

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

¹ CACI filed its Protest (cited herein as “Protest”) on June 12, 2015. It added further support and refined its arguments in a Supplemental Protest (cited herein as “Supplemental Protest”) on July 8, 2015.

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I. Background

The Solicitation and resulting contract support the training program for air traffic controllers. *AR* Tab 2 at 1. The Contract requires the awardee to provide program management and training in Washington, DC, Oklahoma City, and at many other locations nationwide. *AR* Tab 1 at § F.1. Of particular importance to the present protest, significant contract resources support the FAA Academy. *AR* Tab 1 § C.4.1.2. This includes providing an Academy Program Manager and an Academy Deputy Program Manager, who work on site at the academy. *Id.* The Contract has a base period of three years, with two one-year options, and is described as “hybrid indefinite delivery, indefinite quantity (IDIQ) contract with a combination of firm fixed price (FFP) and time and materials (T&M) contract line item numbers (CLINs).” *Id.* at § B.2.

The Solicitation closed on October 20, 2014, and five proposals were received. *AR* Tabs 3 and 4. Offerors were directed to provide five separate volumes, including those at issue, i.e., Volume II, “Technical/Management Approach,” and Volume IV, “Cost/Price.” *AR* Tab 1 at Table L-1. These were evaluated by separate evaluation teams with different team members. *AR* Tabs 7 and 26. At the close of the evaluation, SAIC and CACI [REDACTED]. CACI had [REDACTED] Total Evaluated Price, but it also had a “[REDACTED]” risk rating as opposed to SAIC’s [REDACTED] Total Evaluated Price with a “[REDACTED]” risk rating. *AR* Tab 4 at iv. The [REDACTED] risk rating assigned CACI, as the Source Evaluation Board (“SEB”) explained, was due to language in CACI’s proposal [REDACTED].” *Id.* at v. “[B]ased on [REDACTED],” the Source Evaluation Board recommended that CACI did not offer the best value to the Government. *Id.*

The Source Selection Official adopted the SEB’s recommendation, and award was made to SAIC on March 31, 2015. *AR* Tabs 8 and 9. CACI received a debriefing on June 5, 2015, and filed its Protest on June 12, 2015. SAIC filed its Supplemental Protest on July 8, 2015. The record closed on August 21, 2015.

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II. Jurisdiction, Standing, and Standard of Review

The Solicitation in question uses the procedures, clauses, provisions, and authority found in the FAA's Acquisition Management System ("AMS"). *Agency Response* ("AR") Tab 1. The ODRA finds, therefore, that it has jurisdiction over the Protest under 49 U.S.C. § 40110(d)(4) (2012); 14 C.F.R. § 17.1 (2015). Moreover, the parties do not dispute that CACI submitted a timely proposal that the Product Team evaluated but did not select. The award decision was to be made on a best value tradeoff rather than low cost, technically acceptable. AR Tab 1 at § M.4. CACI protests the key elements of the tradeoff decision inasmuch as it challenges both the evaluation of its own cost proposal and the technical evaluation of the awardee. If sustained, CAIC could have a reasonable chance for award, and therefore has standing as an interested party to protest. *Consolidated Protests of Consecutive Weather, et al.*, 02-ODRA-00250, -00251, -00252 and -00254.

CACI, 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 Adsysstech, 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.

III. Detailed Findings of Fact and Discussion

A. The Cost/Price Evaluation

The Cost Evaluation Team ("CET") determined that CACI's cost volume generally contained fair, reasonable, and realistic pricing, but it assigned CACI a "[REDACTED]" risk. CACI

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protests this risk assignment, and raises several challenges to the Product Team's evaluation of CACI's Cost/Price Volume. The most significant issues² include CACI's claims that the CET used unstated evaluation criteria when it used a "sampling methodology" and when it considered labor rates vis-à-vis the ability to attract and retain staff. *Protest* at 6-10. CACI charges that the agency's erroneous "moderate" price risk resulted in a "fatally-flawed best value analysis." *Protest* at 7. The ODRA recommends denying this aspect of the Protest.

The Solicitation provided that a "[REDACTED]" rating is appropriate when "[REDACTED]." AR Tab 1 at Table M-4. The CET's assessment under this standard is firmly based on CACI's prices and proposal language. The TEP noted that CACI had [REDACTED] direct labor rates in several categories and substantially lower ([REDACTED]%) than the Independent Government Cost Estimate ("IGCE"). AR Tab 7 at v and 30-31. These facts, as well as the observation that CACI included [REDACTED], led the CET to conclude that CACI could have a staffing problem. *Id.* Further, the CET focused on CACI's own statement that certain "[REDACTED]" *Id.* Such proposal language, which expressly states labor rates can be increased in future task orders, could not have been rationally ignored.³ Indeed, *standing alone*, it provides a rational basis for the assessment of a [REDACTED] risk.

The ODRA finds no material errors regarding the methodology or consideration of hiring and retention. The methodology specifically at issue is described in Appendix B of the Cost/Price Evaluation Report. *Protest* at 9; *Supplemental Protest* at 19. Appendix B related to Service Contracting Act analysis and is immaterial regarding the assignment of risk.⁴ Moreover, the conclusions that CACI's labor rates were [REDACTED] came from CACI's proposal, Vol. IV,

² CACI did not press certain allegations in the Protest and Supplemental Protest after the agency provided its Response. Specifically, CACI argued that the CET's Service Contract Act analysis made CACI's rates "appear" to be lower than the legally required wages. *Supplemental Protest* at 20. The report, however, expressly concluded that CACI satisfied "all" of the SCA-covered labor rates. AR Tab 7 at 36. Likewise, CACI argued that its decision to use a different standard hours per year in its [REDACTED] CLIN resulted in the assignment of a [REDACTED] risk. *Protest* at 11. CACI did not discuss the matter in its Comments, much less show substantial evidence in the record that these hours relate to the risk assessment. The ODRA, therefore, finds no merit in these issues.

³ The CET explained its view of the statement, writing, "This statement indicated that the Offeror had not taken into account the need to supply the requirements of the contract at the prices proposed and that it [REDACTED]" This interpretation is well-supported and rational. AR Tab 7 at v.

⁴ See note 3, *supra*. The CET did not find non-compliance with the Service Contract Act. See also AR Tab 27 at 2.

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section 3.1, p. 25. *See AR* tab 27 at 2. Comparison of CACI's rates with the IGCE and other offeror's rates—approaches that are consistent with the AMS policy and guidance—appeared in Appendix A and are proper forms of analysis. *See generally, FAA Contract Pricing Handbook*, subchapters 5.2 and 7.5; *AMS Guidance* T3.2.3.A.1.b. to d. CACI, therefore, has offered no viable basis to challenge the CET's overall conclusion that CACI proposed low compensation rates for its staff.

Regardless of the propriety of the analysis or whether it was based on CACI's own proposal language, CACI claims that considering labor rates vis-à-vis staff hiring and retention constitutes use of an improper, unstated evaluation criterion. *CACI Comments* at 28. CACI's position on this final point does not withstand scrutiny. The cost realism analysis at issue was specified as an evaluation element in Solicitation section M.7.4.2(b), and it expressly provided for analyzing consistency with the “various elements of the Offeror's Technical/Management Volume.” *AR* Tab 1 at § M.7.4.2.(b). An evaluation element of the Technical/Management Volume included an assessment of the “degree to which the Offeror proposes a sound and effective approach to recruiting and retaining the personnel needed” *Id.* at § M.7.2.2., subfactor 2.1. Undeniably, assessment of employee compensation is at the heart of recruiting and retention of personnel, and the ODRA finds that the CET's approach conformed to the requirements of the Solicitation.

The ODRA recommends that this ground be denied.

B. Conflict of Interest

CACI alleges that the integrity of the acquisition process was “compromised” by the marital relationship of a senior manager (“Senior Manager”)⁵ of the FAA Academy and a key member of the SAIC team. *Protest* at 2. According to CACI, the FAA failed to take timely action to ensure that the Senior Manager was not “personally and substantially” involved in the

⁵ The Senior Manager in question held several positions within the FAA Academy during the timeframe at issue. In the late summer of 2013, when the market survey was being prepared, she was the Air Traffic Division Manager. *AR* Tab 19 at 1. In July of 2014, she became the Acting Deputy Superintendent for the FAA Academy. *Id.* In February of 2015, she became the Superintendent for the FAA Academy. *AR* Tab 27 at 7. The phrase “Senior Manager” is used in these Findings and Recommendations to ensure consistency and clarity when referring to the individual.

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acquisition to remedy the “obvious conflict of interest.” *Id.* at 17 (citing 18 U.S.C. § 208(a)). While CACI recognizes that regulations from the Office of Government Ethics (“OGE”) provide for recusal in such matters, CACI asserts that the efforts taken were too little and too late to protect the integrity of the acquisition process. *Protest* at 18; *Supplemental Protest* at 3; and *Protester Comments* at 5.

Law, regulation, and policy require FAA employees with real or apparent conflicts of interest to “withdraw from participation in the procurement process.” *AMS Policy* 3.1.5 “Conflict of Interest” (October 2008).⁶ The parties do not dispute the fact that the Senior Manager is married to SAIC’s proposed Academy Deputy Program Manager (“ADPM”). Further, the parties recognize that the Senior Manager signed recusal memoranda in 2005 and again on April 16, 2014 due to this marital relationship. *Supplemental Protest* at 7; *AR* Tabs 31 and 32, respectively. Regardless of these memoranda, CACI maintains that the acquisition process was tainted, especially during the “development of the requirements” for the Solicitation. *Supplemental Protest* at 8. One question before the ODRA is whether the Senior Manager participated “personally and substantially” “through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise,” in a “proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest or other particular matter....” 18 U.S.C. § 208(a).

CACI attempts to establish the Senior Manager’s participation through her influence over subordinates who served on the acquisition team.⁷ *Supplemental Protest* at 9. CACI uses a

⁶ The policy cites to applicable law and regulation, stating:

3.1.5 Conflict of Interest (Revised 10/2008)

Any member of a service organization or Office of Dispute Resolution for Acquisition (ODRA) who is a Federal employee that has a real or apparent conflict of interest must withdraw from participation in the procurement process when required by law (18 U.S.C. 208) or regulation (5 CFR Part 2635). To sustain the integrity of the procurement process, non-Federal members of a service organization or ODRA are held to the same standards.

AMS Policy 3.1.5 “Conflict of Interest” (October 2008); *see also AMS Guidance* T3.1.5 “Conflict of Interest,” at A.1. (July 2014).

⁷ CACI’s first argument, as refined in its *Supplemental Protest*, is a naked assertion that SAIC (through its proposed subcontractor/key-employee) had unequal access to information that gave SAIC an advantage in preparing its proposal. *Supplemental Protest* at 8. SAIC stresses that it does not know whether such information actually was

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straw man⁸ argument to make its point rather than relying on the applicable standards found in the OGE regulations. Those regulations interpret the statutory phrase “personal and substantial” when it is applied to the supervision of subordinates. In particular, “To participate personally means to participate directly. It includes the direct and active supervision of the participation of a subordinate in the matter.” 5 C.F.R. § 2635.402(b)(4) (2015) (emphasis added). Further, “it requires more than official responsibility, knowledge, perfunctory involvement, or involvement on an administrative or peripheral issue.” *Id.* Thus, the applicable standard requires more than a showing of mere administrative authority over the evaluators, and more than simple awareness that an acquisition effort was underway.⁹

The documentary record shows that the Senior Manager had only minor administrative involvement. The record contains a brief email from the Senior Manager to the project leader (an employee outside of the FAA Academy) providing the names of three employees from the FAA Academy who would serve on the “requirements team.” AR Tab 18. These three named individuals indicate that they did not communicate to the Senior Manager regarding the acquisition. AR Tabs 13, 14, and 15. The record also includes declarations from the three evaluators whom CACI specifically identifies and challenges as under the supervision of the Senior Manager. *Supplemental Protest* at 9; AR Tabs 13, 23, and 24. Each declarant, in different wording, indicates that he or she did not involve the Senior Manager in the CTC acquisition process. AR Tabs 13, 23, and 24. Other declarations corroborate

shared, and asserts that all that matters is that the opportunity existed. *Id.* This argument, however, assumes that the Senior Manager personally and substantially participated in the acquisition, and therefore, had information to share. Thus, the argument necessarily returns the ODRA to the basic question of whether the Senior Manager personally and substantially participated in the acquisition.

⁸ Without legal citation, CACI claims the Government should have taken certain mitigating steps, but did not. *Supplemental Protest* at 9. These include establishing a new supervisory chain that bypassed the Senior Manager, verifying that the evaluators could make a fair evaluation regardless of the effect on their supervisor’s interest, warning other evaluation team members regarding the influence the Senior Manager might have over her subordinates, and requiring members to report any perceived favoritism. *Id.* While all of these may be reasonable, they do not reflect or state the applicable legal standard. Moreover, several of the declarations indicate that bypassing the Senior Manager regarding this procurement is precisely what occurred. *See e.g.*, AR Tabs 13, 14, 15, 19 and 23.

⁹ CACI cites an old opinion from the General Accounting Office (now the Government Accountability Office), *Applied Resources Corporation*, B-249258, October 22, 1992. *CACI Comments* at 19. In that case, the disqualified protester, not the awardee, employed the conflicted spouse. Further, the OGE regulations cited above became effective on February 3, 1993, *i.e.*, after the GAO issued its opinion. *See* 57 Fed. Reg. 35006, 35042 (August 7, 1992) (first codified as 5 C.F.R. Part 2635 (1993)). The ODRA does not take issue with the GAO’s conclusion as to the Army’s exercise of discretion to disqualify its protester, but the case is not authoritative or persuasive in the present Protest.

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these declarations by demonstrating that employees knew to refrain from reporting on, or otherwise involving, the Senior Manager in the acquisition process. *See e.g.*, AR Tabs 19 and 20. Indeed, regarding a visit at the Academy, the original Contracting Officer notes that “there was a strict protocol observed where there was no discussion with, or around [Senior Manager], on the subject of CTC.” AR Tab 20 at 1.

CACI also relies upon an anonymous hotline complaint filed with the Department of Transportation’s Inspector General’s office. *Supplemental Protest* at 5 and Attachment E; *see also* AR Tabs 10 and 11. The internal agency investigation, as reported by the FAA Assistant Administrator for Finance and Management, concluded that the recusal process was sufficient to maintain the integrity of the procurement and that the Senior Manager had no role in the acquisition. AR Tab 11. This conclusion, dated May 22, 2014, is corroborated by the various declarations in the record. *See* AR Tabs 13-15, 19, 20, 23, and 24. The ODRA therefore finds that the anonymous allegation is not reliable and probative to whether the Senior Manager “personally and substantially” participated in the acquisition. Further, it substantially is outweighed by the declarations in the record.

In short, the record before the ODRA does not show requisite direct and active involvement by the Senior Manager in the acquisition even as a supervisor of the evaluators in question. This assessment is based on the relevant facts, as supported by the administrative record, and therefore also does not give rise to an appearance that the OGE regulations were violated.^{10, 11}

The ODRA recommends this ground of the Protest be denied. Notwithstanding this recommendation, however, the issue of whether the evaluators properly assessed the proposed key personnel – including the proposed ADPM – must be considered.

¹⁰ “Whether particular circumstances create an appearance that the law or these standards have been violated shall be determined from the perspective of a reasonable person with knowledge of the relevant facts.” 5 C.F.R. § 2635.101(14) (2015) (OGE’s general principle regarding the appearance of an ethics violation).

¹¹ The ODRA’s conclusions regarding compliance with OGE regulations and related statutes are strictly for the purpose of reviewing the procedures used for the acquisition. The ODRA does not have jurisdiction to adjudicate personnel matters under these authorities.

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C. Evaluation of Key Personnel

CACI challenges the evaluation of Key Personnel, conducted under subfactor 2.1. *Protest* at 11-16; *Supplemental Protest* at 13-18. That subfactor included a bullet that required the TMET to consider:

The degree to which the Offeror's proposed Key Personnel are suitably qualified to effectively execute the responsibilities of their positions. The degree to which the key personnel are available and committed to the CTC program.

AR Tab 1, § M.7.2.2. CACI argues that SAIC's proposed Program Manager ("PM"), Deputy Program Manager ("DPM") and its Academy Deputy Program Manager ("ADPM") were unqualified for their positions. *Protest* at 11-14 (regarding PM); *Supplemental Protest* at 13-15, 18 (regarding PM and DPM, then ADPM). CACI argues that under the terms of the Solicitation, these unqualified individuals should have rendered SAIC ineligible for award. *Protest* at 16; *Supplemental Protest* at 13-15. Alternatively, CACI charges that the resulting evaluation for this subfactor should have yielded an "[REDACTED]" rating rather than the slightly better rating of "[REDACTED]." *Supplemental Protest* at 16-18.

1. The Solicitation did not Mandate Disqualification of SAIC

There is no dispute that the TMET considered SAIC's proposed PM and DPM as "[REDACTED]," and therefore, that SAIC's proposal on this point "[REDACTED]." AR Tab 26 at 34. Contrary to CACI's position, however, the Solicitation did not contain a draconian disqualification rule for these flaws.

While the Solicitation certainly states that "to be eligible for award, the Offeror must meet all requirements of the SIR," the language is tempered by ensuring that the FAA may "waive any requirements" and "accept minor irregularities and discrepancies." AR Tab 1 at § M.2. Moreover, "omission of information or proposals that do not fully conform to Section L requirements may be grounds for eliminating a proposal from award consideration or will impact the resulting evaluation ratings." *Id.* at § M.6 (emphasis added). Thus, reading the Solicitation as a whole, it vests discretion in the Product Team as to whether to eliminate a proposal or reserve consideration of defects for the evaluation and ratings process. Given that no

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disqualification occurred, the appropriate question before the ODRA is whether the evaluators properly evaluated the key personnel. They did not.

2. The Evaluation of Key Personnel is not Supported by the Record

Regardless of the deficient qualifications of the PM and DPM, the evaluation record *is absolutely silent* regarding the evaluation of the ADPM. *AR* Tab 26, *passim*. The absence of any evaluation of the ADPM means that the evaluation of subfactor 2.1 lacked a rational basis and was not in accordance with the AMS.

The fundamental principles of the AMS and its express language require the evaluation process to be documented to create a sufficient record for review in the event of a protest. *Protest of Adsysstech, Inc.* 09-ODRA-00508 (citing *AMS Policy* 3.2.2.3.1.2.3 and *AMS Guidance* T3.2.2, Appendix (Source Selection Guide), § 1.7) (complex source selection); *see also Protest of Arctic Elevator Co., LLC*, 12-ODRA-00629 (simplified purchase method). Recognizing that contemporaneous development of a perfect record for review may not always be possible, the ODRA “is not precluded from considering post-protest explanations that provide a detailed rationale for contemporaneous conclusions, as such explanations can simply fill in previously unrecorded details.” *Artic Elevator, supra* (citing *Protest of Team Clean, Inc.*, 09-ODRA-00499).

The record presently before the ODRA does not support the “[REDACTED]” evaluation of SAIC for subfactor 2.1. The Technical/Management Evaluation Report itself makes no mention whatsoever of SAIC’s proposed ADPM. *AR* Tab 26, *passim*. Further, despite filing ten separate declarations, including two from members of the TMET, the Product Team has not provided any explanation of how it evaluated the proposed ADPM. *See AR* Tabs 2, 12-15, 19, 20, 22, 23, and 27. Considering that subfactor 2.1 was identified as a key issue in both the Protest and the Supplemental Protest, the declarants’ silence is unexplainable. Indeed, the absence of any record of the evaluation of the proposed ADPM leads the ODRA to conclude that the Product Team lacked a rational basis for its evaluation under subfactor 2.1.

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3. Prejudice

“The ODRA will not sustain a protest unless the protester can demonstrate that but for the agency’s inappropriate action or inaction, the protester would have had a substantial chance of receiving the award.” *Protest of Enterprise Engineering Services, LLC*, 09-ODRA-00490. Evaluation of SAIC’s proposed ADPM was to be measured by whether he would be “suitably qualified to effectively execute the responsibilities” of the position. *AR* Tab 1 § M.7.2. Based on the record before the ODRA, it is readily apparent that there is a substantial chance that the proposed ADPM would warrant a negative evaluation. In this matter, a negative evaluation of the proposed ADPM could very well drop SAIC’s rating of “[REDACTED]” to “[REDACTED]” under the evaluation standards set out in the Solicitation. The possible reduction of SAIC’s technical rating, especially given that CACI [REDACTED], means that CACI had a substantial chance for award but for the evaluation error. *See AR* Tab 7 at iv.

The ODRA finds that the Product Team’s evaluation of SAIC’s proposal under subfactor 2.1 lacked a rational basis and was prejudicial. The ODRA therefore recommends that this aspect of the Protest be sustained.

IV. Recommended Remedy

“The ODRA has broad discretion to recommend and impose protest remedies that are consistent with the AMS and applicable law.” 14 C.F.R. § 17.23(a) (2015). In developing a remedy, the ODRA “may consider the circumstances surrounding the procurement or proposed procurement including, but not limited to: the nature of the procurement deficiency; the degree of prejudice to other parties or to the integrity of the acquisition system; the good faith of the parties; the extent of performance completed; the feasibility of any proposed remedy; the urgency of the procurement; the cost and impact of the recommended remedy; and the impact on the Agency’s mission. *Id.* at (b).

The ODRA’s finding that the evaluation of subfactor 2.1 with respect to the ADPM lacked a rational basis necessitates a reevaluation of SAIC’s proposal. The ODRA notes allegations in the record that three (the proposed PM, APM, and ADPM) of the four key personnel proposed by SAIC are not working on the project. *CACI Comments* at 1-2; *see also AR* at 13, n.6. In order to

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avoid giving SAIC an unfair competitive advantage, the appropriate reevaluation must be based on the proposal in the record, not any substitute key personnel now employed or proffered by SAIC. If, based on a rational and well-documented evaluation of the original proposals, SAIC remains the best value, it may be appropriate under the AMS Complex Procurement Method to negotiate new personnel in place of the unacceptable individuals. *See AMS Policy 3.2.2.3.1.2.5.*^{12, 13} If SAIC is not selected, or if a negotiated agreement is not possible, then SAIC's contract should be terminated and a new best value decision should be made after confirming that the desired awardee's proposal remains open.

Additionally, the Product Team should be directed to immediately develop a schedule for completing the recommended corrective action and submit a schedule to the ODRA. The Product Team should also be directed to report to the Administrator through the ODRA every 30 calendar days on the status of the corrective action and its completion. The services being provided by SAIC should, consistent with the needs of the agency, continue pending completion of the corrective action.

V. Conclusion

The ODRA recommends this Protest and Supplement Protest be denied in part, and sustained in part, as discussed above. It further recommends reevaluation of SAIC's key personnel under subfactor 2.1 and, if necessary, that a new best value decision be rendered.

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

¹² "In some circumstances it may be appropriate to down-select to one offeror for negotiation. However, if the FAA and the selected offeror cannot come to an agreement, the FAA may select another competing offeror for communications/award without issuance of further SIRs." *See AMS Policy 3.2.2.3.1.2.5.* If such negotiation and agreement with SAIC has already occurred during the pendency of this protest, the results may be ratified if SAIC is again found to be the offeror whose proposal represents the best value to the FAA.

¹³ In fashioning this remedy, the ODRA in no manner intends to discount the importance and meaning of "key personnel." By definition, they are "key" because they are the linchpins in the assessment of whether contract will be performed well. Like any buyer, the FAA should know what it is ordering *before* it signs the contract.