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

FINDINGS AND RECOMMENDATIONS

Matter: **Protest of Exelis, Inc.**
 Under Solicitation No. DTFAWA-13-R-00020

Docket No.: **15-ODRA-00727**

Appearances:

For the Protester: Kevin P. Connelly, Esq.; Marques O. Peterson, Esq.; Kelly E. Buroker, Esq.; and Caroline A. Keller, Esq., of Vedder Price P.C.

For the Intervenor: Daniel R. Forman, Esq.; Jonathan M. Baker, Esq.; Olivia Lynch, Esq.; and Sharmistha Das, Esq., of Crowell & Moring

For the FAA Product Team: William J. Selinger, Esq.

Solicitation DTFAWA-13-R-00020 (“Solicitation”) sought competitive offers for a contract to modernize information systems throughout the National Airspace System (“NAS”). Four offerors responded to the Solicitation, including Exelis, Inc. (“Exelis”). Exelis filed this post-award protest (“Protest”) on May 5, 2015 against the contract award to Northrup Grumman Corporation (“NG”). This Protest is Exelis’ second protest arising out of the Solicitation. The prior protest (docketed as 14-ODRA-00719) involved several more issues, but the parties ultimately reached a mediated settlement agreement that required the Product Team to reevaluate specific aspects of the proposals. After reevaluation, the Product Team confirmed its award to NG. Exelis’ present Protest now challenges the Product Team’s reevaluation in four areas: (1) the evaluation of NG’s Principal Information Engineer, (2) the evaluation of subfactor B of

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technical factor one, (3) the evaluation of subfactor C of technical factor one, and (4) the cost evaluation of NG's Help Desk services.

After extensive briefing, and 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. Jurisdiction and Standard of Review

The parties do not dispute that Exelis submitted a timely proposal that the Product Team evaluated, but did not select. The ODRA finds that it has jurisdiction over the Protest under 49 U.S.C. § 40110(d)(4) (2012); 14 C.F.R. § 17.1 (2015).

Exelis, as the 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 Adsytech, Inc.*, 09-ODRA-00508). Consistent with the Administrative Procedures Act, 5 U.S.C. §§ 554 and 556, which applies to ODRA adjudications, the phrase "substantial evidence" means that the ODRA considers whether the preponderance of the evidence supports the challenged Agency action. Where the record demonstrates that the challenged 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) (2015); *Protest of Potter Electric Co.*, 13-ODRA-00657.

II. Background Findings

The Product Team issued the Solicitation to support the Aeronautical Information Management Modernization Segment 2 ("AIMM S2") program. *Protest* Exh. C (the Statement of Work or "SOW") at § C1.1. The AIMM S2 program is part of the FAA's effort to modernize its information systems by creating a common information source (called the Aeronautical Common Service or "ACS") that provides a single source for dissemination of aeronautical information.

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Id. at § C.1.3. Broadly stated, the Solicitation includes requirements for systems development, hardware and software maintenance, help desk services, equipment and software purchasing, and more. *Protest* Exh. B (Section B of the Solicitation). This comprehensive Solicitation also has the full range of pricing methods: Cost-Plus-Incentive Fee (“CPIF”), Firm-Fixed Price (“FFP”), and Time and Materials (“T&M”) pricing. *Id.* at B-1.

The Solicitation required offerors to provide three separate volumes: (I) Technical / Management, (II) Cost, and (III) Oral Presentation. *Protest* Exh. E at Table L-3. Various evaluation teams – a Technical Evaluation Team (“TET”), a Management Evaluation Team (“MET”), and a Cost Evaluation Team (“CET”) – reviewed portions of the proposals relating to their areas of expertise. *Agency Response* (“AR”) Tab 44 (the Evaluation Plan). Each team produced reports that recorded its rationale and conclusions. The TET and MET’s evaluations were to be based on criteria that gave greatest weight (80%) to the Technical/Management Volume and the least weight (20%) to the Oral Presentation Volume. *AR* tab 12 at § M.5.1. The evaluation scheme includes weighted evaluation criteria down to the subfactor level. *Id.* Subfactor scoring ranged from 0 to 100 points, based on the impact of strengths, weaknesses, deficiencies, and risk. *Id.* at § M.5.0.

The Cost Volume was not scored. Consistent with the hybrid nature of the pricing – FFP, CPIF, and T&M – the Solicitation gave wide latitude to the CET regarding the methods used to assess reasonableness and realism. *AR* Tab 12 at § M.4.3.

The Solicitation provided for a single award, based on the “best overall value to the Government.” *AR* Tab 12 at § M.3.0. “The best value approach provides the opportunity for technical and costs/price trade-offs, and does not require that the award be made to either the Offeror submitting the highest rated proposal or the Offeror submitting the lowest price. As technical scores are closer, cost/price becomes more important.” *Id.* As indicated in the original Source Selection Evaluation Board Report to the SSO (the “Source Selection Officer”), Exelis and NG achieved the two highest overall scores at [DELETED] and 87.73, respectively. *AR* Tab 50 at 5. Exelis’ price, however, was \$[DELETED] compared to NG’s at \$81,750,050. *AR* Tabs

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13 and 14. The original source selection decision found that NG's lower priced proposal represented the best value given the slight difference in scores. *AR* Tab 14 at 10.

As previously mentioned, a prior award to NG resulted in a protest (14-ODRA-00719) and subsequent settlement agreement. *Protest* Exh. O. The settlement agreement required reevaluation of certain items, and a new best value determination. *Id.* Noting that "Exelis' score was raised slightly and Northrup Grumman's score was reduced slightly," the SSO nevertheless concluded that "the advantages of Exelis' higher rated proposal do not justify their significantly higher price" of "\$[DELETED]." *AR* Tab 23. The SSO signed his memorandum on Friday, April 24, 2015, and informed Exelis that NG had been selected again for award. *Protest* at 2. Exelis filed this Protest on May 5, 2015, and its Supplemental Protest on May 14, 2015. After receiving the Agency Response, and Comments from both Exelis and NG, the record closed on June 8, 2015.

III. Detailed Findings of Fact and Discussion

The mediation in the prior protest, 14-ODRA-00719, successfully narrowed the present Protest to four main issues relating to management personnel, two aspects of the technical evaluation, and the cost evaluation regarding the help desk. These are addressed in turn.

A. NG's Principal Information Engineer

All parties acknowledge, and the ODRA finds, that the Product Team determined that NG did not offer a Principal Information Engineer who possessed the required educational achievements specified in attachment J-14 of the Solicitation. *Protest* at 34 and 43; *AR* at 3 (citing *AR* Tab 26); and *NG Comments* at 5. The issues that Exelis presents to the ODRA, therefore, start with whether this finding mandated rejection of the NG proposal under specific language in section L and provisions M.14.2.1.2 and M.5.1.2. *Protest* at 45. Exelis further argues that NG's proposal should have been rejected under the Solicitation's general language that required offerors to meet "all requirements of the [Solicitation]." *Id.* at 44 (citing §§ M.3.1., and M.1.0.). Finally, Exelis charges NG with misrepresentation of the Principal Information Engineer's qualifications.

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1. Provisions L.14.2.1.2 and M.5.1.2 Do Not Mandate Rejection of NG's Proposal.

Provisions L.14.2.1.2(j) and M.5.1.2 use identical language that cross references special clause H.16:

Key personnel will be scored on a pass/fail basis. To receive a rating of “pass”, resumes for all key personnel must establish that all proposed key personnel meet or exceed requirements specified in section H.16. **Proposals that receive a rating of “pass” will be further evaluated as explained in M.3.1.1. Proposals receiving a rating of “fail” in this criterion may not be further evaluated and may not be considered for award.**

AR Tabs 11 and 12 (boldface and underline in the originals). Exelis argues that NG's Principal Information Engineer “failed” to meet the key personnel requirements, and relies in part on the quoted language to assert that the Solicitation mandated rejection of NG's proposal. *Protest* at 46.

Exelis' conclusion is not supported on close inspection of the provisions. The express standard of measurement for the “pass” or “fail” determination is clause H.16, not the educational requirements found in attachment J-14. Indeed, clause H.16 makes no express reference to the educational requirements found in attachment J-14,¹ and the plain purpose of H.16 is to ensure that the individuals proposed by each offeror remain on the contract for at least twelve months (subject to certain exceptions) before the successful offeror attempts to replace the individual. AR Tab 7, at H.16(d). The record demonstrates that the Source Selection Official (“SSO”) adopted this interpretation during the reevaluation, and he found that a “pass” was justified for compliance with clause H.16. AR Tab 23 at 1-2.² Moreover, NG acknowledged in its proposal the obligation to comply with H.16, and Exelis has not shown in any portion of the record that

¹ Special Clause H.16 is AMS Clause 3.8.2-17 “Key Personnel and Facilities (May 1997),” with language inserted to identify the key personnel positions. AR Tab 7. The full text of standard clause is available online at <https://conwrite.faa.gov/cwcategoryst.cfm> (last visited June 12, 2015).

² *Exelis' Comments* direct the ODRA to AR Tab 51, which is a clarification request regarding the Principal Information Engineer's [DELETED] in computer science. *Exelis Comments* at 28. That request cites M.5.1.2, and Exelis argues that this demonstrates that the evaluators contemporaneously interpreted M.5.1.2's pass/fail as pertaining to qualifications, not compliance with H.16. *Id.* The ODRA rejects this interpretation of the evidence for the reasons stated above, and because the brief reference to M.5.1.2 does not elaborate whether the pass/fail criteria under the first part of M.5.1.2 is the basis for the clarification request, or whether the reference to further evaluation under M.3.1.1. is the basis of the clarification request.

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NG took exception to H.16.³ See AR Tab 28. Exelis, therefore, has not demonstrated that the Product Team failed to follow the requirements of provisions L.14.2.1.2(j) and M.5.1.2.⁴

2. The Product Team's Treatment of the Educational Deficiency was Consistent with the Solicitation

Having correctly awarded NG a “pass” under the provisions analyzed above, the MET was then obligated to evaluate the key personnel in accordance with provision M.3.1.1. AR Tabs 12, at § M.5.1.2(j) (quoted above). Exelis, however, argues that general language found in provision M.3.0 cuts short any further evaluation because “to be eligible for award an Offeror must meet all the requirements of the SIR.” *Protest* at 44.⁵ “From an overall standpoint,” according to Exelis, “NG’s proposal failed to meet the key requirements of the SIR for the Principal Information Engineer and should have been found ineligible for award.” *Id.* at 45. The Solicitation – when read as a whole and giving meaning to all parts – does not support Exelis’ conclusion.

The full context of the language cited by Exelis is:

To be eligible for award an Offeror must meet all the requirements of the SIR. The FAA reserves the right to reject any and all offerors, or waive minor irregularities and discrepancies, if it is in the best interest of the FAA to do so.

AR Tab 12, at § 3.0. The full quote reveals that discrepancies do not automatically render an offer ineligible for award, but instead, can be waived depending on the best interest of the FAA.

³ Exelis correctly points out that NG’s resumes themselves did not show the commitment of each employee to remain on the job for a year. *Exelis Comments* at 30-34. Exelis provides its own set of resumes with attached commitment pledges as examples of how to properly follow the instruction to offerors. *Exelis Comments* at 31 (citing Exh. LL). The ODRA recognizes, however, that both sets of resumes were before the evaluators and the different approaches did not raise concerns during the evaluation. At best, Exelis raises a minor irregularity that is overcome by NG’s representations found elsewhere in the proposal.

⁴ The arguments that the language of these provisions enjoins further evaluation or award are premised on Exelis’ flawed construction of the sentences relating to the pass/fail determination measured by clause H.16. *Exelis Comments* at 24.

⁵ Exelis also quotes similar general language on the same page, found in provisions M.1 and M.3.0. *Protest* at 44. The first cite states, “A ‘responsive’ proposal conforms to all requirements under the SIR,” and the second states, “Award will be made to the Offeror whose proposal conforms to the requirements of this SIR and provides the best overall value to the Government.” AR Tab 12.

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Moving from this general language to more specific language further demonstrates the weaknesses in Exelis' position.

Specific language in the Solicitation defines a "deficiency" as "any part of the proposal that fails to meet the FAA's requirements as established in the SIR." Relying on this definition, the Solicitation also provides a table of numeric scores associated with "general descriptors" and a "description and/or definition." *AR* Tab 12, at table M-2. Under each evaluation factor, a proposal can earn a respectable score of 80 to 89, described as "good," when "[t]he impact of identified strengths outweighs the impact of any identified weaknesses and deficiencies." *Id.* By contrast, an "Excellent" score, between 90 and 100 points, has no deficiencies. *Id.* Thus, a deficiency does not require automatic rejection of a proposal, but it does preclude awarding an "excellent."

The record shows that the Product Team did not automatically reject the proposal, but actually assessed the qualifications of NG's proposed Principal Information Engineer. *AR* Tab 26. As all parties acknowledge, the MET found a deficiency for not meeting the requirement for a Bachelor of Science degree in either computer science or engineering. *Id.*; *Protest* at 43; *AR* at 3; and *NG Comments* at 5. The MET also found, however, that it was a "low impact deficiency" because of over 15 years of experience that includes "in-depth technical knowledge of the NAS and the system interface requirements for AIMM." *AR* Tab 26. The Principal Information Engineer's experience, as cited by the MET, is supported by the record. *See Protest* Exh. EE. In light of this deficiency and experience, and consistent with the evaluation criteria that preclude an "excellent" score when a deficiency is present, the MET reduced the prior score of 91 ("excellent") to a score of 89 ("good"). *Compare AR* Tab 26 *with* Tab 33. The ODRA, therefore, finds that Exelis has not demonstrated that the Product Team failed to follow the Solicitation criteria or that its determination in this regard lacked a rational basis.

3. Misrepresentation

Citing the ODRA's precedent regarding "bait and switch," i.e., the practice of proposing one employee but ultimately providing (or intending to provide) another after award, Exelis alleges

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that NG made material misrepresentations regarding the proposed Principal Information Engineer and as a result, the award should be terminated. *Protest* at 48-49.

The issue presented is best analyzed not by the bait and switch analysis suggested, but rather as a question of responsibility. One obvious factor that distinguishes this case from bait and switch cases is that nothing suggests that NG intends to provide a different individual than the person identified in the proposal. Exelis' argument is more subtle; it claims that the person proffered did not have the requisite education to match the sales pitch⁶ of the proposal and this was a material misrepresentation. *Protest* at 47-50. The very word "misrepresentation," by its nature, raises the issues of integrity and business ethics that lie at the heart of a responsibility determination. *AMS Policy* 3.2.2.2.⁷

With the facts before it, the Product Team confirmed its award decision, and this serves as a finding of responsibility. *AMS Policy* 3.2.2.2. During the reevaluation process, the evaluators had the transcripts and other detailed information regarding the proposed engineer that set up this specific claim of misrepresentation. *See AR* Tabs 26 and 27; *see also Protest* Exh. EE. This documentation was highlighted for review as part of the settlement agreement and the Product Team knew from the prior protest that "misrepresentation" was an issue. *See AR* Tab 18 (Exelis' Third Supplemental Protest in 14-ODRA-00719). Nevertheless, the Product Team found that award was proper and by extension, that NG was a responsible contractor. "The ODRA ordinarily will not question a Contracting Officer's affirmative determination of contractor responsibility, absent fraud or bad faith on the part of the Contracting Officer." *Protest of J & S Services, Inc.*, 07-ODRA-00408 (citing *Protest of Rocky Mountain Tours, Inc.*, 01-ODRA-00183). Such matters are left to the Contracting Officer's discretion, and Exelis has not established that the Contracting Officer has engaged in fraud or bad faith.

The ODRA therefore recommends that the aspect of the Protest concerning the NG Principal Information Engineer be denied.

⁶ Exelis points to statements from NG such as, "[DELETED]" and that the Principal Information Engineer "[DELETED]" *Protest* at 48-49.

⁷ One element of a responsibility determination is that the awardee "has a satisfactory record of integrity and proper business ethics." *AMS Policy* 3.2.2.2.

B. Volume I, Technical Evaluation Factor 1, Subfactor B

The settlement agreement from Exelis’ prior protest required the Product Team to “re-analyze” NG’s approach to SSD-134 and -135.⁸ In particular, it required:

II. Substantiation of Northrop Grumman’s Ability to Meet Technical Requirements

The SIR’s System Specification Document (“SSD”) requires, among other things, that offerors’ proposed system demonstrate its ability to: (1) “return the results for a WFS query with up to 1000 returned features that are queried on a single attribute which is indexed in the database, in 10 seconds or less” (SSD-134) and (2) “respond to airspace conflict detection requests for a single airspace in 10 seconds or less” (SSD-135). The Technical Evaluation Team (“TET”) will re-analyze Northrop Grumman’s proposal to determine whether and how these specific SSD requirements are satisfied through the proposed solution. This analysis will take into account all SIR requirements and practical considerations, including (but not limited to) push/pull restrictions of various sources and data threads, as well as any limitations on the frequency of accessing or querying such sources and data threads. The TET will document its analysis in this regard, noting any deficiencies, weaknesses or risks related to Northrop Grumman’s ability to meet these requirements.

Protest Exh. O, at App. 1, p. 1. SSD-134 and -135 are important because they formed the basis for a deficiency originally noted in the NG proposal for Volume I, Technical Evaluation Factor 1, Subfactor B, paragraph 5.⁹ *See Protest* Exh. P-3 at 2 (report on re-evaluation); and Exh. II at 2 and 6, paragraph B-5 (the original evaluation report for Vol. I, Technical Evaluation, Factor 1.B. for NG’s proposal). Exelis now protests that nothing in the reevaluation “‘explains’ or provides any analysis as to ‘whether and how these specified SSD requirements [SSDs-134 and 135] are satisfied’ based upon NG’s proposed solution.” *Protest* at 61.

⁸ The System Specification Document lists 751 requirements, including:

SSD-134	The system must return the results for a WFS query with up to 1000 returned features that are queried on a single attribute which is indexed in the databased, in 10 seconds or less.
SSD-135	The system must respond to airspace conflict detection requests for a single airspace in 10 seconds or less.

Protest Exh. C at 15.

⁹ “Paragraph” is a term supplied by the ODRA. The Solicitation, which is not a model of organization, has 14 separate paragraphs under its description of Subfactor B. *See AR* Tab 12 at § M.4.1.1.2.

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Preliminarily, the Settlement Agreement's opening premise that an offeror's "proposed system [must] demonstrate its ability" to meet SSD-134 and 135 is not controlling. The Settlement Agreement does not set the standard by which NG's proposal must be evaluated.¹⁰ As in all evaluations, the Solicitation sets the standard. Here, the relevant criterion in Section M of the Solicitation states:

M.4.1.1.2 Sub factor [sic] B: System and Software Architecture

...

5. The Government will evaluate the degree to which the Offeror's proposed approach includes analysis of system dependencies, interfaces, or infrastructure as well as performance roadblocks or bottlenecks in design, including dependencies on legacy and/or external systems, to provide a solution that satisfies all requirements in the AIMM S2 SSD.

AR Tab 12 at § M.4.1.1.2, at ¶ 5 (underline added). The underlined portion of the quote reveals that the proper evaluation addresses whether NG's technical approach "includes analysis" of dependences and other conditions so that an awardee can ultimately satisfy the SSD requirements, including SSD-134 and -135. Confirming this interpretation, Section L provides direction to offerors for preparing proposals, and states:

L.14.1.1.2 Sub factor [sic] B – System and Software Architecture

...

d) The Offeror must describe their approach for including analysis of system dependencies, interfaces, or infrastructure as well as performance roadblocks or bottlenecks in design, including dependences on legacy and/or external systems, to provide a solution that satisfies all requirements in the AIMM S2 SSD.

AR Tab 11 at § L.14.1.1.2 (underline added).

NG's proposal does in fact promise an analysis. The reevaluation document cites explanations in NG's proposal regarding the use of [DELETED]. *Protest* Exh. P-3 (citing NG Proposal, Vol. I at page I-28). The evaluators quoted NG's explanation at length, including:

¹⁰ NG is not a party to the Settlement Agreement. Although not specifically raised in this Protest, enforcement of the Settlement Agreement in any manner that would require the FAA to apply unstated evaluation criteria against NG would be unenforceable under long-established precedent and public policy. See *Protest of Mid Eastern Builders, Inc.* 05-ODRA-00333. Under the Settlement Agreement, unenforceable terms may be severed from the remaining terms. See *Protest* at Exh. O, ¶ 8.

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[DELETED]

Id. (underline added). Paraphrasing in plain terms, NG states [DELETED] and [DELETED] to meet the SSD requirements. As the TET noted, NG also states (without details) that it will comply with SSD-134 and -135 “[DELETED]” *Id.* (citing NG Proposal, Vol. I at page I-33).

Upon reevaluation, the TET raised the prior deficiency for subfactor B, paragraph 5 to a weakness, and this is entirely supported by the record. A weakness “lacks analysis or factual data,” whereas a deficiency “fails to meet the requirements.” Here, the quoted portions of the NG proposal – which the TET relied upon – support the finding of a weakness because NG states that [DELETED]. This is not a failure to meet a requirement, and thereby, not grounds to find a deficiency. Indeed, as the TET concluded, “Even though it was not fully described as part of individual requirements, it was clear to the TET that the technology that NG was utilizing in the proposal could satisfy SSD 134 and 135.” *Protest* Exh. P-3, at 3. A weakness – in the vested discretion of the TET – is appropriate based on NG’s lack of detail. The ODRA therefore recommends that this aspect of the Protest be denied.

C. Volume I, Technical Evaluation Factor 1, Subfactor C

The settlement agreement required the Product Team to “revisit” its technical evaluation of both NG and Exelis. *Protest* Exh. O, at App. 1, p. 2. The agreement required the Product Team to document whether the “scores/ratings assigned accurately reflected the merit of the respective proposals.” *Id.* Exelis now protests in regard to Volume I, Technical Evaluation Factor 1, Subfactor C, that “the FAA’s reevaluation provides nothing further on the reason of why Exelis’ six medium to high impact strengths were outweighed by NG’s 1 high impact strength plus [a] deficiency.” *Protest* at 59.

In both the original evaluation, and the reevaluation under the settlement agreement, NG received a score of 89 points and Exelis received a score of [DELETED] points for this subfactor. To paraphrase Exelis’ argument, the assessment of Exelis proposal with several

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strengths and one weakness surely must have outscored the one strength and one deficiency assigned to NG. *See Protest* at 59.¹¹

As the Product Team points out, in accordance with the evaluation criteria, the evaluator scored proposals based on a measurement of the *impact* of identified strengths *vis a vis* any identified weaknesses. *AR* Tab 12 at Table M-2. According to the Product Team, NG received its score of 89 for Factor 1, Sub-factor C because its one strength was assessed as a high-impact strength and its one weakness had a low impact. *AR* at 12. In contrast, Exelis received its score of [DELETED] because of the significance of a high impact weakness as compared to the identified strengths. *Id.*; *see also Protest* Exh. P-3 at 5-6. Moreover, evaluator notes from the reevaluation confirm the prior assessment of proposals which also weighed the impacts of strengths and weaknesses, finding NG's [DELETED] to be a high impact strength that outweighed a low impact deficiency which pertained to [DELETED] requirements. *Protest* Exh. P-3 at 5-6 and Exh. W at 1. Likewise for Exelis, the evaluators used comparative language to describe its determination that higher impact strengths relative to automated testing and agile work flow outweighed the impact of identified weaknesses related to inadequate or ambiguous descriptions of other features of its proposal. *Protest* Exh. P-3 at 6 and Exh. Z at 1.

Based on the record, the ODRA finds that the TET properly considered the relative impacts of the strengths and weaknesses in developing its score for NG. The ODRA further finds ample support demonstrating a rational basis for the evaluators' findings of strengths and weaknesses for both Exelis and NG, that the strengths outweighed the weaknesses, and that both received a score in the Good range. This is consistent with the criteria established by the Solicitation, and "[t]echnical evaluators have considerable latitude in assigning ratings, which reflect their subjective judgments of a proposal's relative merits." *Protest of Systems Research and Applications Corporation*, 10-ODRA-00562 (quoting *Protest of Ribeiro Construction Company*,

¹¹ Exelis cites ODRA precedent relating to disparate treatment in support of this position. *Id.* at 50-51. The disparate treatment cases cited address the disparate scoring for similar proposals by different offerors. *See e.g., Enterprise Engineering Services, LLC*, 09-ODRA-00490 (disparate assignment of a strength for every offeror but the protester after TET found that all offerors had a "clear understanding" of the Statement of Work). In the present matter, Exelis does not complain of disparate assignment of strengths and weaknesses based on similar representations in the two proposals. In fact, Exelis does not challenge the actual awards of strengths and weaknesses assigned under this factor to each proposal. Instead, Exelis challenges the overall assessment of the *impact* of the collected strengths, weaknesses, and deficiencies of the offerors.

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Inc., 08-TSA-031). Mere disagreement with the evaluation is insufficient grounds to sustain a protest. *Ribeiro, supra*. The ODRA, therefore, recommends that this aspect of the Protest be denied.

D. The Evaluation of NG's Help Desk Costs

In both its Protest and a Supplemental Protest, Exelis challenges the Cost Evaluation Team's ("CET") assessment of whether NG proposed reasonable and realistic pricing for the help desk. *Protest* at 71; *Supplemental Protest* at 10. Exelis summarizes its position as follows:

Collectively, in its Initial and Supplemental Protests, Exelis has essentially argued that (1) the FAA's cost/price analysis techniques utilized by the CET were flawed, given the uselessness of the IGCE and the significant price variances evident from the CET's comparison of offerors' Help Desk costs; (2) the FAA has failed to explain or otherwise substantiate whether Northrop Grumman's staffing plan contains sufficient hours—or a reasonableness of Northrop Grumman's average rate—for the Help Desk work; and (3) the CET unreasonably ignored that Northrop Grumman proposed to perform the Help Desk work with [DELETED] labor categories.

Exelis Comments at 50 (citing *Initial Protest* at 63-72 and *Supplemental Protest* at 10-16). The ODRA has reviewed each of these points and finds no merit in Exelis' position.

As to the "uselessness of the IGCE," Exelis seemingly ignores well-established principles that "mechanical application of an agency's own estimates ... without analyzing the offeror's proposed costs based upon its particular approach and circumstances," is unreasonable. *Matter of TMG Services, Inc.* B-410926, et al, 2015 CPD ¶ 121 (March 25, 2015) (citing *Metro Mach. Corp.*, B-297879.2, May 3, 2006, 2006 CPD ¶80 at 9-10). In the present matter, the CET recognized that the IGCE was no longer a good measure of price reasonableness because certain underlying labor assumptions were no longer valid. *AR* Tab 24. Quite properly,¹² the CET used other methods to analyze the proposal, and Exelis has not shown by the preponderance of the evidence that the methods used were flawed. Indeed, the ODRA finds the analysis to be quite detailed in providing several analytical tables (*including* those so heavily relied upon in the

¹² The Solicitation afforded the CET wide latitude in selecting analytic methods by making the IGCE one of several measures that the CET "may" use. *AR* Tab 12 at § M.4.3.

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Supplemental Protest) that demonstrate the CET's understanding and rationale of the relative approaches by these offerors. For example, as the CET noted, the hours NG proposes for the help desk are higher than those proposed by the company currently performing the work under the predecessor program, and the same table shows that NG proposed [DELETED]. AR Tab 24. This lends support to the CET's conclusion that NG's pricing is realistic and Exelis certainly cannot argue that the hours are unreasonable (i.e., too high).

Exelis' summary of its position (inset above) also raises concerns about analysis of NG's average rate for help desk work and NG's decision to "work with [DELETED] labor categories." Neither issue supports sustaining the Protest. Again, Exelis makes its case using the very analytic tables and other observations generated by the CET, but merely disagrees with the conclusions. Mere disagreement with the evaluation does not satisfy the protester's burden. *Protest of J & S Services, Inc.*, 07-ODRA-00408. Moreover, the tables demonstrate a rational basis for the evaluation: the CET compared labor rates for [DELETED] both among the four offerors and against the averages of several GSA schedule contracts. AR Tab 24. This approach aligns perfectly with the techniques described in the FAA's *Contract Pricing Handbook* at 8-9 (January 2012) and *AMS Guidance* T3.2.3.¹³

Finally, as to the fact that [DELETED] of the NG's CLIN XX03 staffing comes from [DELETED], Exelis posits that NG could not have met the contract requirements using this staffing plan. *Exelis Comments* at 54. In support of its position, Exelis cites to the IGCE to argue that even the FAA recognizes that other labor categories beyond help desk staff are needed to fulfill the requirements. *Id.* at 55. The CET explained, however, that the IGCE was not reliable to analyze help desk pricing because it was based on a prior FAA contract with a different labor mix. AR Tab 24 at 2. More specifically, the CET pointed to section C.3.5.4.3 of the Statement of Work (found in AR Tab 2) as defining the limited service provided under CLINs XX03 for level one and two support. *Id.* As the CET then wrote:

¹³ The *Contract Pricing Handbook* shows by example that comparison of proposed labor rates to those found in GSA Schedules is a valid technique for evaluation of T&M rates. *Contract Pricing Handbook* at 8-9 (January 2012). Similarly, the *AMS Guidance* allows comparison of rates found in other contracts or published sources, and comparison of the proposed prices received from other offerors. *AMS Guidance* T3.2.3.c. (revised April 2013).

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If a problem is new and/or personnel from this group cannot determine a solution, they raise the issue to Level 3 personnel. Level 3 staff handle the most difficult problems, assist Levels 1 and 2 personnel[,] and study/develop solutions to new issues.

Id. The SOW does indeed place Level 3 support under CLINS XX02 (software maintenance), rather than XX03 (help desk):

Level 3 help desk support is provided as part of software maintenance, SOW paragraph C.3.5.4.1, for AIMM S2 and optional future enhancements, including but not limited to, S3 and S4 developed software.

AR Tab 2 at § C.3.5.4.3; *see also* AR Tab 1 at B-4 (pricing tables). Similarly, whereas Exelis complains that [DELETED] would be unable to render the services required by SOW sections C.3.6 to 3.8 (*Supplemental Protest* at 12), the CLIN structure expressly defines those services as falling under CLINs XX00A to C, XX02, XX05, and XX07, but not the help desk CLIN found in XX03. AR Tab 1.

The ODRA finds that Exelis has failed to show that the CET did not follow the Solicitation or inappropriately evaluated cost and price. The ODRA therefore recommends that these grounds in the Protest and Supplemental Protest be denied.

IV. Conclusion

Having determined that the foundation for the source selection decision is sound, i.e., that the decision has a rational basis, is not arbitrary or capricious, or an abuse of discretion, and otherwise complies with the FAA AMS, the ODRA recommends that the Protest be denied in its entirety.

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