of grounds); *id.* at 20-30 (analysis of grounds). The F&R contain fifty detailed findings of fact that form the basis for the ODRA's recommended denial of those protest grounds. *F&R* at 2-19. According to those findings, Concur and CWT hold master contracts with the GSA to support the ETS-2 Program. *FF* 1, 2. Executive branch agencies must use the ETS-2 program as part of a Government-wide effort to realize cost savings through consolidation and bulk purchasing. *FF* 1, 2 and 15. To implement the program, agencies can award task orders to Concur or CWT for "standard fixed-price services" and for "tailored services" that need a more detailed statement of work ("SOW") drafted by the ordering agency. *FF* 3, 9. This Protest arose out of the ESC's third solicitation for a task order, and it included a SOW for tailored services. *FF* 24, 26.

The Protest primarily focused on the ESC's evaluation criteria changes, which occurred between an earlier solicitation and the current Solicitation. *Compare FF* 19 *with FFs* 30 and 38. The changes eliminated the technical evaluation factors (and associated subfactors) from the competition and changed the relative importance of past performance and price/cost by making past performance "significantly more important than price/cost." *FF* 38. The ODRA found that the contemporaneous internal record—

called a "Procurement Planning Template for Simplified Acquisitions, Template A"—stated three grounds for the new evaluation approach:

> The acquisition strategy is based on a time impact and lack of available/qualified Subject Matter Experts. As a result we removed the technical aspect because the Requiring Organization said both GSA Master Contract holders could provide a viable solution.

F&R at 25-26 (citing *FF* 33 (emphasis added in the original finding)). As the ODRA originally summarized, "the underlined portion of the contemporaneous record shows that the driving considerations were time, lack of evaluators, and a belief that both CWT and Concur could provide a viable solution." *F&R* at 26.

The ODRA found that one of the grounds was supported by reliable and probative evidence. *F&R* at 26-27. Specifically, the ODRA found a rational basis for the "time impact" ground in light of several declarations that elaborated extensively on the dramatic escalation in time-related costs associated with continuing to use older travel systems. *Id.* at 26 (citing *FF* 34, 35). The declarations also explained concerns that the costs associated with a failure to migrate quickly could lead the ESC to lose its "customers" from other agencies and the revenue that they provide. *Id.* (citing *FF* 36). The ODRA found that the ESC had not sufficiently supported the two other rationales, i.e., that it lacked subject matter experts and that either offeror could provide a viable solution. *Id*. at 26-27. The ODRA recognized, however, that the GSA had awarded master contracts to Concur and its competitor, CWT. *FF* 2.

The ODRA further found that: (1) notwithstanding Concur's claims to the contrary, neither the FAA's AMS nor the GSA master contracts and guidance required that the ESC include a technical factor as part of its evaluation plan; (2) the establishment of the terms of a competition is a matter primarily entrusted to the soundly exercised discretion of program offices such as the ESC; and (3) Concur did not meet its burden of demonstrating that the ESC abused that discretion or that its choice of evaluation factors was arbitrary and capricious, or lacked a rational basis. *F&R* at 20-27. In addition, the

ODRA found that Concur had not met its burden of demonstrating prejudice. *F&R* at 28. The ODRA stated in that regard:

> To show prejudice, a protester must "demonstrate that but for the agency's inappropriate action or inaction, the protester would have had a substantial chance of receiving the award." [*Protest of Enterprise Engineering Services, LLC*, 09-ODRA-00490] Concur has not made this showing, and in fact, the agency's evaluation criteria apply equally to both companies. As one of only two GSA master contract holders, Concur still has "a substantial chance of receiving the award," and the ODRA will not speculate regarding the outcome of the ESC's evaluation of price and past performance.

Id.

Finally, the ODRA rejected as unsupported the remaining two grounds of Concur's Protest related to alleged ambiguity of the Solicitation's past performance criterion and the timeframe established for the response to it. *Id.* at 28, 29. [2]

III. THE STANDARD OF REVIEW

The ODRA Procedural Regulation establishes both the procedures for and the standard applicable to requests for reconsideration. The applicable Section provides:

> A party seeking reconsideration must demonstrate either clear errors of fact or law in the underlying decision or previously unavailable evidence that warrants reversal or modification of the decision. In order to be considered, requests for reconsideration must be filed within ten (10) business days of the date of issuance of the public version of the subject decision or order.

14 C.F.R. § 17.47; *see also Protest of Brand Consulting Group, Inc.*, 12-ODRA-00598, *Decision on Request for Reconsideration*, dated May 8, 2012; *Protest of Arctic Slope Consulting Services*, 12-ODRA-00632, *Decision on Request for Reconsideration*, dated May 8, 2012.[3]

[2] Concur's Request does not seek reconsideration of the ODRA's F&R regarding these two grounds. The Request does assert, however, that Concur alleged an additional protest ground that the ODRA failed to address. *See infra* Part IV.A.3.

The reconsideration standard set out in the Procedural Regulation is grounded in longstanding ODRA case law. *See Protest of Maximus, Inc.*, 04-TSA-009, *Decision Denying Motion for Reconsideration,* dated November 29, 2004; *Protest of HyperNet Solutions, Inc*., 07-ODRA-00416, *Decision on Reconsideration,* dated January 25, 2008; *Protest of Raytheon Technical Services Company,* 02-ODRA-00210, *Findings and Recommendations on Motion on Protester's Request for Reconsideration,* dated April 10, 2002; *Protest of Consecutive Weather*, 99-ODRA-00112, *Recommendation Regarding Reconsideration Request,* dated July 13, 1999; *Consolidated Protests of Camber Corporation and Information Systems and Networks Corporation,* 98-ODRA-00079 and 98-ODRA-00080, *Decision on Motion for Reconsideration,* dated July 23, 1999.

The Procedural Regulation further provides that: "the ODRA will not entertain requests for reconsideration as a routine matter, or where such requests evidence mere disagreement with a decision or restatements of previous arguments." 14 C.F.R. § 17.47. Thus, attempts to re-litigate previously adjudicated issues, or introduce new legal arguments based on the original administrative record do not provide a basis for reconsideration. *See Protest of Raytheon Technical Services Company*, 02-ODRA-00210, *Findings and Recommendations on Request for Consideration of the Merits and for Clarification,* dated April 22, 2002.

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[3] "Specifically, the moving party must show: (1) the occurrence of an intervening change in the controlling law; (2) the availability of previously unavailable evidence; or (3) the necessity of allowing the motion to prevent manifest injustice." *Matthews v. United States*, 73 Fed.Cl. 524, 526 (2006) (citing *Griswold v. United States*, 61 Fed.Cl. 458, 460-61 (2004)). A request for reconsideration must identify "the errors of law or fact on which the previous order was based." *Obasohan v. U.S. Att'y Gen.,* 479 F.3d 785 (2007) (quoting *Assa'ad v. U.S. Att'y Gen.*, 332 F.3d 1321, 1341 (11th Cir. 2003)). A mistake of law is further defined as "an abuse of discretion." *Id.* (quoting *United States v. Hoffer*, 129 F.3d 1196, 1200 (11th Cir. 1997)).

IV. DISCUSSION

A. First Basis for Reconsideration: Alleged Factual Error in Finding a Rational Basis for the Evaluation Factors

Concur sums up its first basis for reconsideration by stating:

> [I]t was a clear error for ODRA to find that the words "time impact" provided a rational basis for the decision to overhaul the SIR when that decision was not appropriately documented and did not provide a stand-alone justifications and the Product Team could not substantiate why it jumped to the conclusion that abandoning all consideration of technical merit was a reasonable response to rising prices under the incumbent contract.

Request at 13. Notwithstanding these assertions, the F&R cited to:

> … several declarations showing dramatic cost and programmatic impact if this acquisition is delayed. *FFs* 34-36. The ODRA has found that the current legacy system (ETS1) is being phased out and that costs to use it will increase substantially as more agencies move to implement ETS2. *FFs* 34 and 35. The FAA ESC is also concerned that delays may cause the loss of agency-customers and the revenue they provide. *FF* 36. Although Concur argues that these time pressures do not support minimizing competition (*Concur's Comments* at 14), the record does not suggest that the ESC was dilatory in its planning or that it actively discouraged competition. To the contrary, the record shows that the ESC issued two earlier solicitations. *FFs* 15-22. Indeed, even Concur suggests that withdrawal of the first of these may have been due to an opportunity to increase competition in light of CWT's own successful protests that led to the present multiple-award IDIQ offering under the GSA's Master Contracts for ETS2. *See Concur's Comments* at 17.

F&R at 26. The F&R went on to find that the above constituted substantial evidence in the record and provided a sufficient rationale for the change to the Solicitation, regardless of findings that other grounds for the change were not properly supported. *Id.* at 27. As the F&R noted, "This rule of decision is particularly appropriate in pre-closing or pre-award protests." *Id.* The ODRA concluded its analysis by finding that:

> [T]he ESC had a rational basis when it elected to eliminate the complex technical evaluation process found in Solicitation -01117[4] in favor of using past performance as its measure of "the probability of an offeror to successfully accomplish[ ] the proposed effort." *FF* 39 (citing Solicitation section M.2(6)). The ODRA further finds that this approach is consistent with the explanation in the AMS Guidance that past performance is an indicator of future performance. *See supra* Part III.A.1 (citing *AMS Guidance* T3.2.2.A.3).

Id. at 27-28. Concur's Request clearly takes issue with the above conclusions, but provides neither new evidence nor demonstrates errors of fact or law. Instead, Concur contends that the ODRA erred in concluding that the ESC had a rational basis for "removing all consideration of technical merit from the evaluation of proposals," and for "raising past performance from the least important evaluation factor to the most important." *Request* at 3. To support these two fundamental assertions, Concur:

> (1) disagrees with the interpretation and application of ODRA precedent regarding the use of declarations (*Request* at 7-9);
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> (2) disagrees with the interpretation of the planning template (*Request* at 10-13); and
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> (3) asserts a heretofore unarticulated, highly nuanced version of the protest based on the incorrect notion that the ODRA ignored the relative weights of past performance and price/cost (*Request* at 5-6).

As discussed in the following sections, all of these theories must fail. Mere disagreement with a decision, restatements of previous arguments and attempts to raise new legal arguments do not provide appropriate grounds for reconsideration. 14 C.F.R. § 17.47*; Protests of Hi-Tec Systems, Inc.*, 08-ODRA-00459, -00460 *(consolidated), Decision on Reconsideration of Denial of Motion to Compel*, dated December 1, 2008*; Protest of Raytheon Technical Services Company*, 02-ODRA-00210, *Findings and Recommendations on Request for Consideration of the Merits and for Clarification,* dated April 22, 2002.

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[4] *See FF* 19.

1. The Declarations Elaborated on the Contemporaneous Record.

Concur argues that the record did not support a finding of a rational basis for the decision to alter the evaluation criteria. *Request* at 3. Part of this argument asserts that the ODRA violated its established precedent by considering three declarations that explained the meaning of "time impact." *Id.* at 7.

In so doing, Concur fundamentally misapplies the ODRA's precedent. As the ODRA previously explained, it "… is not precluded from considering post-protest explanations that provide a detailed rationale for the contemporaneous conclusions as such explanations can simply fill in previously unrecorded details." *F&R* at 26-27 (finding that a declaration and other materials did not provide details regarding the "viable solutions" rationale); *F&R* at 26 n.8 (citing *Protest of Artic Elevator Company, LLC*, 12-ODRA-00629; *Protest of Team Clean, Inc.*, 09-ODRA-00499). Consistent with this precedent, the ODRA correctly used the declarations to understand the meaning of "time impact." Concur acknowledges that the "Procurement Planning Template for Simplified Acquisitions, Template A," found in the Agency Response ("AR") at Tab 6, is contemporaneous with the decision to alter the evaluation criteria. *Request* at 7. Concur even quotes with added italics, boldface, and underline, a portion of the contemporaneous template that explained, "***The acquisition strategy is based on a <u>time impact</u> …***" *Id*. The three declarations, cited in Findings of Fact 34-36, provided the context for understanding the "time impact" associated with conducting a more detailed evaluation process. They credibly filled in unrecorded details that one would not expect to be found on a template for simplified acquisitions.

In sum, the use of the declarations in the cited findings was proper under our precedent, and the ODRA finds no basis to reconsider its factual findings relating to the time impact rationale.

2. Concur's Interpretation of the Planning Document Constitutes Mere Disagreement with the ODRA's Findings, which does not Justify Reconsideration

Concur claims it was erroneous to interpret the Planning Template as having three rationales for the decision to alter the evaluation criteria. *Request* at 10. Concur also asserts that the ODRA omitted discussion of the ESC's failure to consider alternatives to restructuring the Solicitation. *Id.* at 11.

The relevant text from the F&R is found in Finding of Fact 33 and pages 25 and 26 of the Discussion. In pertinent part, the Discussion states:

> Under the space provided to address "Background and Contracting History," the Contracting Officer stated:
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> > This requirement is a Re-competed action because of a protested action taken at the Task Order level. As a result of the settlement agreement the previous requirement it was decided that new strategy [sic] will utilize a Performance Price Tradeoff where past performance is significantly more important than price/cost (with no technical evaluation criteria). The acquisition strategy is based on a time impact and lack of available/qualified Subject Matter Experts. As a result we removed the technical aspect because the Requiring Organization (RO) said both GSA Master Contract holders could provide a viable solution.
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> *[FF 33]* (emphasis added). Summarizing, the underlined portion of the contemporaneous record shows that the driving considerations were time, lack of evaluators, and a belief that both CWT and Concur could provide a viable solution.

F&R at 25-26. The ODRA then analyzed the evidence for each of these considerations and found that: (1) substantial evidence showed that the "time impact" consideration referred to dramatic cost and programmatic impact if the acquisition was delayed, *id.* at 26; and (2) this supported consideration was sufficient, in the context of a pre-award protest, to establish a rational basis for the chosen evaluation criteria under the AMS, 14 C.F.R. § 17.21(m) and persuasive precedent. *F&R* at 27.

Concur disagrees with this approach by proffering a different factual interpretation of the record. Specifically, Concur believes that the language of the Planning Template does not allow treating the three considerations independently. *Request* at 10. Concur's contrary views regarding the interpretation of the evidentiary document is merely disagreement with the ODRA's interpretation of the evidence, which is not a basis for reconsideration. Moreover, Concur's parsing of text attempts to divert attention from the fundamental issue in this pre-closing protest; namely, whether the Product Team acted arbitrarily or capriciously, abused its discretion, or otherwise failed to comply with the AMS in selecting its evaluation criteria. *F&R* at 20, 25. Answering this question does not require a product team to have multiple reasons for its actions, and absolute perfection in the product team's decision-making is not required. Rather, a product team must have a supported basis that logically relates to the action in question. In this regard, the "time impact" rationale directly supported the omission of lengthy technical evaluations as well as the reliance on past performance as the gauge of successful future performance. To this end, the ODRA explained,

> the ESC had a rational basis when it elected to eliminate the complex technical evaluation process found in Solicitation -01117[5] in favor of using past performance as its measure of "the probability of an offeror to successfully accomplish[ ] the proposed effort." *FF* 39 (citing Solicitation section M.2(6)). The ODRA further finds that this approach is consistent with the explanation in the AMS Guidance that past performance is an indicator of future performance. *See supra* Part III.A.1 (citing *AMS Guidance* T3.2.2.A.3).

F&R at 27, 28. Thus, even though the ESC did not support two of the stated considerations, the remaining cost and programmatic considerations (i.e., "time impact") were supported by substantial evidence and logically related to the selected evaluation criteria.

Concur also criticizes the ESC and the ODRA for not analyzing possible renegotiation of an old contract with Northrup Grumman Corporation as an alternative way to redress the

[5] *See FF* 19.

time impacts it caused. *Request* at 11-13.[6] CWT rightly points out that Concur does not identify a legal or other reason that mandates exploration of other conceivable solutions when a chosen solution was permissible under the AMS and had a rational basis. *CWT Opposition* at 16. Moreover, Concur assumes—without providing evidence to carry its burden of persuasion—that renegotiation with Northrup Grumman was a realistic solution that could be accomplished so quickly that it addressed the time impact concerns previously discussed. In this regard, more extensive analysis of this issue by the ODRA was not necessary since Concur never demonstrated that any duty existed on the part of the ESC to explore the option of renegotiation. The ODRA finds no grounds for reconsidering its F&R based on this issue.

3. The Relative Importance of Cost/Price and Past Performance

In addition to the above, Concur's Request raises what amounts to a new ground of Protest and contends that the ODRA erred in failing to address it in the F&R. *Request* at 5, 6. Concur now states:

> ODRA's decision focuses primarily on the Product Team's decision to abandon technical evaluations. This is understandable given that the abandonment of the technical aspects of the original SIR is arguably the most striking element of the Product Team's reversal, and during the protest, the Product Team focused primarily on defending that decision. Yet Concur's protest also challenged the Product Team's decision to reverse course on the relative weight or value of the remaining evaluation factors: cost/price and past performance. **[*]** Without ***any*** explanation ….

Request at 5 (bold and italics in the original; asterisk added by ODRA). The asterisk added to the quote highlights the obvious omission from Concur's Request: citation to the portion of the Protest that gave fair notice of this new, highly nuanced protest ground. Indeed, throughout its Request Concur fails to cite to any portion of the *four specified grounds of protest* as containing this new allegation.

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[6] Concur notes, however, that a portion of the *F&R* acknowledges Concur's argument that time pressures did not support minimizing competition and cites to page 14 of its Comments. *Request* at 11 (quoting, without citation, *F&R* at 26).

Concur's Protest had four separately outlined protest grounds. *Protest* at 14-20 (setting out Grounds A to D). The ODRA specifically relied upon this structure of the Protest in its decision, but noted a degree of overlap in grounds A and B, and the first two paragraphs of ground C. *F&R* at 19, 28 n.12. Concur now critically quotes the ODRA's footnoted discussion of these first two paragraphs of Ground C. *Request* at 5. Notwithstanding Concur's assertions, the ODRA's footnote correctly pointed out that the "key discriminator" arguments raised in the first two paragraphs of Ground C related to prior arguments under Grounds A and B, where "key discriminator" requirements in the AMS were discussed at length. *F&R* at 28 n.12 (referencing *F&R* at 22 (Part III.A.)). [7] The thrust of Ground C was that the ESC failed to "explain unambiguously how it would conduct" a comparison of past performance as a key discriminator. *Protest* at 18 (title of Ground C). The first paragraph of Ground C set up the argument by referencing the "key discriminator" language in the AMS:

> The Product Team's focus on past performance at the expense of <u>all other non-price considerations</u>[8] is arbitrary and capricious and contravenes the AMS, which dictates that "[t]he FAA procures products and services from sources offering ***the best value to satisfy FAA's mission needs"*** and that "[e]valuation criteria should be tailored ***to the characteristics of a particular requirement"*** and should identify "***key discriminators*** in the ultimate selection decision." AMS §§ 3.2.2.2, 3.2.2.3.1.2.3.

Protest at 18, first paragraph (bold and italics added by Concur; underline and footnote added by the ODRA). The critical text in the second paragraph then transitioned the argument from the general concept of "key discriminator" to a specific suggestion that past performance is not a valid comparison for these two offerors:

> While conducting technical evaluations may take time and resources and can be challenging, that is no excuse for abandoning the factors

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[7] In the footnote, the ODRA responded to Concur's fundamental overstatement that in the prior solicitation, "the Product Team did not identify past performance as a key discriminator." *F&R* at 28 n.12 (citing *Protest* at 18). Inasmuch as the footnote itself is not at issue here and is self-explanatory, the ODRA will not belabor discussion of the Concur's critique. Moreover, CWT's Opposition, at 7-8, more than adequately defends the footnote.

[8] This emphasized phrase places at issue past performance in relation to the removed "non-price considerations," rather than in relation to the relative weight of past performance and price/cost.

> the Product Team itself deemed most critical and focusing instead on a single factor, past performance, for which it is difficult to compare the offerors and that is unlikely to result in a source-selection decision that presents the best value to the Government.

Id. at 18, second paragraph. The remainder of the argument in Ground C focused on the "divergence in the offeror's experience" and the alleged absence of "clear, unambiguous standards in the SIR for comparing experience on divergent programs." *Protest* at 18 (third paragraph). The conclusion in Ground C made no reference to price at all, much less its weight relative to past performance:

> The bottom line is that the SIR, as it currently stands, does not provide a reasonable approach for comparing the offeror's respective past performance, and it is especially irrational to rely solely on past performance when other more relevant and reliable considerations (particularly, technical capabilities) are available to achieve a determination of the actual "best value" for the Government.

Protest at 19-20. Concur does not—and cannot—press its case now by showing that any portion of Ground C actually invited the ODRA to expressly consider the relative weight of past performance and price/cost. Instead, its best effort now cites to a snippet of text expressing curiosity,[9] found on the third page of the Protest, well before the stated grounds of protest. That snippet makes no reference to the cost/price factor.

One snippet expressing curiosity, well segregated from the articulated protest grounds, is insufficient to state a ground of protest and does not provide a basis for granting reconsideration. It is axiomatic that a forum is "entitled to rely on the plain language and structure of the complaint in determining what claims are present there." *Ruivo v. Wells*

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[9] Page six of the Request quotes a snippet of text that is divorced from a larger discussion, and separated from Ground C by fifteen single-spaced pages:

> Under the earlier SIR, the Product Team found that Concur's and CWT's past performance were essentially equal. It is curious, therefore, that the Product Team would shift to an award scheme that focuses on an evaluation factor under which it already concluded, only two months ago, that there was little to differentiate the companies.

Request at 6 (citing *Protest* at 3).

Fargo Bank, N.A., No. 13-1222, 2014 WL 4402068 at *3 (3d Cir. Sept. 8, 2014) (citing *Cortés-Rivera v. Dept. of Corr. & Rehab.*, 626 F.3d 21, 28-29 (1st Cir. 2010)). "To be sure, a plaintiff need not divide her complaint into specifically labeled subsections, one for each Count. However, when, as here, a plaintiff chooses to do just that, her claims are confined by the 'internal logic present in … the complaint.'" *Ruivo*, 2014 WL 4402068 at *3. The logic of *Ruivo* is found in older decisions as well. One court, in holding that appellant's pleading was insufficient, emphasized that "district judges are not expected to be clairvoyants .... Litigants [must] spell out their legal theories face-up and squarely in the trial court; if a claim is 'merely insinuated' rather than 'actually articulated,' that claim ordinarily is deemed unpreserved for purposes of appellate review." *Iverson v. City of Boston*, 452 F.3d 94,102 (1st Cir. 2006) (quoting *McCoy v. Mass. Inst. of Tech.*, 950 F.2d 13, 22 (1st Cir. 1991)). Other courts have similarly used the requirement of notice to forbid the practice of "creat[ing] a claim which appellant has not spelled out in his pleading." *Clark v. Nat'l Travelers Life Ins. Co.*, 518 F.2d 1167, 1169 (6th Cir. 1975) (quoting *Case v. State Farm Mutual Auto. Ins. Co.*, 294 F.2d 676, 678 (5th Cir. 1961)); *see also Paterson-Leitch Co. v. Mass. Mun. Wholesale Elec. Co.*, 840 F.2d 985, 990 (1st Cir. 1988) (A party must "spell out its arguments squarely and distinctly … [rather than being] allowed to defeat the system by seeding the record with mysterious references … hoping to set the stage for an ambush should the ensuing ruling fail to suit."); *Beaudett v. City of Hampton*, 775 F.2d 1274, 1278 (4th Cir. 1985) ("[F]leeting references [should not be allowed] to preserve questions on appeal.").

The ODRA Procedural Regulation at 14 C.F.R. § 17.15(c)(7) (2014) requires "a detailed statement of both the legal and factual grounds of the protest, and one (1) copy of each relevant document." Thus, like the host of cases cited above, the initial pleading in an ODRA protest is required to squarely and plainly present all of the issues that the protester requests be adjudicated. Moreover, as was noted above, the ODRA will not, in the context of a reconsideration request, consider new arguments that are based on the previously existing record. *Protest of Raytheon Technical Services Company*, *supra* at 7.

Notwithstanding the foregoing, and assuming for purposes of argument that the referenced ground of protest had been sufficiently pled, Concur nevertheless failed to support it with substantial evidence and thus failed to meet its burden of persuasion on the issue. Scouring the Protest for tidbits of information yields the barest results:

- Page 3, quoted previously in n.8, *supra*, expresses curiosity at "focusing" on past performance.
- Page 8 describes provisions M.1 and M.4, but provides no evidence beyond quotations of those provisions, which also happen to be set forth in the *Findings and Recommendations* at 15-16, *FFs* 38, 40.
- Page 13, stating as fact that past performance was "least important" two months ago, and asserting without citation that both offerors had the same rating when evaluated under the second solicitation's criteria.
- Page 18, setting forth Ground C, and discussed in detail above.

Looking to Concur's First Comments does not improve the evidentiary record:

- Pages 1 and 2 reiterate that the price has significantly more weight; and
- Page 21, expresses concern over "elevated past performance" without adequately explaining to Concur how the past performance would be assessed.

Finally, Concur's second set of Comments, filed on August 11, 2014, does not discuss the issue.[10, 11]

This record does not show that the relative weighting of cost/price and past performance violated the AMS or was arbitrary, capricious or an abuse of discretion. The AMS gives broad discretion to procurement teams regarding the relative ranking of past performance and price. *AMS Guidance* T3.2.2. A.3.b.3. As to how that discretion was exercised, Concur has demonstrated only that the past performance evaluation is significantly more important than cost/price. The ODRA noted that fact in the F&R. *See FF* 38. The ESC

[10] The absence of relevant discussion is not unexpected. The Second Comments from both Concur and CWT were limited to discussion of the supplemental filing by the ESC regarding the alleged "viable solution" consideration. *See FF* 48-50.

[11] The six bullets are the sum-and-substance of all of Concur's discussion regarding the change of relative weight between the price/cost and past performance factors. These six citations are sprinkled in diverse locations of the pleadings, and thereby intermixed with other arguments. None of these bulleted points, however, placed before the ODRA a squarely presented, clearly defined and independent ground of protest regarding relative weight.

had explained in the Solicitation that past performance was to be the gauge of an offeror's likelihood of success. *F&R* at 16; *FF* 39 (quoting provision M.2(6)). Using past performance as a gauge in the context of a simplified acquisition is consistent with the previously discussed "time impact" factor. The AMS Guidance specifically recognizes that time considerations are valid reasons for using simplified acquisitions, and that past performance serves as a measure of probable future performance. *AMS Guidance* T3.2.2.5 A.1.b. and T3.2.2. A.3.a. The ODRA finds nothing inappropriate in the weighting of the criteria,[12] and Concur certainly has offered no evidence to suggest that the ESC's approach was arbitrary, capricious or an abuse of discretion. Concur's argument, at its core, merely reflects its disagreement with the ESC's acquisition approach and the ODRA's F&R.

4. Conclusion Regarding the First Reconsideration Basis

The discussion above forecloses reconsideration on the first basis of the Request. The ODRA properly considered declarations to fill in unrecorded details relating to the stated rationale found in the Planning Template, and the ODRA correctly interpreted the driving considerations to find that the cost and programmatic effects of the "time impact" consideration established a rational basis for the resulting evaluation criteria. The ODRA also rejects Concur's newly formulated claim that now specifically challenges the relative weight of past performance and cost/price as a basis for reconsideration. Moreover, the relative weight of past performance and cost/price, as well as the ESC's rational, were recognized and discussed in the F&R.[13] While Concur obviously disagrees with the ODRA's fundamental conclusion that neither the FAA AMS nor the GSA master

[12] While Concur describes the relative ranking of past performance as being "elevated," another way to phrase the situation is that "cost/price remained a secondary consideration." Indeed, under both the second and third solicitations, cost/price was less important than the technical performance criteria. *See Protest*, Exh. A, § M.4. Since the more time-consuming performance criteria were removed, it would be rational to "elevate" past performance to retain the relative weight of performance and price/cost.

[13] Even assuming that Concur had properly raised such a ground, it has not shown that the relative ranking is inconsistent with the AMS or that it was the product of improperly exercised discretion.

ordering agreement requires that a technical evaluation factor be used in task order competitions, such disagreement provides no basis for the requested reconsideration.

B. Second Basis for Reconsideration: Prejudice

Concur's second reconsideration ground asks the ODRA to consider the debriefing materials and the award notices as new evidence showing that the "removal of technical merit and reversing the value of evaluation factors prejudiced Concur." *Protest* at 2; *see also Protest* at 13-19. Significant portions of Concur's argument constitute attempts to reargue positions taken in the underlying Protest, *id*. at 13-14, but such arguments are not properly the subject of a reconsideration motion. *See, e.g., Protest of Advanced Sciences & Technologies, LLC*, 10-ODRA-00536, *Decision on Request for Reconsideration*, dated November 30, 2010. The remainder of the second ground addresses the "new evidence" and charges that the ODRA has established an "untenable standard" for demonstration of prejudice. *Id.* at 14-16.

Concur's argument rests on the faulty premise that post-award documents are relevant to reviewing the ESC's broad, pre-award discretion to select evaluation factors, or to the issue of prejudice. The fact that the ultimate contract award did not go to Concur does not in any way evidence that the Solicitation was defective, that the ESC violated the AMS, or that the ESC improperly exercised its discretion to select evaluation factors and weighting. As to prejudice, nothing in the documents shows or even suggests that had technical evaluations been conducted, Concur would have performed better. In this regard, Concur offers only speculation, not citation:

> If the price/cost factor was "significantly" more important than the past performance factor, as it was under the prior SIR, the Product Team likely would have awarded to Concur. **[*]** And if the Product Team had evaluated technical proposals and considered the three technical factors as it intended to do, Concur's advantage on those more heavily-weighted factors would have overcome any perceived (though unwarranted) advantage of CWT under the past performance factor. **[*]** Thus, the new evidence from the Product Team's award decision and debriefing confirms that Concur was prejudiced by the Product Team's decision to overhaul the SIR, ….

Request at 16 (asterisks inserted). The asterisks inserted above show that Concur fails to cite support for its speculation that its competitive standing would have been enhanced had the earlier evaluation scheme been used. Concur has the burden of persuasion and proof in this regard, but does not direct the ODRA to any portion of its new evidence to make its case.

Beyond those basic defects in Concur's Reconsideration argument, Concur's critique of the ODRA's discussion of prejudice does not provide grounds for reconsideration. The critique merely disagrees with the ODRA's application of its own established prejudice standards. Moreover, a finding of prejudice would not alter the conclusion that the evaluation criteria selected were supported by a rational basis and were consistent with the AMS. *See F&R* at 20-28 (at Parts III.A.1-3). Protesters must demonstrate both that the agency action complained of lacked a rational basis or was otherwise deficient, **and** that the protester was prejudiced by that action. *Protest of Northrop Grumman Systems Corporation*, 06-ODRA-00384. Thus, a finding of prejudice, standing alone, would not provide a basis for sustaining Concur's protest. A showing that the ultimate contract award did not go to Concur does not evidence that the original Solicitation was defective and does not mandate reconsideration or changing the recommendation to deny the Protest.[14]

IV. CONCLUSION

Concur's Request fails to demonstrate a clear error of law or fact and is unsupported by new evidence. It constitutes at most: (1) mere disagreement with the terms of the Solicitation and F&R; and (2) the restatement of its previous arguments. No offeror is entitled to have a Solicitation structured in a way that compensates for its weaknesses or accentuates its strengths. Neither can offerors pick and choose for the Product Team

[14] Concur also attacks the ESC for "cherry picking" Concur's marginal past performance ratings during the evaluation process. *Request* at 15. Concur has not filed a post-award protest, and the ODRA declines the implicit invitation to adjudicate post-award protest issues in the context of a request for reconsideration.

what criteria should be used in a competition. Inasmuch as the Request does not provide a basis for the ODRA to recommend that the Administrator reconsider his Order (*see Protest of Columbus Technologies and Services, Inc*., 10-ODRA-00514, *Decision on Reconsideration Request*, dated January 14, 2013), the ODRA denies the Request for Reconsideration and will not recommend that the Administrator reconsider the Final Order in this Protest.

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Anthony N. Palladino
Director and Administrative Judge
FAA Office of Dispute Resolution
for Acquisition

October 21, 2014