

**PUBLIC VERSION**

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

**FINDINGS AND RECOMMENDATIONS**

**Matter:**       **Protest of Concur Technologies, Inc.**  
                  **Under Solicitation No. DTFAAC-14-R-04718**

**Docket No.: 14-ODRA-00708**

*Appearances:*

For the Protester:                   Michael D. McGill, Esq. and Erin L. Alexander, Esq. of  
   Hogan Lovells US LLP

For the Intervenor:               Lars E. Anderson, Esq.; James Y. Boland, Esq.; and Anna  
   E. Pulliam, Esq. of Venable LLP

For the FAA Product Team:       Scott A. Reygers, Esq.

This Protest arises out of the Federal Aviation Administration’s (“FAA”) attempt to competitively award a task order under a General Services Administration (“GSA”) multiple-award, indefinite delivery indefinite quantity (“IDIQ”) master contract. The GSA holds two master contracts to service the “E-Gov Travel Services-2” program (“ETS2”) in an effort to consolidate the travel services of agencies throughout the Federal Government. The protester, Concur Technologies, Inc. (“Concur”), holds one master contract, and the intervenor, CWTSatoTravel (“CWT”), holds the other. Using Solicitation DTFAAC-14-R-04718 (“Solicitation”), the FAA’s Enterprise Service Center (“ESC”) seeks a task order under either master contract to support travel services for the Department of Transportation (“DOT”), U.S. Commodity Futures Trading Commission (“CFTC”), Consumer Product Safety Commission (“CPSC”), Government Accountability Office (“GAO”), Institute of Museum and Library Services (“IMLS”), National Endowment for the Arts (“NEA”), and the U.S. Securities Exchange and Commission (“SEC”).

## PUBLIC VERSION

Concur filed its Protest on June 20, 2014, a little over an hour before the closing time under the Solicitation. The key issues<sup>1</sup> focus on the ESC's decision not to require technical proposals, and therefore, not to include a technical evaluation factor as part of its best value evaluation plan. Concur argues that the ESC's approach violates the FAA's Acquisition Management System ("AMS"), and the ordering requirements of its master contract. Concur also asserts that the decision to forego technical evaluation is arbitrary, capricious, and an abuse of discretion. Other issues relate to the past performance evaluation criteria. Specifically, Concur argues that the evaluation factor is ambiguous and that its questions were not adequately answered. Concur also argues that the Solicitation provided too little time to submit adequate responses.

For the reasons set forth in the discussion below, the Office of Dispute Resolution for Acquisition ("ODRA") recommends that the Protest be denied in its entirety.

### **I. Findings of Fact**

#### **A. Background – The GSA's Multiple Award IDIQ Master Contracts**

1. The GSA sponsors the "E-Gov Travel Program," which in turn manages the E-Gov Travel Service ("ETS") and its successor, ETS2. *Agency Record* ("AR") Tab 3 at 3. The function of the E-Gov Travel Program is to consolidate agency travel requirements across the United States Government in order to reduce costs through automation, self-service, and bulk-buying of travel services. *Id.*
2. The GSA awarded IDIQ contracts to Concur and to CWT to provide support to agencies using ETS2. AR Tabs 2 and 4; *see also* Tab 3 at 3. The GSA refers to these contracts as "master contracts." *E.g.*, AR Tab 3 at 4.
3. The master contracts have many Contract Line Item Numbers ("CLINs") covering several option periods. AR Tab 1. The CLINs are divided into two basic groups. Section B.2.1 contains CLINs for reservation and fulfillment services, vouchers, tickets, etc. AR Tab 1 at 7-15. Section B.2.2 contains the CLINs of greatest concern to Concur

---

<sup>1</sup> *Concur's Supplemental Comments*, at 3.

## PUBLIC VERSION

(*Concur's Comments* at 8-9), and include "Supplemental Training Services," "Custom Report Development," and "Custom Interface Development and Interface Testing." *Id.* at 15-16 (CLINs 0009, 0011, and 0013, respectively, for the base period of performance).

4. The master contracts and the GSA solicitation contained definitions for terms used in the CLINs. Relevant definitions include:

**CUSTOM INTERFACE DEVELOPMENT AND INTERFACE TESTING:** Development of Interfaces between the ETS2 and customer agencies' core business systems that need changes or enhancements to the standard interface functionality as requested in Section C.8, Agency Business Systems Data Integration Capabilities and Characteristics, including but not limited to generation of accounting transactions as needed; updating and verification of funds control and the standard general ledger; and generation of disbursement actions by electronic funds transfer (EFT) or other means IAW Section C Attachment 9, Agency Business System Integration Guidance. In addition, this CLIN will be used for application level end-to-end testing between ETS2 and an agency's business systems (financial, human resources, charge card vendors, etc.) for an agency's initial implementation. After initial implementation, application level end-to-end testing is covered under the Contractor's release management cycle as requested in Section C.5.1.1#8. **CLIN0013** is priced at a NTE hourly rate. The ceiling hourly rate includes wages, overhead, general and administrative expenses, and profit applicable to the Contractor as well as subcontractor(s)/teaming partners. This work does not include efforts identified in CLIN 0005 for Standard Implementation (standard integration configuration and deployment development for standard implementation) and should be used for agency specific customized interface needs and not to charge for the standard integration capabilities as requested in Section C.8, Agency Business Systems Data Integration Capabilities and Characteristics or configuration efforts for establishing, operating, and maintaining the ETS2 integration capability as requested as Standard Implementation Services. Applicable to **CLIN 0013** and corresponding option CLINs.

**CUSTOM REPORT DEVELOPMENT:** Custom report development IAW *Section C.9 Queries and Reports* for the development of customer agency custom reports to support agency-specific reporting requirements. Priced at a not-to-exceed (NTE), hourly rate. [sic] The ceiling hourly rate includes wages, overhead, general and administrative expenses and profit applicable to the Contractor as well as subcontractor(s)/teaming partners. Applicable to **CLIN 0011** and corresponding option CLINs.

...

## PUBLIC VERSION

**SUPPLEMENTAL TRAINING SERVICES (INCLUDING USER ROLES):** Supplemental Training Services as required by Section C.12.1, *Training*, to include but not limited to all user roles at CONUS and OCONUS sites to accommodate at least 25 students per class, customized step-by-step training aids, or other training material. Priced at a hourly rate. The ceiling hourly rate includes wages, overhead, general and administrative expenses, and profit applicable to the Contractor as well as subcontractor(s)/teaming partners. CLIN 0009.

*AR* Tab 1, § B at 1-2, 4-5 (emphasis in original).

5. The GSA stated in its own solicitation that it would evaluate the two sets of CLINs differently. The first set, under section B.2.1, was to “be competitively evaluated as described in Section F.” *AR* Tab 1 at 7. Section F, in turn, elaborated on four technical factors considered in the first phase of evaluation, summarized as follows:

- Technical Factor One: The Performance Work Statement
- Technical Factor Two: The Project Management Plan
- Technical Factor Three: Demonstrations
- Technical Factor Four: Key Personnel

*AR* Tab 1 § F.3.2. If an offeror moved to the second phase of evaluation, additional technical factors included:

- Technical Factor One: Computational Ratings
- Technical Factor Two: Functional/Usability Ratings
- Technical Factor Three: Security
- Technical Factor Four: Section 508/Accessibility Testing

*Id.* § F.6.2.

6. The GSA’s second set of CLINs were not evaluated with the same rigor. Indeed, the ODRA finds that the GSA did not conduct technical evaluations for this set because the GSA’s solicitation expressly stated that these CLINs – which included custom interfaces, reports, and training – would “only be evaluated to ascertain that the price offered was fair and reasonable.” *AR* Tab 1 at 15.
7. Clause D.18 of the master contracts describes the ordering procedures. *AR* Tab 1 § D.18. The clause is lengthy, covering nearly four and half pages in the GSA’s solicitation. *Id.*

## PUBLIC VERSION

Based on the portions germane to the present Protest, nothing in this clause requires an ordering agency to evaluate technical capabilities. *Id.* Relevant portions of the clause include the following:

### **D.18 ORDERING PROCEDURES – THIS CLAUSE IS APPLICABLE ONLY IN THE EVENT AWARD IS MADE TO MORE THAN ONE CONTRACTOR**

(a) Definitions: The following definitions are provided:

Fair Opportunity: Reviewing all qualified master contractors for potential award. This can be accomplished through agency review of the web-information, publications or contact with master contractors.

...

Qualified Contractor: Those master contract awardees that meet agency requirements.

(b) Task Orders – General

...

- (3) For orders above the micro-purchase threshold, agencies are required to review all qualified contractors using the web, publications or contact with master contractors prior to placing their task order.

...

(c) Order Limitations

...

(d) Task Order Issuance

- (1) A task order may be issued by the ordering Contracting Officer after receipt and review of all of the qualified contractors' proposals in accordance with the established evaluation criteria and methodology.

...

- (6) For orders over the micro-purchase threshold:

If necessary, the procedures that will be used to provide multiple awardees a fair opportunity to be considered for task order award are as follows:

- (A) Agencies will furnish identical information concerning a proposed acquisition to all qualified contractors. Agencies will treat all prospective awardees fairly. The agency will

## PUBLIC VERSION

submit a written task request to all qualified contractors. The task request shall include, at a minimum:

- (i) the performance work statement or statement of work for a particular requirement or project that clearly specifies all tasks to be performed and products to be delivered under the task order,
  - (ii) period of performance,
  - (iii) discriminators/evaluation factors,
  - (iv) relative importance of discriminators/evaluation factors,
  - (v) methodology for award of the task order, and
  - (vi) a request for proposals from qualified contractors.
- (B) Agencies are encouraged to request oral proposals or demonstrations from qualified contractors where practicable. Agencies are encouraged to utilize streamlined procedures (e.g., electronic submission of proposals, page restrictions on proposals, etc.).
- ...
- (D) Within the timeframes specified by the agency, the Contractor(s) shall submit their task order proposal that identifies contract line item numbers and price, in accordance with agency instructions. Pricing shall be firm fixed price. It shall identify all prices and/or price reductions offered.
- (E) The agency will review and evaluate each proposal received against established evaluation criteria and methodology. The agency may then do one of the following:
- Select the awardee without further discussions; or
  - Conduct negotiations.
- (F) If negotiations are conducted, they will occur at the time and place designated by the ordering Contracting Officer and/or his/her designated representative. Following the completion of negotiations, the Contractor(s) shall submit a finalized task order proposal, as directed by the agency, which reflects the final offer, technical and price, and include a firm milestone schedule.
- (G) Based on the information provided by the qualified master contractors, the agency will evaluate the offers received in accordance with the established evaluation criteria and methodology. The ordering agency will notify the other

## PUBLIC VERSION

participating contractors of which awardee will be issued the task order. Agencies are not required to develop formal negotiation or evaluation plans or scoring schemes for task orders. For task orders valued at over \$5 million (inclusive of options), debriefings will be provided in accordance with the requirements established in FAR 16.505(b)(4).

...  
(e) Pre and Post Award Task Order Assistance

...  
AR Tab 1 § D.18 (underline added).

### B. The GSA's "ETS2 Transition Planning Guide"

8. The GSA also published an "ETS2 Transition Planning Guide" ("the Guide"). AR Tab 3. The Guide "is designed to provide all of the necessary information and instruction to federal agencies to enable them to obtain ETS2 services through the General Services Administration (GSA) Master Contracts." *Id.* at 4. There is no evidence that the guide is contractually binding or that it speaks with regulatory force.
9. Tracking the two sets of CLINs described in section B of the master contracts (*see Finding of Fact ("FF") 3, supra*), the Guide addresses the use of "standard fixed-price CLINs" and "a tailored process for exceptional needs that may lie outside the standard CLIN." AR Tab 3 at 6. In particular, the Guide states:

The ETS2 task ordering process supports both a standard process, which utilizes only the standard fixed price CLINs previously negotiated in the master contract, and a tailored process for exceptional needs that may lie outside the standard CLINs. The ETS2 Master Contract includes CLINs for supplemental services such as VIP services, custom reports development and non-emergency after hours TMC service to accommodate these specific needs. These CLINs are broad in scope, therefore their use must be more sharply defined in the agency's task order, and additional time and effort will be involved when an agency requires these CLINs. When using tailored task ordering procedures, agencies must develop a SOW [Statement of Work] to define the agency objectives (to which vendors will respond with a performance work statement describing their approach to meet those objectives), establish evaluation criteria, issue a RFP to all qualified ETS2 vendors in order to provide fair opportunity, and receive and evaluate proposals. This process,

## PUBLIC VERSION

which the ETS2 PMO strongly encourages, will allow for increased competition and subsequently lower prices on negotiable CLINs.

*Id.* ¶ 2.2.1 (underline added).

10. The Guide reiterates the distinction between orders using standard services and orders requiring a SOW:

### **3.1.2. Determine Acquisition Type (SOW, Standard)**

When placing a task order off of the master contract there are two acquisition options that are inherent to the process. The first option is the standard method which may be used when an agency orders solely off of the established fixed price CLINs. The second option incorporates the need for supplemental services and tailored ordering, which must be used if an agency has requirements for the use of Supplemental Services, Custom Report Development, or On-Site Support Services in addition to any other CLIN described in the master contract.

The second option, which incorporates exceptional needs that may not be satisfied by the standard order CLINs, requires the use of a Request for Proposal (RFP). Because these standard CLINs are broad in scope, their use must be more sharply defined in the agency's task order, and therefore additional time and effort will be involved when an agency requires any of these CLINs. When using tailored ordering procedures, agencies must develop a SOW to define the agency objectives (to which vendors will respond with a statement of work describing their approach to meet those objectives), establish evaluation criteria, issue an RFP to all ETS2 vendors in order to provide fair opportunity, and receive and evaluate proposals.

AR Tab 3 at 9, ¶ 3.1.2 (underline added).

11. The Guide describes "Standard Task Ordering Process" in further detail, and states in part:

### **3.2.2. Conduct Evaluation (Evaluation Factors)**

The only mandatory evaluation factor in the fair opportunity process is the price factor. While price must always be a factor an agency may also consider factors such as technical, management and past performance. If these factors are used the agency will determine the relative weights of these factors in making the award decision. A good business approach is to base the selection criteria on the features of each agency's particular case. Agencies may evaluate these criteria based on all available information including the vendor websites and other contractor provided information. At a minimum each agency should conduct a meaningful



## PUBLIC VERSION

discussion with each vendor to ensure clarity in relaying their requirements to the vendor as well as the solution the vendor will provide.

AR Tab 3 at 10, ¶ 3.2.1(underline added).

12. The Guide's description of the "Statement of Work (SOW) Process" includes the following introduction:

### **3.3. Statement of Work (SOW) Process**

The statement of work process incorporates the need for supplemental services, and tailored ordering, which must be used if an agency has unique requirements that cannot be met using the standard CLIN structure. This process is used to address the services for which priced CLINs are not established in the ETS2 Master Contract. The SOW should be based on the identified unique requirements and the information needed to satisfy the requirements. Each agency is responsible for developing an SOW that is in compliance with the ETS2 Master Contract. The complexity of the SOW will depend upon the complexity of the agency's requirements. There is no FAR-prescribed template when it comes to writing an SOW; however, a recommended step-by-step outline detailing the procedures for creating an SOW are as follows: ... .

AR Tab 3 at 11.

13. The Guide also addresses the evaluation process for the SOW ordering process:

### **Evaluation Plan**

Present sufficient high level information to allow the contractor to understand the basis for making the Fair Opportunity decision. Provide schedule information as appropriate. Specify the factors – technical, management, past performance, price, other – that will be used to evaluate contractor proposals. State the importance of price relative to the other factors. It is not necessary to provide specific details of the evaluation process.

AR Tab 3 at 14-15 (underline added).

## PUBLIC VERSION

### C. Protests Relating to the GSA's Award of Master Contracts

14. The GSA's acquisition efforts were the subject of numerous protests by CWT at the Government Accountability Office ("GAO") and the Court of Federal Claims ("COFC").<sup>2</sup>

### D. The ESC's First Attempt to Award a Task Order

15. All executive branch civilian agencies are required to use ETS2. *AR* Tab 3 at 3; *see also* 41 C.F.R. § 301-73.101 (2014). Award of a task order to a master contract vendor constitutes implementation under the regulation. 41 C.F.R. § 301-73.101 at note 2.
16. The FAA's ESC coordinates ETS2 travel services for the Department of Transportation ("DOT"), U.S. Commodity Futures Trading Commission ("CFTC"), Consumer Product Safety Commission ("CPSC"), Government Accountability Office ("GAO"), Institute of Museum and Library Services ("IMLS"), National Endowment for the Arts ("NEA"), and the U.S. Securities Exchange and Commission ("SEC"). *AR* Tab 24, "*FAA ESC Director's Decl.*," at ¶ 1.
17. On August 14, 2013, before the award of a master contract to CWT, the FAA issued a solicitation ("Solicitation -07448") to Concur for a proposal to cover the needs of the ESC. *Concur's Comments*, Attachment A, "*Concur Sr. Vice President Decl.*," at ¶ 9. No award was made under Solicitation -07448. *Id.*

### E. The ESC's Second Attempt to Award a Task Order and Concur's Prior ODRA Protest filed at the ODRA

18. The ESC, working through the FAA's Mike Monroney Aeronautical Center, attempted to obtain an ETS2 support task order for a second time when it issued

---

<sup>2</sup> The history of these three GAO protests, and two related protests at the COFC, are found in *CW Gov't Travel, Inc. v. United States*, 99 Fed. Cl. 666 (2011), and *CW Government Travel, Inc. d/b/a/ CWTSato Travel v. U.S. and Concur Technologies, Inc.*, 110 Fed. Cl. 462 (2013).

## PUBLIC VERSION

solicitation DTFAAC-14-R-01117 (“Solicitation -01117”). *Protest* at 1-2; *AR* at 1-2; *CWT’s Comments* at 1-2.

19. Solicitation -01117 required proposals to include three technical volumes for evaluation:

Volume I – Technical Interface Content  
Volume II – Technical System Configuration / Administrative User  
Experience Content  
Volume III – Technical Training Content

*Protest*, Attachment A § L.4. Each volume had a corresponding technical evaluation factor, and each of these factors was broken down into subfactors. *Id.* Volume VI was to address past performance (*Id.* § L.6), which in turn was reviewed as a stand-alone evaluation factor, i.e., evaluation factor five. *Id.* § M.7.

20. CWT received the award under Solicitation -01117, but Concur protested the award at the ODRA on April 15, 2014 in the matter docketed as 14-ODRA-00702. *Protest* at 1-2; *AR* at 1-2; *CWT’s Comments* at 1-2.
21. Rather than proceed with adjudication of case 14-ODRA-00702, the ESC voluntarily withdrew the award to CWT, and issued the Solicitation at issue in the present Protest, i.e., Solicitation DTFAA-14-R-04718.
22. Concur withdrew its protest under Solicitation -01117, and the ODRA dismissed the matter with prejudice on May 14, 2014. *Protest of Concur Technologies, Inc.*, FAA Order ODRA-14-721. The ODRA did not reach the merits or render Findings and Recommendations in the matter. *Id.*

### **F. The ESC’s Third Effort to Award a Task Order using the Current Solicitation**

23. The FAA’s Mike Monroney Aeronautical Center issued Solicitation DTFAAC-14-R-04718 as a Request for Proposals on June 4, 2014. *Protest*, Exh. B.

## PUBLIC VERSION

24. The Solicitation elicits proposals for a task order under either of the GSA’s multiple-award master contracts for travel services. *Protest*, Exh. B, Attachment 1 at 1. The solicitation includes a SOW. *Id.*
25. Section B of the Solicitation contains a base period and three option periods. *Protest*, Exh. B § B.
26. The base period extends from the award date to 3 June 2015. *Protest*, Exh. B § B. It contains thirteen Contract Line Item Numbers (“CLINs”) supporting the ESC, the DOT, the SEC, and the GAO. *Id.* The base period includes CLINs for:
- Training (CLINs 0003, 0006, 0009, and 0012);
  - Creation of a computer “interface” (CLIN 0002);
  - Onsite support costs (CLINs 0007 and 0010);
  - Technical assistance to create an ETS2 financial interface system (CLIN 0002);
  - Custom reports (CLINs 0004 and 0013);
  - Some agency-specific requirements (CLIN 0008 (SEC) and 0011 (GAO)); and
  - Implementation costs that included a full-time project manager and a “Service Level D Package” as described in the GSA’s master contracts. *Id.*

*Id.*

27. Several of the ESC’s CLINs for the base year use the services found in section B.2.2. GSA’s master contract CLINs, i.e., the GSA CLINs that were not evaluated using technical evaluation factors. *See FF 6, supra.* The base years of the ESC’s Solicitation and the GSA master contracts compare, in part, as follows:

Item	ESC CLINS ( <i>Protest Exh. B § B</i> )	GSA Solicitation CLINS ( <i>AR Tab 1 § B.2.2</i> )
Interface	0002	0013 <sup>3</sup>
Training	0003, 0005, 0006, 0009, 0012	0009
Reports	0004, 00013	0011

28. The ESC’s CLINs for the option periods are substantially different from the base period. The options include a single CLIN, broken down into several sub-CLINs. These sub-CLINs do not involve training, programming, specific reports or the other

---

<sup>3</sup> See also AR Tab 23, “2d. COR Decl.,” at 4.

## PUBLIC VERSION

duties defined in the base period. Instead, the ESC's option-year CLINs relate to the use of the GSA's group of CLINs that were evaluated using technical factors, i.e., the CLINs in GSA solicitation section B.2.1 for reservation and fulfillment services, vouchers, tickets, etc. *Compare Protest*, Exh. B at 0014, 0015, and 0016, with *AR* Tab 1, Section B.2.1.; *see also FF 3, supra*. The notable aspect of the options is the unusually long periods of performance:

- Option Period 1 lasts from June 4, 2015 to June 3, 2019;
- Option Period 2 lasts from June 4, 2019 to June 3, 2023; and
- Option Period 3 lasts from June 4, 2023 to June 3, 2027.

*Protest*, Exh. B, at Section B.

29. Section L.1 of the Solicitation explains that the ESC is using “streamlined acquisition procedures employing best practices for competitive negotiated procurements” as authorized by the FAA AMS. *Protest*, Exh. B. § L.1(a). The provision further stated:

(e) This acquisition shall involve the use of GSA IDIQ Master Contracts and specific Federal Aviation Administration (FAA), Acquisition Management System (AMS) instructions, conditions, and notices to offerors bidding on this DOT/FAA Task Order. Both offeror's have been found technically acceptable based on GSA's e-Gov Travel Services Program and as a result, technical evaluations are not required in this SIR/RFP.

*Id.* § L.1(e).

30. The Solicitation requires only two volumes. Volume I is a Past Performance Proposal, and Volume II is a “Cost/Price/Solicitation Proposal.” *Protest*, Exh. B. at L.3.

31. Section L.4 addressed past performance, and requires in part:

(b) Each proposal shall provide current and relevant information regarding an offeror's actions under previously awarded contracts/task orders. Offerors shall identify past contracts for efforts similar to the Government requirement as stated in this SIR/RFP. Offerors must provide information on all relevant Federal contracts before State, or local government. Limit contract references to work performed in the last three (3) years with a minimum of three (3) and a maximum of five (5) total references. Recency is defined as work that has been performed within three (3) years of the issue month of the solicitation. In addition, past performance information on contracts not listed by the offeror may be solicited and used in determining the overall past performance rating.

## PUBLIC VERSION

Relevancy is defined as projects involving the same magnitude of effort and complexity.

*Protest*, Exh. B § L.4.

32. Section L.4. also gives latitude to offerors to demonstrate the most relevant information as to past performance:

(d) Offerors must explain what aspects of the contracts identified are deemed relevant to the proposed effort, and may include a discussion of significant achievements, recognitions, and successes obtained in specific projects or explain past efforts to identify and manage problems that are relevant to the SOW. The contractor's Past Performance Proposal Content shall be limited to no more twelve (12) pages to include sub-contractors and in accordance with L.3.d.

*Protest*, Exh. B § L.4.

33. Section L does not require the submission of technical proposals. *Protest*, Exh. B. The Contracting Officer used an internal FAA form called the “Procurement Planning Template for Simplified Acquisitions, Template A” to document this decision. *AR* Tab 6. Under the space provided to address “Background and Contracting History,” the Contracting Officer (“CO” in some quotes hereinafter) stated:

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 [sic] the previous requirement it was decided that new strategy 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.

*Id.* at 1-2 (underline added). The Contracting Officer signed this document on May 30, 2014. *Id.* at 3.

34. The ODRA finds that the reference to “time impact” equates to the increasing costs associated with using a Northrup Grumman system under ETS1. According to a declaration by the DOT ETS Program Manager, the ETS1 contract expired in November 2013, but an extension negotiated by the GSA has provided time to accommodate the

## PUBLIC VERSION

transition to ETS2. *AR* Tab 25, “*DOT PM Decl.*” at ¶ 3. The extension provides that as the volume of transactions processed on ETS1 decrease, the cost per voucher increases. *Id.* ¶4. Additionally, a management fee will be imposed when the total monthly volume of vouchers drops below “the floor” of 15,000. *Id.* That is expected to occur in March or April of 2015, and the minimum payment will be \$738,000 per month, shared by those agencies that still use the Northrup Grumman system. *Id.* DOT is already incurring a cost increase given that “DOT ETS1 transaction fees are currently 61% higher than under the original ETS1 contract.” *Id.* ¶5.

35. The SEC, one of the agencies the ESC services, uses FedTraveler as its ETS1 provider / interface. FedTraveler is expected to hit its floor in October or November of 2014 and incur similar cost increases. *AR* Tab 24, “*FAA ESC Director’s Decl.*,” at ¶ 3.

36. Time pressures also created a concern that the FAA’s ESC will lose agency-clients and associated revenue if issuance of the task order and creating a working interface are delayed. *AR* Tab 22, “*FAA Contracting Officer’s Representative’s (“COR”) 1<sup>st</sup> Decl.*,” at ¶ 5.

37. Section L includes AMS Provision 3.9.1-3, “Protest (October 2011).” *Protest*, Exh. B. at 16-17.

38. Section M.1 indicates that a “best value” award will be made using a “Performance Price Tradeoff (PPF).” *Protest*, Exh. B. § M.1. That section elaborates:

(2) The PPT approach permits tradeoffs between price/cost and past performance, and assumes that both contractors are technically acceptable, because both contractors hold GSA Master Contracts. Contract award will be made to the responsible offeror whose proposal conforms to the solicitation requirements and will provide the best value to the Government, considering price and past performance. For this acquisition, past performance is significantly more important than price/cost.

*Id.*

## PUBLIC VERSION

39. Section M.2 is two pages long and describes in great detail how past performance will be evaluated. A key portion of the text explained:

(4) Past performance represents "how well" an offeror accomplished the effort and must be current and relevant, as well as comparable in scope and magnitude to that described in the SOW. The Government will evaluate the offerors ability to successfully complete projects based on demonstrated past and present experience under recent and relevant contracts.

*Protest*, Exh. B § M.2(4). The provision continues with specific definitions of "experience" and "relevancy," and provides several gradations from "non-relevant" to "very relevant." *Id.* Another key portion of the text provides:

(6) The assessment process will result in a consensus score based on the Past Performance Questionnaire Summary Sheet and correlates to an overall performance confidence assessment of "Substantial Confidence," "Unsatisfactory Confidence," "Unknown Confidence," "Little Confidence," and "No Confidence." The ratings must support the following described assumptions:

The process will result in an overall performance rating as defined below. This performance assessment represents the Government evaluation team's judgment of the probability of an offeror successfully accomplishing the proposed effort based on the offerors['] demonstrated past and present performance. The ratings are defined as follows:

[Table material omitted.]

*Id.* § M.2(6).

40. Section M.4, describes the process to be used for the selection process:

### **M.4. BEST VALUE SELECTION DECISION**

If the lowest priced evaluated offer is judged to have a Substantial Confidence rating that offer represents the best value for the government and the evaluation process stops at this point. Award shall be made to that offeror without further consideration of any other offers. If the lowest priced offeror is not judged to have a Substantial Confidence rating, the next lowest priced offeror will be evaluated and the process will continue (in order by price) until an offeror is judged to have a Substantial Confidence rating or until all offerors are evaluated. If each offeror has the same confidence rating, then the award shall be made to the offeror with the lowest priced evaluated offer. The Source Selection Official shall then make an integrated assessment best value award decision.



## PUBLIC VERSION

The FAA reserves the right to award a task order based on initial offers received without discussions or negotiations. For this reason, each initial offer shall be submitted on the most favorable terms from the standpoint of past performance and cost/price. However, the FAA reserves the right to conduct discussions if later determined by the Contracting Officer to be necessary.

*Protest*, Exh. B § M.4.

41. The Solicitation was issued on June 4, 2014, and established a closing time of 2:00 PM Central Standard Time on June 20, 2014. *Protest*, Exh. B. at 1.
42. Concur posed several questions regarding the Solicitation. *Protest*, Exh. C. Many of the questions sought specific information regarding how ETS1 and ETS2 experience would be considered under section M.2. *See, e.g., Protest* at 11 (quoting questions and answers without pin citation to Exh. C). For the most part, the answers either referred Concur to specific provisions of the Solicitation, or indicated that the subject matter is the offeror's responsibility. *See, e.g. Protest* at 11, second sub-bullet quote ("As referenced in L.4(a), '...'), and third sub-bulleted quote ("It is the offeror's responsibility to demonstrate the recency and relevance of the contracts/task orders provided.").

### **G. This Protest**

43. Concur filed this Protest on June 20, 2014, slightly more than an hour before the deadline for responses to the Solicitation. *Protest* (with ODRA Time Stamp).
44. On June 30, 2014, the parties executed an ADR Agreement that provided for concurrent adjudication and an agreement by the ESC to refrain from making an award until at least August 29, 2014 or until a final order by the Administrator is issued in this Protest. *ADR Agreement* at § 3.
45. The ESC filed its Agency Response on July 15, 2014. *AR* at 1.

## PUBLIC VERSION

46. CWT filed its Comments on the Agency Response on July 22, 2014. *CWT's Comments*, at fax cover sheet.

47. On July 22, 2014, Concur filed its Comments on the Agency Response. *Concur's Comments* at fax cover sheet.

48. On July 29, 2014, the ODRA wrote to the parties to direct that additional information be provided to complete the administrative record, elaborate on references such as “market research,” and clarify instances when the declarants used the passive voice. *ODRA Letter of July 29, 2014* at 1. Specifically, the ODRA directed the ESC to supplement the record with the following:

1. The identity of the “Requiring Organization” referenced in *AR* Tab 6, at p. 2.
2. Evidence that explains the “Requiring Organization’s” conclusion that both CWT and Concur can provide a viable solution.
3. Evidence regarding the “market research” referenced in paragraph 10 of Ms. Grantham’s second declaration. Such evidence, if available, should identify at a minimum the persons involved in the market research, the results, and the timing. It should also include all market survey requests, industry replies, agency conclusions, and other related documentation.
4. The identity of the person or persons who made the decision to omit the technical evaluation, as referenced in paragraph 10 of Ms. Grantham’s second declaration.

*Id.* at 2.

49. On August 5, 2014, the ESC filed its Supplemental Agency Response (“SAR”) to the ODRA’s letter. It was signed by the agency’s counsel and the Contracting Officer, but it was not provided either as an affidavit or as a declaration under 29 U.S.C. § 1749. *SAR* at 4. While it included six attachments, none of these contained market research findings, analysis or conclusions. *SAR, passim*. The attachments related to the two prior efforts by the ESC to secure a task order, starting with a January 2013 “Data Exchange Specification” for Concur’s standard integration services, to a May 5, 2014 CWT design document for DOT integration requirements. *SAR*, Attachments 1-6. None of these

## PUBLIC VERSION

documents are for the period between the termination of the CWT task order under Solicitation -01117 and the issuance of the current Solicitation. *Id.*

50. The record closed on August 11, 2014 with the filing of Supplemental Comments from both Concur and CWT. *ODRA Letter of August 8, 2014.*

### II. Burdens of Proof and Persuasion

A protester bears the burden of proof, and must demonstrate by substantial evidence that the challenged decision lacked a rational basis, was arbitrary, capricious or an abuse of discretion, or otherwise failed in a prejudicial manner to comply with the Acquisition Management System ("AMS"). *Protest of Alutiiq Pacific LLC*, 12-ODRA-00627 (citing *Protest of Adsystech, Inc.*, 09-ODRA-00508). Consistent with the Administrative Procedure Act, 5 U.S.C. §§ 554 and 556, which applies to ODRA adjudications, the phrase "substantial evidence" means that the ODRA weighs whether the preponderance of the evidence supports the challenged Agency action. *Id.*

In cases challenging the terms of a Solicitation, such as the present Protest, the ODRA recognizes that the determination of a program office's needs and the best method for accommodating them are matters primarily entrusted to the soundly-exercised discretion of the product team. *Protest of Northrop Grumman Corporation*, 00-ODRA-00159. Where the record demonstrates that a decision has a rational basis and is not arbitrary, capricious or an abuse of discretion, and is consistent with the AMS and the underlying solicitation, the ODRA will not substitute its judgment for that of the designated evaluation and source selection officials. 14 C.F.R. § 17.19(m) (2013); *Protest of Potter Electric Co.*, 13-ODRA-00657.

### III. Discussion

Concur groups its protest grounds into four categories, "A" through "D," and the first two overlap to some degree. Succinctly stated, grounds A and B assert that the ESC failed to follow various sections of the AMS when it decided to forego a technical evaluation, and further, the ESC's decision was arbitrary, capricious, unreasonable, and irrational. *Protest* at 14-17. Ground C challenges the past performance evaluation criteria, and the last ground argues that the 15-day

## PUBLIC VERSION

deadline for past-performance submissions was too short.<sup>4</sup> *Id.* at 18-20. All of these grounds are considered below, and the ODRA recommends that they be denied.

### **A. Grounds A and B – AMS Requirements, the GSA Master Contracts, and the Rational Basis**

Grounds A and B of the Protest, as stated above, overlap. Ground A argues that abandonment of the “plan to request extensive technical proposals and conduct a qualitative comparison of those proposals is arbitrary and capricious and inconsistent with the AMS.” *Protest* at 14 (title of Ground A). Similarly, Ground B’s title states, “The Product Team’s decision not to evaluate whether the offerors are qualified to meet the ESC’s technical requirements is unreasonable and inconsistent with the AMS.” *Id.* at 17. The ODRA concludes that the determinative issues for Grounds A and B are:

1. Does the AMS mandate that a product team conduct a technical evaluation or is it a matter of discretion?
2. Do the GSA’s master contracts, or the GSA’s guidance, mandate that an ordering agency (like the FAA ESC) conduct a technical evaluation or is the use of such an evaluation a matter of discretion?
3. If a product team is vested with discretion regarding the use of technical evaluations, has Concur shown that the ESC acted arbitrarily, capriciously, or abused its discretion?

Each question is addressed below, and the answers lead the ODRA to recommend that Protest Grounds A and B be denied.

#### **1. The AMS does not Mandate Technical Evaluations**

The AMS policies and procedures for both complex and simplified acquisitions are stated in AMS Policy 3.2.2, “Source Selection.” The AMS Policy opens by generally describing when it is appropriate to use each of these methods:

---

<sup>4</sup> In this pre-closing, pre-award protest, the relative merits of the offerors is not an issue. CWT and Concur have included significant amounts of immaterial, disparaging, and speculative comments about one another in their filings. These remarks are of no value to the ODRA, and have not been relied upon.

## PUBLIC VERSION

The first method is described under Complex and Noncommercial Source Selection and is used for complex, large dollar, developmental, noncommercial items and services. This is the method that typically would be used for investments approved by the Joint Resources Council.

The second method is described under Commercial and Simplified Purchase Method and, is typically used for commercial items that are less complex, smaller in dollar value, and shorter term. Such products or services may be routine in nature and are generally purchased on a fixed price basis.

*AMS Policy 3.2.2.1, “Applicability.”* The ESC asserts that it used the second method, i.e., the “Commercial and Simplified Purchase Method.” *AR* at 9. Concur argues that it is irrational to rely on simplified procedures for an acquisition that could be valued at \$285 million.<sup>5</sup> *Concur’s Comments* at 13. Ultimately, for the issues in this Protest, it makes little difference which method was used because the AMS does not mandate technical evaluations for either method.

The AMS’s general source selection policy unequivocally mandates that product teams evaluate price and past performance when the complex method is used, but no similar statement requires technical evaluations. Specifically, the AMS states:

Each SIR must contain specific evaluation criteria that FAA will use to evaluate offeror’s submittals. **When using complex and noncommercial source selection methods, FAA must include past performance as an evaluation factor.** If appropriate, FAA may use process capability of suppliers as an evaluation factor according to established criteria. **Cost or price considerations must be an evaluation factor in all final selection decisions.** Any request for offer (RFO) must include a requirement for a formal cost or price proposal. The source evaluation team must document the findings of the evaluation. The source selection official (SSO) must base all selection or screening decisions on evaluation criteria established in each SIR. The CO must conduct debriefings with all offerors that request them.

*AMS Policy 3.2.2.2, “Policy”* (emphasis added). Implicit in this limited mandate is the idea that sometimes a past performance assessment sufficiently addresses technical ability. This implication dovetails neatly with the AMS Guidance, which observes that past performance may be a stand-alone evaluation factor, and that it serves “as an indicator of a prospective contractor’s

---

<sup>5</sup> Concur cites to Federal Acquisition Regulation (“FAR”) Part 13 in response to agency arguments based on GAO case law. *Concur’s Comments* at 13 (commenting on *AR* at 10). The FAR has no applicability to the FAA’s source selection process and GAO decisions are only persuasive when FAR and AMS requirements are similar. *See* 49 U.S.C. § 40110(d); *Protests of IBEX Weather Services*, 13-ODRA-00641 and -00644, at nn. 35 and 38.

## PUBLIC VERSION

future performance.” *AMS Guidance* T3.2.2.A.3. The general AMS Policy and Guidance on “Source Selection,” therefore, do not support Concur.

Turning from the general source selection policies to the more detailed discussion of the two AMS competitive methods of source selection also does not benefit Concur. As to the complex method, the ODRA has long-held that technical evaluation is not required. *Protest of Cooper Construction, Inc.*, 97-ODRA-00054 (Special Master’s Report (Board Judge Goodman (GSBCA)) of January 28, 1998, adopted by FAA Order ODRA-98-52). Rather, a solicitation (a.k.a., a “screening information request” or “SIR”) “should focus on information that directly relates to the key discriminators for the procurement.” *AMS Policy* 3.2.2.3.1.2.1, “*Screening Information Request*” (underline added). The section continues, “The following are examples of the types of information that may form the basis of a screening request:

- Equipment/products for FAA testing,
- Vendor testing,
- Testing data,
- Technical documentation (commercial, if available/practicable),
- Capability statements,
- Quality assurance information,
- Performance experience,
- Sample problems,
- Draft/model contracts,
- Technical proposals (including oral presentations, if appropriate/practicable),
- Commercial pricing information,
- Financial condition information,
- Cost or price information, and
- Cost or price proposals.”

*Id.* (underline added). The underline text in the bullets clearly shows that technical information is appropriate to consider, but the preceding “should” and “may” language renders the use of technical submissions a matter of discretion rather than a mandatory procedure. *AMS Policy vs. Guidance Statement; Protest of Adsystech, Inc.*, 09-ODRA-00504 at n.16.<sup>6</sup> Similar “should”

---

<sup>6</sup> The AMS Statement entitled “AMS Policy vs. Guidance” explains that the following terms, “when used throughout AMS, shall be interpreted” in the following manner:

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

language is found in the other AMS wording that Concur cites to the ODRA. *See Protest* at 16-18 (citing *AMS Policy* 3.2.2.3.1.2.3); *Concur's Comments* at n.30 (also citing *AMS Policy* 3.2.2.3.1.2.3.).

The simplified acquisition method also uses “should” and “may” language when discussing the evaluation process. It states:

**3.2.2.5.3 Screening**

The CO should determine the appropriate screening approach and format for vendor's responses (e.g., electronic, written, oral, use of standard commercial or FAA forms). The CO may also conduct communications with individual offerors, as appropriate, to address offeror understanding of the requirement, performance capability, prices, and other terms and conditions. For commercially available products, the CO is encouraged to use "commercial competition techniques" such as continuing market research throughout the process by using vendor proposals as the source of prices and commercially available capabilities and sharing that information with other vendors.

**3.2.2.5.4 Selection Decision and Award**

The CO's selection decision should be based on the FAA's stated evaluation criteria. The selection decision for commercial or simplified purchases should be based on the best value to the FAA including, but not limited to, factors such as price, functional specifications, delivery capability, warranty, and payment terms. This may be accomplished through establishing specific evaluation criteria with an accompanying evaluation plan as described under Complex, Noncommercial Source Selection, and making the selection based on the stated criterion. It may also be based on the most favorable solution available in the commercial market, as determined by the FAA, as described under Commercial and Simplified Purchase Method, or through a combination of methods depending on complexity, risk, dollar value, and urgency of the requirement.

---

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

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

AMS Statement on “AMS Policy vs. Guidance,” found at [http://fast.faa.gov/AMSPolicyVsGuidance.cfm?p\\_title=AMS Information](http://fast.faa.gov/AMSPolicyVsGuidance.cfm?p_title=AMS%20Information), last viewed on July 24, 2014.

## PUBLIC VERSION

*AMS Policy 3.2.2.5, “Commercial and Simplified Purchase Method” (underline added).* Nothing in the quoted text – and nothing cited by Concur – mandates the use of technical evaluations and technical submissions.

Based on the foregoing analysis and discussion, the ODRA reiterates the holding in *Cooper* that the AMS does not mandate the submission and evaluation of technical proposals in all procurements. Instead, the AMS vests in FAA procurement personnel the reasoned<sup>7</sup> discretion to use – or not use – technical evaluation factors when selecting sources under either the Complex and Noncommercial method or the Commercial and Simplified Purchase Method.

### **2. Neither the Master Contracts nor the GSA Guide Mandate Technical Evaluations.**

Without pointing to specific language, Concur argues in its Comments that the master contracts require the ESC to evaluate technical proposals. *Concur’s Comments* at 10. This position is patently contrary to clause D.18, which encourages agencies to “utilize streamlined procedures” and states that “[a]gencies are not required to develop formal negotiation or evaluation plans or scoring schemes for task orders.” *FF* 7. The ODRA finds as a matter of law that the master contracts do not obligate the ESC to include a technical evaluation factor.

Implicitly recognizing the weakness of its position regarding the language in master contracts, Concur states, “[E]ven if there is some ambiguity in the Master Contract, GSA’s ETS2 Task Order Guide ... resolves the ambiguity.” *Concur’s Comments* at 11. Concur quotes the language set forth above in Findings of Fact 10 and 12, to argue that the ESC must use a technical evaluation when there is an agency need to be articulated in a detailed SOW. *Concur’s Comments* at 12. Concur misses the mark for two reasons. First, the GSA Guide is merely a guide; it has no regulatory or other authoritative force. Second, it simply cannot be read as far as Concur would like. Although the language in the GSA Guide indicates that the SOW ordering process must be used for certain unpriced CLINs such as training, report generating, and interface development, it does so with the contextual explanation that “because these standard CLINs are broad in scope, their use must be more sharply defined in the agency’s task order.”

---

<sup>7</sup> See n.6, *supra*.



## PUBLIC VERSION

*FF* 10. Rather than dictate the use of technical evaluations, the GSA Guide instead merely states that agencies need to “establish evaluation criteria, issue an RFP to all ETS2 vendors in order to provide a fair opportunity, and receive and evaluate proposals.” *Id.* Nothing in this quote, or elsewhere in the GSA Guide, mandates technical proposals or technical evaluation. As with the AMS, the criteria that the ordering agencies establish is a matter left to their discretion.

### **3. The ESC had a Sufficient Rational Basis for not Requiring Technical Proposals or Evaluations**

ODRA precedent firmly establishes:

[T]he determination of a contracting agency’s need and the best method of accommodating them are matters within the agency’s soundly exercised discretion, which the ODRA will question only if the agency’s judgment is shown to lack a rational basis or constitutes an abuse of discretion. [Citations omitted.] Additionally, mere disagreement with the agency’s judgment concerning the agency’s needs, and how to accommodate them, does not show that the agency’s judgment is irrational, arbitrary, or capricious.

*Protests of Air Transport. Ass’n, et al.*, 08-ODRA-00452; *see also Protest of Frequentis*, 02-ODRA-00231, (*Amended Findings and Recommendations*, at *Supplementary Statement of the ODRA Director* (“Under the AMS, FAA Product Teams have substantial latitude and discretion ... to designate the criteria to be used for a particular procurement...”)).

The Agency Response cites to two documents as containing the rationale for eliminating technical submissions and evaluation. The first document is a completed form entitled, “Procurement Planning Template for Simplified Acquisitions, Template A.” *FF* 33. Under the space provided to address “Background and Contracting History,” the Contracting Officer stated:

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.

## PUBLIC VERSION

*Id.* (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.

The “time” consideration is supported by 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. *FF* 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.

The second reason stated in the Procurement Planning Template refers to a lack “of available/qualified Subject Matter Experts.” *AR* Tab 6 at 1 (quoted above). There is no elaboration on this point in the Agency Report itself (*AR passim*), and the ODRA finds this ground to be unsupported.

Finally, the third reason was a stated belief that both CWT and Concur could provide a “viable solution.” *AR* Tab 6 at 2 (quoted above). The ESC attempted to elaborate on this reasoning by submitting the COR’s second declaration<sup>8</sup> and, at the ODRA’s direction,<sup>9</sup> by filing its

---

<sup>8</sup> “The ODRA ... 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.” *Artic Elevator Company, LLC*, 12-ODRA-00629 (citing *Protest of Teams Clean, Inc.*, 09-ODRA-00499).

<sup>9</sup> In hindsight, the ESC’s third proffered rationale is not determinative of the outcome of this Protest. But during the course of the adjudication, “the ODRA is bound to consider the whole record.” *Protest of Adsystech, Inc.*, 09-ODRA-00508 (citing 5 U.S.C. § 556(e)). “To develop a complete record, the ODRA Procedural Regulation places upon the Product Team a burden to produce relevant documents ....” *Id.* (citing former 14 C.F.R. § 17.17(f) (*but compare* 14 C.F.R. 17.21(d) (2014))). When gaps in the record are evident, orders requiring supplementation of the records are proper. *Adsystech*; *see also* 17 C.F.R. § 17.21(c) (2014).

## PUBLIC VERSION

Supplemental Agency Response with six attachments. *FF* 48-49; *SAR*, *passim*. None of these materials provide reliable and probative evidence<sup>10</sup> of the contemporaneous rationale (from May to June 2014) for conclusion that both CWT and Concur can provide a viable solution. *FF* 48-49.

While the administrative record is deficient with respect to two of the proffered reasons, these inadequacies do not diminish the import of the time and monetary considerations that also drove the elimination of the technical evaluations. As noted above, these considerations are well supported by substantial evidence in the record. *FF* 34-36. Even when just one sufficient rationale supports a discretionary decision, the ODRA will not recommend sustaining a protest. *Accord*, *Matter of Innovative Refrigeration Concepts*, B-253983, 93-2 CPD ¶ 260 (October 26, 1993) (original grounds for rejecting offer were invalid, but other grounds were sufficient). This rule of decision is particularly appropriate in pre-closing or pre-award protests. In such cases, a product team has full insight into a protester's criticisms and continually retains the authority to amend the solicitation or take other voluntary corrective action before it commits to the costs associated with performance of an awarded contract. A *pro forma* ODRA order or recommendation requiring re-assessment of the evaluation criteria likely will not change the status quo, and a more extensive remedy – such as imposing specific evaluation criteria – would require the ODRA to substitute its judgment for the *continuing judgment* of a product team in a manner contrary to well-established precedent. *See, e.g., Protest of Alutiiq Pacific LLC*, 12-ODRA-00627 (citing *Protest of Communication Technologies, Inc. ("COMTek")*, 03-ODRA-00257 and the *Protest of Computer Assocs. Int'l, Inc.*, 00-ODRA-00173).

The ODRA, accordingly, finds that the ESC had a rational basis when it elected to eliminate the complex technical evaluation process found in Solicitation -01117<sup>11</sup> 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

---

<sup>10</sup> The SAR, *i.e.*, the ESC's letter filed with the ODRA on August 5, 2014, is not evidence. At best it is argument of counsel and an unsworn statement by the contracting officer. *See FF* 49.

<sup>11</sup> *See FF* 19.

## PUBLIC VERSION

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).

### **4. Concur has not Demonstrated Prejudice**

In addition to demonstrating that a challenged action lacks a rational basis, or is otherwise arbitrary, capricious or an abuse of discretion, protesters have the burden of showing that they have been prejudiced by the action. *Protest of Enterprise Engineering Services, LLC*, 09-ODRA-00490. 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.” *Id.* 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.

The ODRA therefore recommends that grounds A and B of the Protest be denied.

### **B. Protest Grounds C and D – Past Performance Issues**

Concur’s third ground of protest relates to the ESC’s planned approach to evaluating past performance. Concur charges that the ESC failed to unambiguously explain how it would evaluate past performance. *Protest* at 18-19. Concur’s fourth challenge to the Solicitation attacks the 15-day response deadline for offerors to prepare their past performance volumes. *Id.* at 20. Neither ground is well-founded.

#### **1. Ground C – The Past Performance Criteria are Not Ambiguous**

The first reference to ambiguity found in Ground C is in the third paragraph of the argument (*Protest* at 18),<sup>12</sup> but this reference does not direct the ODRA to allegedly ambiguous language

---

<sup>12</sup> Concur opens its argument in Ground C by asserting that past performance was not a key discriminator under Solicitation -0117, but now, without a rational basis, it is. *Protest* at 18. Concur overstates its case. While past performance was of less importance under Solicitation -0117, it nevertheless was a stand-alone evaluation factor (and not merely part of a responsibility determination) under the previous solicitation. *FF* 19. Moreover, this is not

## PUBLIC VERSION

in the Solicitation. Instead, Concur begins a lengthy and insufficiently cited description of “the divergence in the offerors’ experience” to show “the absence of any clear, unambiguous standards in the SIR for comparing experience on divergent programs.” *Id.* Concur concludes with a “bottom line” on page 19-20 that the standards “do not provide a reasonable approach for comparing the offerors’ respective past performance.” *Id.* at 19.

A protester cannot properly charge that a solicitation is ambiguous without telling the forum exactly what language can be interpreted in more than one way. Indeed, the ODRA is not obliged to hunt for ambiguities, particularly here, where the text as a whole is lengthy and appears unremarkable, fairly standard, and replete with definitions. *See FFs* 31, 32, and 39. Similarly, the ODRA will not find an ambiguity based on a protester’s particular circumstances prior to the evaluation of past performance. To do so would pre-judge the evaluation outcome. Moreover, Concur fails to state a valid protest ground inasmuch as it is based on arguments that merely compare Concur’s experience to CWT’s experience. *Protest of Northrop Grumman Corp.*, 00-ODRA-00159 at n.12 (The “FAA is not required to structure the procurement in a manner that neutralizes a competitive advantage that one vendor may have” as a result of experience on a competitively awarded contract.).

Finally, as stated above, specific references to the evaluation criteria are not found in the Protest grounds (*Protest* at 18-20), but Concur’s factual section quotes various questions submitted to the Contracting Officer and the associated responses. *Protest* at 9-13. The questions themselves seek information as to how the criteria will be specifically applied to experience under ETS1 and ETS2. *FF* 42. On the whole, the answers refer Concur back to the Solicitation, and stress that it is the offeror’s responsibility to present the most recent and relevant experience that meets the criteria. *Id.* These questions do not establish ambiguity in the specification, and nothing in the responses appear unusual, out of the norm, inaccurate, or improper. Indeed, the answers evince an effort to avoid prejudging the evaluation or conferring a competitive advantage to either offeror. All that remains is mere displeasure with the answers, which is not a proper ground for a protest.

---

a charge of ambiguity, but really another form of articulating grounds A and B, already discussed and rejected above. *See supra*, Part III.A.

## PUBLIC VERSION

The ODRA, therefore, recommends that Ground C be denied.

### **2. Ground D – Concur has not Shown the 15-Day Deadline to be Unreasonable**

Concur's final protests ground is that it "may not be able to submit the past performance information" within the Solicitation's 15-day deadline. *Protest* at 20. The past performance information was due roughly one hour after Concur filed its Protest (*FFs* 41 and 42), but nothing in Concur's Comments indicate that it actually failed to meet the submission deadline. Indeed, the ESC argues that Concur met the deadline, and that this issue is moot. *AR* at 19. Concur did not press this argument in its Comments. *See Concur's Comments, passim*. The ODRA finds that regardless of the merits of this ground, Concur has failed in its burden to demonstrate prejudice, and recommends that the fourth ground be denied.

### **IV. Conclusion**

Concur has not shown by the preponderance of the evidence that the ESC's decision to not require or evaluate technical proposals was arbitrary, capricious, an abuse of discretion, or a violation of the AMS. Concur also has failed to demonstrate that it has been prejudiced by the challenged decision. Similarly, Concur has not shown by the preponderance of the evidence that the past performance evaluation criteria are ambiguous or that the 15-deadline prejudiced it in any way. The ODRA, therefore, recommends that the Protest be denied in its entirety.

--S--

---

John A. Dietrich  
Dispute Resolution Officer and Administrative Judge  
FAA Office of Dispute Resolution for Acquisition

**PUBLIC VERSION**

**APPROVED:**

--S--

---

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