Board of Contract Appeals

General Services Administration
Washington, D.C. 20405

June 28, 2005

PUBLIC VERSION

GSBCA 16614-FAA
(ODRA Consolidated Docket Nos. 05-ODRA-00342C and 05-ODRA-00343C)

AGENCY TENDER OFFICIAL JAMES H. WASHINGTON,

and

KATE BREEN, AS AGENT FOR A MAJORITY OF DIRECTLY AFFECTED FEDERAL AVIATION ADMINISTRATION EMPLOYEES

Contesters,

and

KATE BREEN,

Intervenor (Washington Contest),

and

RAYTHEON TECHNICAL SERVICES COMPANY LLC,

Limited Intervenor,

and

COMPUTER SCIENCES CORPORATION,

Limited Intervenor,

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v.

FEDERAL AVIATION ADMINISTRATION,

Respondent,

and

LOCKHEED MARTIN SERVICES, INC.,

Intervenor.

William W. Thompson, Jr., of Thompson & Waldron, Alexandria, VA, counsel for Contester Agency Tender Official James H. Washington.

David M. Nadler, Charlotte R. Rosen, and Joseph R. Berger of Dickstein Shapiro Morin & Oshinsky LLP, Washington, DC, counsel for Contester Kate Breen as Agent for a Majority of Directly Affected Federal Aviation Administration (FAA) Employees.

Gerard F. Doyle of Doyle & Bachman LLP, Arlington, VA, counsel for Limited Intervenor Raytheon Technical Services Company LLC.

Helaine G. Elderkin and Carl J. Peckinpaugh of Computer Sciences Corporation, Falls Church, VA, counsel for Limited Intervenor Computer Sciences Corporation.

Nathan Tash, Program Office, Federal Aviation Administration, Washington, DC, counsel for Department of Transportation.

Thomas C. Papson, Alison L. Doyle, and Jeniffer M. De Jesus of McKenna Long & Aldridge LLP, Washington, DC, counsel for Intervenor Lockheed Martin Services, Inc.

NEILL, Board Judge, acting as Special Master.

On December 19, 2003, the Federal Aviation Administration (FAA) announced a public-private competition for the services provided by approximately 2500 FAA specialists at fifty-eight FAA automated flight service station (AFSS) facilities located in the continental United States, Puerto Rico, and Hawaii. The competition was conducted by

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FAA's Competitive Sourcing Program Office (Program Office) pursuant to the agency's adaptation of Office of Management and Budget (OMB) Circular No. A-76.

Proposals were received from four prospective service providers (PSPs) and an Agency Tender was submitted by the FAA's Most Efficient Organization (MEO) team.[1] The MEO team was composed of technical and functional experts appointed by FAA's Agency Tender Official (ATO) to assist with the preparation of the agency's own tender for this acquisition.[2] On February 5, 2005, FAA announced that, in accordance with established solicitation criteria, it had made its performance decision and had selected Lockheed Martin Services, Inc. (Lockheed) to perform the required services. The total evaluated cost of the Lockheed contract was $1.9 billion.[3]

FAA's decision to select Lockheed to perform the AFSS services was promptly contested by the FAA's ATO, James H. Washington (ATO Contest). Shortly thereafter, Ms. Kate Breen, President of the National Association of Air Traffic Specialists (NAATS), and acting as agent for a majority of directly affected FAA employees, also filed a separate contest against the performance decision (Breen Contest). FAA's Office of Dispute Resolution for Acquisition (ODRA) consolidated these two contests Consolidated Contests).

In addition to filing her own contest, Ms. Breen was also admitted as an intervenor in the ATO's contest. *See ODRA Order On Request for Intervention as an Interested Party,* dated March 30, 2005. As the selected service provider, Lockheed was similarly permitted to intervene in the consolidated contests. *See ODRA Contest Rule 2(g).* Finally, Raytheon Technical Services Company (Raytheon) and Computer Science Corporation (CSC), were granted limited intervenor status in these contests according to the terms specified by the parties in an alternative dispute resolution (ADR) agreement which had been approved by

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[1] The MEO is chiefly responsible for developing the Agency's proposal -- which is referred to as a "Tender." *See OMB Circular No. A-76, Attachment B,* p. B-2, ¶ A.8.d.(2), dated May 29, 2003.

[2] The ATO is an inherently governmental official, independent of the agency contracting and source selection officials, charged with preparing the Agency Tender and representing the MEO's interests. *Id.*, p.B-2, ¶ A.8.a.

[3] The Lockheed contract was for a base five-year period and five option years. The award was made on a "best value" basis.

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the ODRA. *See ODRA Order On Request for Intervention as an Interested Party*, dated March 28, 2005.

Pursuant to a standing agreement with the General Services Board of Contract Appeals (GSBCA), the ODRA Director has asked the Board's Chairman to designate a Board judge to perform the adjudication of the consolidated contests. The Chairman has appointed the undersigned judge to serve as special master and to make findings and recommendations on the merits of these contests. As special master, it is my recommendation to the ODRA Director that these consolidated contests be denied.

Findings of Fact

Solicitation Provisions

1. Personnel at FAA's AFSS facilities provide meteorological, aeronautical, and other coordination information to a wide variety of customers to facilitate safe and efficient use of the National Airspace System (NAS). Throughout the 1970's and 1980's a combination of greater demand for services and the limitations of antiquated systems drove the need for modernization of flight service stations. Through automation and standardization, the FAA was able to provide services more efficiently and ultimately to consolidate over 300 flight service stations into sixty-one AFSSs. The competition which is the subject of these contests does not cover the flight services provided by three AFSS facilities located in Alaska owing to the unique nature of air travel there. It does, however, involve the services provided by the remaining fifty-eight AFSSs located across the eastern and western FAA regions in the United States, including Hawaii and Puerto Rico. Solicitation § C.2 (Program Office Exhibit (POE) 221 at 3).[4]

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[4] The official solicitation for the FAA's public-private AFSS competition was issued on May 3, 2004. It is referred to by FAA's Program Office as "Official AFSS SIR [Screening Information Request] - DTFAAWAACA-76-001." Alternatively it is referred to in the record as the "RFO" [Request for Offers]. It will be referred to herein as "the solicitation" except where it is referred to in a direct quote as the "SIR" or "RFO." FAA's Program Office has provided for the record a fully integrated version of the solicitation, which reflects the original solicitation as modified by all amendments issued after May 3, 2004. *See* POEs 219-38. Any citation to the solicitation here and elsewhere in this document, therefore, will include a reference to the applicable POE and the page in that POE where the solicitation provision referred to can be found.

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2. In launching the public-private competition which is the subject of these contests, FAA stated in the solicitation that the performance goals of the competition were to:

- Deliver timely and accurate information to support safe and efficient flight;
- Ensure quality services are delivered while carrying out the mission of the AFSS;
- Ensure customer needs are met; and
- Achieve significant process improvements to lower costs and maximize operational efficiency of the AFSS.

Solicitation § C.1.2 (POE 221 at 1).

3. Section C of the solicitation divides the services provided by the AFSSs into four categories: (1) preflight services, (2) inflight services, (3) operational services, and (4) special services. The services are to be provided on a continual, twenty-four hour and seven-day per week basis, unless otherwise specified. Solicitation § C.3 (POE 221 at 5-14).

4. The solicitation does contain a few time and material (T&M) contract line items (CLINs) for unanticipated needs that might arise during the various periods of contract performance. No minimum purchase requirement exists for these items, however, and it is clear from a review of the entire price list in section B of the solicitation that flight services constitute the core of this acquisition. *See* Solicitation § B (POE 220 at 1-44).

5. FAA's solicitation for the public-private competition for AFSS services envisioned the use of a fixed-price incentive fee contract. The solicitation defines this type of contract as follows:

> A fixed-price incentive fee [FPIF] contract is a fixed-price contract that provides for adjusting profit and establishing the final contract price by application of a formula based on the relationship of total final negotiated cost to total target cost. The final price is subject to a price ceiling, negotiated at the outset. Specifically, a fixed-price incentive fee contract specifies a target cost, a target profit, a price ceiling, and a profit adjustment formula. These elements are all negotiated at the outset. The price ceiling is the maximum that may be paid to the contractor, except for any adjustment under other contract clauses. When the contractor completes performance, the parties negotiate the final cost, and the final price is established by applying the

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> formula. When the final cost is less than the target cost, application of the formula results in a final profit greater than the target profit; conversely, when final cost is more that target cost, application of the formula results in a final profit less than the target profit, or even a net loss. If the final negotiated cost exceeds the price ceiling, the contractor absorbs the difference as a loss. Because the profit varies inversely with the cost, this contract type provides a positive, calculable profit incentive for the contractor to control costs.

Solicitation § G.14 (POE 225 at 8); *see also id.* § I.5 (POE 227 at 5).

6. In this competition, the solicitation provides that the ceiling price shall be 115% of the target cost and the profit adjustment formula is a 60/40% ratio. *E.g.*, Solicitation § B.2.2 (POE 220 at 5). The ratio relates to the share of responsibility or savings for the parties when the negotiated actual cost falls short of or exceeds the negotiated target cost. In such situations, 40% of the *actual* cost in excess of or less than the negotiated target cost results respectively either in an increased liability or profit for the contractor and 60% is assigned to the Government. *Id.* § I.5 (POE 227 at 7-8). If the various acceptable performance levels (APLs) provided for in the service provider's contract are not met, however, this share ratio does not apply and the contractor will be entitled only to actual costs and target profit. *Id.* § B.2.1 (POE 220 at 4)

7. The solicitation also provides for performance awards for meeting or exceeding the established APLs and performance credits for the Government if these requirements are not met. The Government can also accept an enhanced corrective plan in lieu of credit payments. Solicitation § H.18 (POE 226 at 11-12). The performance awards are to be paid from an award pool of up to $10 million annually beginning in year two of the base period. Any performance credit taken by the Government will not be greater than the target profit for that year. *Id.*

8. The solicitation contains a spreadsheet, Performance Award - Credit Matrix, to be filled out pursuant to Section J.6 and submitted with proposals. It contains cells for the full performance award (associated with satisfactory performance) and the full performance credit (associated with unsatisfactory performance). Solicitation § J.6 (POE 228, 231).

9. Prior to the official issue of the AFSS solicitation, FAA's Office of Competitive Sourcing (OCS) concluded that these performance awards, as a monetary instrument that enhances performance, were, for all intents and purposes, "award fees" as that term is used in Circular A-76. Under Attachment B of section D.3.a(12) of that circular, if a solicitation

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for a public-private competition provides for an award fee for all prospective providers, including the agency tender, then the agency competitive sourcing official (CSO) must determine whether procedures are in place permitting an agency tender to receive such an award fee. POE 6.[5] The OCS Director, therefore, sought and received from the CSO a determination that the legal framework and associated procedures are in place permitting the Agency Tender to participate in the incentive/credit structure described by the OCS Director in the latter's request for approval. POE 42.

10. The performance timeline described in the solicitation provides for a phase-in period which will last for six months following the performance decision. This period may also include up to three one-month phase-in option periods. The contract base period consists of a transition period, which will be no longer than thirty-six months, and at least a two-year end-state solution period. Following the base period, there will be one three-year option period and one two-year option period. The service provider is responsible for the performance of all services described in the contract from day one of the transition period to the last day of the last option period. Solicitation § C.1.5 (POE 221 at 2). The transition period is defined as "[t]he period between the last day of the Phase-In Period and the full implementation of the SP [Service Provider] end-state solution." *Id.* § C.7.2 (POE 221 at 34).

11. Section C.5 of the solicitation advises offerors that they can propose use of Government furnished property (GFP). In such cases, however, the Government will be responsible for the GFP for a maximum of twenty-four months after the end of the phase-in period. Solicitation § C.5 (POE 221 at 28-31). Under section C.6 it is clear that the solicitation ultimately places responsibility on the service provider, itself, to determine what equipment it will use to provide the contractually required services. *Id.* § C.6 (POE 221 at 32-33). Title to supplies and equipment used by the service provider for services required under the FPIF CLINs, other than GFP, remains with the service provider, while title to any supplies and equipment which might be furnished under the few T&M CLINs vests with the Government. *Id.* § E.2.1 (POE 223 at 2).

12. The solicitation incorporates by reference FAA's provision "The Buy American Act - Supplies, (July 1996)." Solicitation § I.1 (POE 227 at 3).

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[5] "POE 6" is a reference to OMB Circular A-76, a copy of which was provided by the agency as an exhibit for the consolidated record for these contests.

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13. The solicitation also provides that any contract awarded will be subject to the Service Contract Act of 1965, 41 U.S.C. §§ 351-358 (2000). Because it is left to the offeror to determine how many sites will be used to provide the AFSS services per the proposed solution and where those sites will be located, the actual places of performance were unknown at the time the solicitation was issued. Nevertheless, the solicitation provides that the service provider will be subject to wage determinations by the Department of Labor (DOL) and specifically provides that those determinations will be incorporated into any resultant contract and will be retroactive to the date of award without any adjustment to contract price. Solicitation § I.13 (POE 227 at 11).

14. Section L.2.5 of the solicitation states that the Government will issue to the offerors material deficiency notices if any are identified. Material deficiency is defined as "a significant failure of a proposal to meet a Government requirement or a combination of weaknesses in a proposal that increases the risk of unsuccessful contract performance to too high a level." Offerors will be given the opportunity to respond to specific material deficiencies. Under this provision, the Government reserves the right to limit discussions to material deficiencies. On the other hand, if the Government wishes to discuss more than material deficiencies it may do so. Solicitation § L.2.5 (POE 233 at 2-3).

15. Section L.2.5.1 provides for a capability assessment (CA) to take place after offerors have submitted their technical proposals. The CA is intended to serve as a forum for the offeror to clarify further, substantiate its written proposal, and answer any questions identified by the Government. A CA plan is to be submitted with the offeror's technical proposal and the Government will contact the offeror when it is time to schedule the CA. Solicitation § L.2.5.1 (POE 233 at 3). In Section M.3.3.1 it is explained that the CA will not be evaluated separately but can impact the evaluation positively or negatively based on the information received during the CA. The provision expressly reserves to the Government the right not to issue discussion items resulting from information received during the CA. *Id.* § M.3.3.1 (POE 235 at 4).

16. Section M of the solicitation addresses the evaluation of proposals. Section M.2 advises offerors that this competition is being conducted under the provisions of OMB Circular A-76 in accordance with the FAA Acquisition Management System (AMS). The award is to be made to the offeror whose proposal is judged to represent the best value to the Government. "Best value" is defined as "the combination of the impact of the overall benefits, risk, and cost for the delivery of the effective flight services to support safe and efficient flight." Solicitation § M.2 (POE 235 at 1).

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17. Section M.2.1 states that the Government will evaluate all PSP proposals in terms of one past performance factor, one cost factor, and four technical factors. The agency tender is not required under this provision to submit past performance information and will not be evaluated for that factor. The past performance factor will not be included in the best value process.[6] This provision also states that the technical factors, in the aggregate, are more important than the cost factors. The technical factors are also said to be of equal importance. The technical factors are identified as:

Technical Factor 1: Phase-In
Technical Factor 2: Staffing and Management
Technical Factor 3; Service Delivery
Technical Factor 4: Performance Management

This same provision states that within each factor are elements to be considered in the evaluation of that factor. These elements are to be used to group strengths and weaknesses for the factor ratings. Elements are not to be rated separately. Solicitation § M.2.1 (POE 235 at 1).

18. Offerors are also advised that the Government will not assign a separate benefit or risk rating. Rather, it will assess benefit and risk throughout the evaluation and may quantify benefit and risk and include it in the best value process. Solicitation § M.2.2 (POE 235 at 1).

19. The elements within the four technical factors are listed in the solicitation as follows:

Technical Factor 1: Phase-In

> *Element A: Phase-In Approach* - The Government will assess the degree to which the PSP's Phase-In approach is non-intrusive and leads to a seamless and effective transition of services.

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[6] Section M.2.3 further explains that the purpose of evaluating the record of past performance is to assess the degree to which a PSP's experience demonstrates adequate knowledge and capability of operations similar to current flight services. This provision advises PSPs that they will be removed from consideration if they do not receive a satisfactory or better rating for this factor. Solicitation § M.2.3 (POE 235 at 2).

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Element B: Phase-in Schedule - The Government will assess the degree to which the PSP's Phase-In schedule provides for a successful Transition.

Technical Factor 2: Staffing and Management

Element A: Staffing - The Government will assess the degree to which the staffing approach provides for recruitment and retention to ensure delivery of effective services to support safe and efficient flight.

Element B: Training and Certification - The Government will assess the degree to which the proposed training and certification program provides for trained and certified employees to ensure delivery of effective services to support safe and efficient flight.

Element C: Program Management - The Government will assess the degree to which the proposed Program Management approach provides for effective oversight and communication to ensure delivery of effective services to support safe and efficient flight.

Element D: Partnership - The Government will assess the degree to which the proposed partnership strategy aligns the strategic interests of the SP with those of the Government to support safe and efficient flight.

Technical Factor 3: Service Delivery

Element A: Transition Approach - The Government will assess the degree to which the PSP's approach to transition expeditiously and seamlessly provides for achievement of the End-State Solution, while delivering effective services to support safe and efficient flight.

Element B: Transition Schedule - The Government will assess the degree to which the PSP's transition schedule provides

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sufficient information to achieve the End-State Solution and adequately addresses their schedule element relationships, availability of resources, and mitigation of risks.

Element C: Concept of Operations - The Government will assess the degree to which the proposed architecture, operational concept, and associated processes provide for delivery of effective services to support safe and efficient flight throughout Transition and End-State.

Element D: Acceptable Performance Levels - The Government will assess the degree to which the PSP's proposed Acceptable Performance Levels (APLs) and associated performance awards and credits contribute to the delivery of effective services to support safe and efficient flight.

Technical Factor 4: Performance Management

Element A: Performance Management Approach - The Government will assess the degree to which the PSP's approach provides for processes, procedures, systems, tools, and resources to effectively manage the performance of AFSS service delivery.

Element B: Customer Service - The Government will assess the degree to which the PSP's proposed customer service approach effectively promotes a customer service-oriented solution that benefits the FAA, users, and customers of the system.

Solicitation §§ M.2.4.1, M.2.4.2, M,2,4,3, M.2.4.4 (POE 235 at 2-3).

20. The solicitation further provides that, in considering the technical factors and elements listed above, the Government will assess the degree to which each offeror's responses are:

- Comprehensive,
- Viable,
- Substantiated,

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- Internally Consistent, and
- Realistic.

Solicitation § M.2.4 (POE 235 at 2).

21. The solicitation provides that, for each technical proposal, the Government is to:

(a) Review, analyze, and consider all information received in response to the Technical and Past Performance Factors, at the CA, and in any discussions;

(b) Identify the strengths and weaknesses of all factors; and

(c) Rate each factor by assessing the impact of the strengths and weaknesses of the elements using Table M-1 below.

Table M-1: Rating Scheme

Rating	Definition
Excellent	The impact of strengths significantly outweighs the impact of any weaknesses.
Good	The impact of strengths outweighs the impact of any weaknesses.
Satisfactory	The impact of any strengths is equivalent to or somewhat outweighs the impact of any weaknesses.
Unacceptable	The impact of weaknesses outweighs the impact of any strengths.

Solicitation § M.3.4 (POE 235 at 5). The solicitation also contains factor rating sheets for the use of the evaluators. The sheets break out, by each factor and element, the specific matters which the evaluators are expected to bear in mind and address as they review each individual PSP's proposal. *Id.* § M app. A (POE 235 at 7-17). A provision in the solicitation also states that the Government reserves the right to eliminate PSPs from consideration for award prior to a final award decision. If a PSP has a rating of "unacceptable" in any technical factor, the Government "may" exclude it from further consideration. *Id.* § M.3.2.2 (POE 235 at 4).

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22. With regard to cost proposals, the solicitation explains that the Government will evaluate "for realism, total evaluated cost, total ownership cost, and reasonableness." Solicitation § M.3.5 (POE 235 at 5).

23. On the matter of cost realism, the solicitation advises offerors that their proposals will be evaluated to determine if they are realistic for the work to be performed, reflect a clear understanding of the requirements, and are consistent with the methods of performance and materials described in the proposals. Offerors are warned that lack of cost realism may result in the Government quantifying cost deficiencies. Solicitation § M.3.5.1(POE 235 at 5). The solicitation expressly states:

> A PSP may propose any labor mix and associated labor rates that it deems to be appropriate for the scope of work to be performed. The Government will assess the realism of the proposed labor mix and rates using the incumbent wage rate for a Full Performance Level (FPL) 2152 - AFSS Specialist, which is equivalent to a General Schedule (GS) 12 Step 5, plus GS locality pay, and not the current Department of Labor approved Service Contract Act (SCA) rates. PSPs shall include a strategy in their Staffing Plan that addresses any risks, including employee recruiting and retention, associated with their proposed labor mix and rates.

Id.

24. As for the total evaluated cost (TEC), the solicitation contains the following provision:

> **M.2.5 Cost Factor: Total Evaluated Cost**:
>
> For each proposal, the Government will evaluate the Total Evaluated Cost (TEC). TEC is defined as follows:
>
> > a) For the Agency Tender, TEC is line 15 of the Standard Competition Form (SCF) as defined in OMB Circular A-76.

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> b) For Private Sector Performance, TEC is line 16 of the Standard Competition Form (SCF) as defined in OMB Circular A-76.[7]

Solicitation § M.2.5 (POE 235 at 3).

25. For purposes of evaluating the total ownership cost (TOC), the solicitation provides that the Government must ensure that the TOC is under the annual contract ceiling as defined in Section H. Solicitation § M.3.5.3 (POE 235 at 6). Section H of the solicitation defines the TOC as:

> the sum of: (1) the annual FPIF Price Ceiling, (2) the annual T&M Not-to-Exceed (NTE) Ceiling Price, (3) the annual Government-assessed costs, (4) the annual Government maintenance costs for Remote Communications Outlets (RCOs), and (5) the annual Performance Award ($0 during Year 1 and $10 million in Years 2 - 10).

Solicitation § H.16 (POE 226 at 9). The solicitation further provides that the SP will be subject to a maximum $435 million annual ceiling for each year of the five-year base contract, subject to a contract ceiling of $1.695 billion over the total five-year base period. This equates to a 22% savings over the current cost of performance.[8] *Id.*

26. As to price reasonableness, the solicitation states:

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[7] Section A.2 of Attachment C of OMB Circular A-76 explains that agencies shall use COMPARE (the costing software that incorporates the costing procedures of Circular A-76 in conjunction with Attachment C of the same circular) to develop cost estimates and generate the SCF. POE 6. Many of the calculations required by Attachment C are embedded directly in the COMPARE software code. These COMPARE calculations are dependent upon accurate cost data that agencies shall determine and manually enter into COMPARE. POE 6.

[8] The solicitation explains that this mandatory minimum savings of 22% was established through the analysis of the productivity of the current AFSS system and the historical savings efficiencies typically gained under an A-76 competition. Solicitation § H.16 (POE 226 at 9).

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> In addition, the proposed costs will be evaluated for reasonableness. The Government will make a determination of price reasonableness based on competition, and where appropriate, by comparing the TEC of each proposal to the Independent Government Cost Estimate (IGCE).

Solicitation § M.3.5.4 (POE 235 at 6)

27. In section L of the solicitation, offerors are directed to substantiate fully in their technical proposals their approach to a wide variety of issues such as program management, staffing, employee training and certification, partnership strategy, concept of operations, acceptable performance levels, and transition. Solicitation §§ L.6.1 - L.6.6, L.11.1 (POE 233 at 10-12, 16). In addressing these issues, offerors are instructed to identify areas of risk associated with the described approaches, propose mitigation strategies, and identify quantified benefits to improve efficiency or provide more effective services as they relate to the requirements of the performance work statement. *Id.* § L.6 (POE 233 at 10).

28. Section L of the solicitation also instructs offerors to submit a variety of well-substantiated plans. Among these are a phase-in plan, a quality management plan, and a transition plan. Solicitation §§ L.9 - L.11 (POE 223 at 15).

29. Section L.6.2, which deals with the PSP's staffing plan, calls for a description detailing the offeror's staffing plan for planning, preparing, and executing its method of continuing AFSS service delivery "from the Phase-In, initial transition, and through the end of the contract." The plan is to address "any staffing adjustments that would be required as the service delivery method evolves from the initial transition configuration through the end state configuration. The plan should also contain plans for seasonal and daily adjustments to staffing necessitated by fluctuations in demand and demonstrate knowledge of how and why demand changes." Solicitation § L.6.2 (POE 233 at 10-11).

30. Section L.6.5, which deals with a required description of the PSP's concept of operations, calls for a concept of operations for all services in all operational environments "during the Transition and End-State phases." Solicitation § L.6.5 (POE 233 at 12).

31. Offerors were also advised in section L that, for their cost proposals, they were to include completed CLIN tables from section B of the solicitation. Solicitation § L.12.4 (POE 233 at 17). The CLIN tables in section B cover not only the base year of the contract but all option periods as well. *Id.* § B.2 (POE 220 at 1).

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32. Section L.12.6.2 directed offerors to complete a furnished cost model in accordance with provided instructions so as to ensure that it reflected the total cost of their proposals. The provision expressly states:

> The Cost Model will be inclusive of the PSP's costs and any Government-assessed costs, and it will provide a listing of possible Government-assessed costs so that PSPs can calculate the cost impacts on their solutions. These costs include, but are not limited to, Government-provided telecommunications, infrastructure support, maintenance, and logistics support for Government Furnished Property (GFP).

Solicitation § L.12.6.2 (POE 233 at 17).

Preparation for the Evaluation Process

33. FAA prepared an evaluation plan (EVP) for the AFSS competition. POE 67. The principal purpose of this plan was to provide guidance and instructions to the government participants in the evaluation process and to ensure compliance with Circular A-76 and the agency's own Acquisition Management System. Appendices A and B of the EVP contains a specially prepared Technical Evaluation Guide (TEG) and a Cost Evaluation Guide (CEG). POEs 164, 171. The EVP, by its own description, is said to be a "high level plan" only. More detailed instructions on the cost and technical evaluations are to be found in the TEG and CEG. Evaluation Plan at 1 (POE 67).

34. The EVP provides that the participants in the formal source selection organization for this competition are: the Source Selection Authority (SSA), the Source Selection Evaluation Board (SSEB), the Cost Evaluation Team (CET), the Technical Evaluation Team (TET), and associated advisors. Evaluation Plan at 8 (POE 67).

35. The TET is composed of a team lead, multiple evaluators, and non-voting advisors. It is tasked with providing the SSEB with the results of the technical evaluation for each proposal in accordance with Section M of the solicitation. The TET Lead is a government employee who serves as the leader of the evaluation team and as a member of the SSEB. Responsibilities of the TET Lead include: participation in evaluation team discussions, resolution of contradictory or ambiguous results among evaluators, interpretation of the TEG, overseeing evaluators and advisors during the evaluation process, and preparation of all evaluation reports for SSEB submission. Evaluation Plan at 10-11 (POE 67).

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36. The CET is likewise comprised of a team lead, evaluators, and non-voting advisors. It is tasked with providing the SSEB with results of the cost evaluation for each proposal. The CET Lead is a government employee who serves as leader of the CET and as a member of the SSEB. Responsibilities of the CET Lead include: planning and managing the progress of the cost proposal evaluations, overseeing evaluators and advisors in accomplishing their tasks, resolving contradictory or ambiguous results among evaluators, and preparing all evaluation reports for SSEB submission. Evaluation Plan at 11 (POE 67).

37. The SSEB has the responsibility of providing the SSA with a sound recommendation for making an informed best value performance decision. The EVP directs that the SSEB will have two co-chairpersons who are government employees. Their responsibilities include facilitating SSEB discussions and resolving discrepancies between and among members, preparation of SSEB recommendation(s), and resolving contradictory or ambiguous results from the evaluation teams. Evaluation Plan at 9 (POE 67).

38. The SSA is the government official responsible for making the final decision based on the recommendation of the SSEB. The Evaluation Plan provides that he/she will consider the recommendation of the SSEB and then use his/her best judgment to arrive at a best value decision. The SSA's responsibilities include: review and approval of the evaluation plan and appointment of an SSEB whose members possess the skills necessary to evaluate properly each PSP proposal and to make recommendations for the performance decision. Evaluation Plan at 8 (POE 67).

39. The TEG describes a further level in the organization of the TET. It provides a separate team for each of the four evaluation factors listed in Section M of the solicitation. Each of these factor teams has its own Team Lead and is composed of a given number of evaluators and advisors. Each Factor Team Lead is a government employee. Responsibilities of the Factor Team Lead include organizing and leading team discussions, participating in element discussions, making final decisions when consensus cannot be achieved for the factor, preparing all factor documentation, reviewing all documentation from all other factor teams to resolve discrepancies or duplication, and assisting the TET Lead in preparing documentation for the SSEB. POE 164 at 2-3.

40. The TEG also instructs the TET members to arrive at all evaluation decisions by consensus. In the event this is not possible, the TET Lead is to make a final decision based on all information and judgment available. Any evaluator not in agreement with the decision of the TET Lead is instructed to write a minority report which includes any material, facts, and analysis supporting this disagreement. POE 164 at 2. There is no

indication in the record for these cases that a minority report was ever filed by a member of the TET.

41. The CEG instructs the CET members to first review the technical proposals and the technical discussion items (DIs) issued by the Government. The CET members are also told to take note of any characteristics of the technical proposals that need to be reflected in the PSPs' cost proposals. Finally, the CET members are instructed to conduct the evaluation in accordance with Section M of the AFSS solicitation "in all respects." POE 171 at 1-2.

42. In evaluating the proposals received in this competition, FAA made use of an automated source selection tool which goes by the name of "Decision Point." This tool assists in documenting the proposal evaluation process. It consists of an online system that can be accessed by the entire evaluation team via the internet. It provides a means for an individual evaluator, groups of evaluators, or the entire team to communicate and share information in real time. The system has many features that aid in the evaluation, such as an online reference library which allows paperless storage and instant access to various source selection documents, an electronic evaluation data base, local and remote access, management tracking of the evaluation process for factor and team leads, security, and simple user interfaces. POE 196. A review of the tool used for the AFSS procurement shows that entries made by TET members are organized in a format similar to that used in the factor rating sheets to be used by evaluators and contained in Section M of the solicitation. *See* Finding 21.

43. The TET Lead oversaw and was responsible for the use of the Decision Point tool. In a sworn statement he explains that when proposals were received, they were entered into the tool so that evaluators could access them. He further states:

> a. . . . The information in the tool allowed users to access the information that pertained to their evaluation responsibilities. As evaluators reviewed each proposal, they entered draft strengths and weaknesses into the *Decision Point* tool's "Candidates" area. They also entered draft Discussion Items (DIs) as either draft Clarification Requests (CRs) or draft Deficiency Reports (DRs). After completion of each evaluator's review of the proposal and entry of draft comments, factor teams met to (a) consolidate duplicate issues; (b) delete any DIs which were not considered by the group to be worthy; (c) determine whether noted deficiencies were material in nature; and (d) agree to forward the resulting set of DIs to the TET Lead. This work occurred within the

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Decision Point "Candidate" view. The same process was used for identifying material deficiencies.

b. The *Decision Point* Tool was also used following receipt of PSP responses to the DIs. As evaluators reviewed each revision to the proposal, they refined draft strengths, weaknesses and risks in the tool's "Candidate" area. . . .

c. The *Decision Point* Tool was also used following the Capability Assessments. The Factor Teams met to discuss the impact of the CA on the strength or weakness. If a deficiency was still outstanding, it was at the team's discretion to describe it as a weakness. It was at this point when all the Factor Teams' work was moved into the *Decision Point* "Consensus" view and represented the final concurrence of the Evaluators. The Factor Teams met to conduct consensus reviews in order to rate the factors. Using Group-based strengths, weaknesses and the related impacts (where appropriate) for all elements within the factor, the Factor Team's evaluators assigned a consensus rating for the factor. This work occurred within the *Decision Point* "Consensus" view and represented the final concurrence of the Evaluators.

Affidavit of ****** (May 6, 2005) at 2-3 (POE 212).

44. Counsel have provided in the Agency Report what is purported to be an accurate account of the weaknesses, strengths, deficiencies, and clarifications found in the Decision Point tool. The exhibit shows raw data from the candidate area by comment type. It also shows that each PSP had similarly large numbers of initial candidate comments that resulted in fewer strengths and weaknesses at the conclusion of all rounds of DIs, conduct of the CA, and final consensus discussions. As the numbers below indicate, there is a consistent pattern that approximately five to ten percent of the initial comments result in consensus based comments.

AcqCenter - Master Comment Roll-Up									
	Strength		Weakness		Clarification Request		Deficiency Report		
	Candidate	Consensus	Candidate	Consensus	Candidate	Consensus	Candidate	Consensus	Material
*****	*****	*****	*****	*****	*****	*****	*****	*****	*****
Lockheed	*****	*****	******	*****	*****	*****	*****	*****	*****

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MEO	*****	*****	*****	*****	*****	*****	*****	*****	*****
*****	*****	*****	*****	*****	*****	*****	*****	*****	*****
******	*****	*****	*****	*****	*****	*****	*****	*****	*****

POE 197.

45. The record contains a listing of all members of the TET. Sixty individuals are identified in this listing. Slightly over half of these individuals are listed as advisors -- as opposed to being identified as evaluators. The experience and background of each individual is briefly summarized on the listing (except for four individuals for whom data was not available at the time FAA filed its agency report). Without descending into particulars, it should at least be noted that the years of professional experience and the key knowledge, skills, and abilities of these TET member are highly impressive. There is a rich mixture of technical expertise and training as well as hands-on experience with and knowledge of FAA air traffic operations. Over a quarter of those listed as TET members have thirty or more years of professional experience. POE 199.

The MEO Proposal

46. The TET Report contains the following summary description of the MEO proposal:

> [The MEO] proposes ******employees on day one of Transition, which includes flight service Specialists, management, and support staff. [The MEO] proposes a total staff of *********at the start of End-State for 3 new facilities and a satellite facility in Hawaii. By the start of the Transition, the PSP plans to have reduced staffing from the current levels to *****. Overall staffing will be reduced by ******within the first year of the contract.
>
> Communication efforts during Phase-In include: frequent meetings with employees, a collaborative website and bargaining unit newsletter, and distribution of packages from HR [Human Resources]. To prepare a future pool of qualified Specialists as replacements for those who retire or otherwise leave, [the MEO] has proposed establishing a Collegiate Training Initiative (CTI) Flight Service Certification Program and hiring those CTI graduates. The PSP proposes establishing these CTI Flight Service Certification Programs at colleges/universities near the three End-State locations, and has

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commitments from the states in which these colleges/universities are located.

[The MEO] ties pay to performance. When APLs are met, employees will receive bonuses based on a PSP sponsored incentive plan tied to overall APLs and individual contributions to performance. [The MEO] also plans to provide AFSS Specialists with other incentives and benefits to enhance recruiting and retention, including the following:

- Current incumbent AFSS Specialist salaries and locality pay
- Relocation at a flat rate of $10K for those who move to the new End-State locations

The transition from the 58 existing flight service stations to three Flight Service Centers (FSCs) and Honolulu AFSS is scheduled to occur over an 18-month Transition period. The initial Operational Capability of facilities and services is scheduled to occur within 15 months of Transition. Development and integration of enhanced technologies will continue for the remainder of the Transition period, with the achievement of an End-State Operational Capability at month 18.

The system architecture is based largely on existing software and hardware packages. Major components include:

- OASIS [Operational Supportability Implementation System] with enhanced technology development by End-State
- COTS [Commercial Off the Shelf] software to display weather graphics, with the ability of flight plan overlay by End-State
- A Solacom voice switch for air-to-ground communications
- Automated broadcast of selected weather information using text to speech generation
- An internet Pilot portal that provides self-service access to most flight planning tools.

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> The systems have demonstrated a moderate level of integration, with a scheduled implementation of End-State architecture by month 18 of Transition.
>
> [The MEO's] PM [Project Management] approach to flight service delivery entails adjustments to management and training practices based on historical performance results, time-phased APLs, and a combination of local and national quality councils. Using both manual and automatic data collection techniques, [the MEO] proposes to track performance against the 21 required metrics, adjusting the majority of APLs upon completion of transition, and incrementally thereafter. Employees across the organization will be trained on customer service basics and ISO standards in preparation for ISO registration within two years of contract award. QA [Quality Assurance] Specialists will receive additional training in QA including data analysis techniques. To build a performance-based culture, [the MEO] plans to adopt new Standard Operating Procedures (SOPs) based on ISO processes, perform quarterly tape talks for all Specialists, and gradually begin to assess individual performance against the APLs. [The MEO] QC [Quality Control] procedures include a semi-annual review of the quality program on a national level with participation for each facility. A National Quality Manager (NQM) and National Training Manager will oversee all of these activities. To identify improvements to services that are consistent with customer needs, [the MEO] uses a Stakeholder Council, which consists of a forum of various aviation associations. Additional channels of customer feedback include a Customer Advocate, telephone post-service surveys, independent third party surveys, and participation in aviation community events.

TET Report at 43-44 (POE 151).

<u>The Lockheed Proposal</u>

47. The TET Report contains the following summary description of Lockheed's proposal:

> [Lockheed] proposes 2302 employees on day one of transition, which includes flight service Specialists, management, and support staff at 58 locations. [Lockheed] proposes a total staff of 1299 at the start of End-State for 17 continuing AFSS sites and three new hub facilities. [Lockheed] proposes to

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offer three year guaranteed employment to all full-time incumbent AFSS employees projected to staff the 20 End-State facilities. In **********of contract performance [Lockheed] plans to ********** **********.

Overall staffing will be reduced as sites are consolidated in stages beginning in the ****** month of the Transition and ending in the ******* month. ** ********** ********** **********.

[Lockheed] also plans to provide AFSS Specialists with other incentives and benefits to enhance recruiting and retention, including the following:

- Match the current incumbent AFSS Specialist salaries and locality pay
- Making employment offers to all AFSS employees
- Relocation package of up to $50k (includes broker registration, home finding trip, temporary living, closing costs, moving household goods, transfer allowance, and spousal job assistance)
- $5k sign-on bonus and $5k retention bonus (for Specialists only)
- Share performance incentive fee with Specialists and Supervisors
- Up to $10k special recognition award
- Laptop computer for each Specialist
- 100% tuition reimbursement
- Additional Area Knowledge Training payment ($500 each area, up to $1k)
- 40 hours of sick leave advanced on day one, vacation same as AFSS Government rate
- 401K retirement plan
- [Lockheed] corporate career opportunities for all employees, including temporary hires

The PSP proposes to install five PCs [Personal Computers] per AFSS in the administrative areas two weeks prior to day one of Transition to conduct

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administrative activities (e.g., training time cards, ********** and benefits information). To manage Phase-In progress, [Lockheed] proposes a Program Management Office (PMO) of **** ***** and plans to use ********** web ********** to report ongoing Phase-In progress, and proposed ********** to FAA. In addition, [Lockheed] proposes **** ********** ****** **** **** ********** *** **********. [Lockheed] estimated 29 hours of Government effort per AFSS site for support of Phase-In activities.

The PSP's approach of transitioning from 58 existing AFSSs to the proposed architecture of three flight service hubs and 17 renovated Automated Flight Service Stations (AFSS) is scheduled to occur over an 18-month period. The transition schedule includes two months of schedule reserve. [Lockheed] proposes to continue current flight service operations without introducing new operational equipment procedures, or training on day one of Transition. [Lockheed] proposes to automate most routine flight service Specialist tasks to achieve workload reductions and other efficiencies.

The proposed system architecture is based primarily on existing software and hardware packages. Major components include:

- ******** ********** for flight planning
- ********** *for knowledge management
- Redflex Switchplus in conjunction with ********** for air/ground and ground/ground communications
- An extensive internet pilot portal that provides self service access to most flight planning tools as well as wireless Personal Digital Assistant (PDA) access
- ********** at fixed base operator locations across the country

The systems require minimal integration with the remaining work, consisting mostly of interface development between and among the components. Exceptions include the pilot web portal, which is ********** and the interface between the Redflex Switchplus and **********, which is **********according to [Lockheed] capability assessment information.

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> [Lockheed's] PM approach is tailored to its service delivery concept which includes the automation of area knowledge, local and national procedures, and Pilot services. The PM approach consists of standardized processes and tools adapted to Flight Services from existing corporate processes and systems. The PSP will be using ********** to measure program progress and APLs respectively. The PSP's proprietary ********** offers ********* access ******** to internal organizations and to the FAA. [Lockheed] establishes an independent QM [Quality Management] organization, led by the Performance Assurance and Safety Manager reporting directly to the program manager and also to the corporate VP [Vice President] for QM. This organization includes three area Quality Managers and quality evaluators on-site. The PSP establishes an ********** at each facility to monitor and ensure the integrity of the QA program. In addition, [Lockheed's] QM program is integrated into and audited by the corporate quality organization. [Lockheed] establishes a key executive, reporting directly to the program manager, for customer relations. In addition to the traditional customer outreach actions to aviation groups and at aviation events, the PSP expands its outreach by proposing seven specific partnership initiatives including ********** ********.

TET Report at 23-24 (POE 151).

Discussions

48. On August 23, 2004, the contracting officer sent the MEO eight discussion items (DIs), namely one material deficiency, six deficiency reports (DRs), and one clarification report (CR). POE 80. The MEO responded to these DIs by letter dated September 3. POE 88.

49. The contracting officer also sent Lockheed several DIs on August 23. These consisted of one material deficiency, ten DRs, and two CRs. POE 81. Lockheed responded to these DIs by letter dated September 3. POE 89.

50. On September 21, the contracting officer sent additional DIs to Lockheed based on the Government's initial review of Lockheed's recently submitted cost proposal. These DIs consisted of six DRs and twelve CRs. In addition to the DIs relating to the cost proposal,

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Lockheed was also given other DIs based on further review of its technical proposal and its replies to DIs provided to it in August. These technical DIs consisted of two DRs and eighty CRs. POE 92.

51. On September 27, the contracting officer sent additional DIs to the MEO based on the Government's initial review of the MEO's recently submitted cost proposal. These DIs consisted of nine DRs and fourteen CRs. In addition to the DIs relating to the cost proposal, the MEO was also given other DIs based on further review of its technical proposal and its replies to DIs provided to it in August. These technical DIs consisted in two DRs and eighty CRs. POE 95

52. On October 5, Lockheed submitted technical proposal pages revised in response to DIs issued on September 21. POE 102.

53. On October 12, Lockheed submitted its cost proposal revisions in response to the cost proposal CRs and DRs issued on September 21. PEO 106.

54. On the same date, October 12, the MEO also submitted revisions to its technical proposal in response to CRs and DRs provided to it on September 27. POE 107.

55. On October 15, the contracting officer sent yet another CR to Lockheed. POE 110.

56. On October 18, the MEO submitted revisions to its cost proposal in response to the CRs and DRs issued to it on September 27. POE 111.

57. On October 26, the contracting officer issued additional DIs to Lockheed. These were based upon further analysis of Lockheed's cost proposal and consisted of seventeen CRs and one DR. POE 114.

58. On November 1, the contracting officer sent Lockheed a letter in preparation for the CA. The letter contained three attachments of the kind received by all PSPs. Attachment 1 was PSP-specific regarding the Lockheed proposal, while Attachments 2 and 3 were the same for all PSPs. Attachment 1 covered eighteen specific items on which FAA wanted additional information. Attachment 2 contained the fifteen specific questions which were put to all PSPs. Attachment 3 was a matrix to be filled out for any changes that would require cost updates. POE 119.

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59. On November 2, the MEO received a similar letter from the contracting officer. Attachment 1 to this letter (which was PSP-specific), listed twenty-five items concerning which FAA wanted additional information. Attachments 2 and 3 were identical to those provided to Lockheed and the other PSPs. POE 120.

60. On November 4, the contracting officer provided both Lockheed and the MEO with similar instructions regarding additional information they were to provide at the CA. POEs 125, 127.

61. On November 5, Lockheed responded to the detailed DIs provided to it on October 26. POE 132. On November 15, the MEO responded to the detailed cost DIs it had received with the contracting officer's letter of November 2. POE 134.

62. Lockheed's CA took place on November 15-16 at its facility in Seabrook, Maryland. POE 135. The MEO's CA took place on November 17-18 at Sprint's facility in Reston, Virginia. POE 136.

63. On November 17, Lockheed informed the contracting officer that in view of discussions which took place during the CA, it did not need to provide changes to its cost proposal based on the DIs provided on October 26. POE 137.

64. On December 21, the contracting officer wrote to Lockheed and the MEO acknowledging receipt of materials filed at the conclusion of their respective CAs to further substantiate or clarify their written proposals. POEs 146-147.

The Technical Evaluation Process

65. The TET Report eventually submitted to the SSEB for this competition describes the technical evaluation process as follows:

> In accordance with the process described in the Evaluation Plan and further defined by the TEG, the sequence of events for the technical proposal evaluation is summarized as follows:
>
> - A compliance review was conducted on each of the proposals to ensure compliance with SIR Section L requirements.

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- A past performance evaluation was conducted to assess PSP demonstrated experience.
- TET members individually prepared for group discussions by reading the proposals. TET members prepared draft Discussion Items (DIs) consisting of Clarification Requests, Deficiency Reports, and Material Deficiencies.
- Each factor team met as a group to discuss each PSP proposal. The factor team reviewed and finalized the draft DIs. The DIs (Round One) were forwarded to the TET Team Lead and Contracting Officer (CO) for issuance to the PSPs.
- After receipt and review of the Round One DI responses, each factor team identified initial strengths, weaknesses, and deficiencies. The factor teams prepared DIs for any remaining clarifications or deficiencies. These DIs (Round Two) were forwarded to the TET Team Lead and CO for issuance to the PSPs.
- After receipt and review of the Round Two DI responses, each factor team updated the initial strengths, weaknesses, and deficiencies.
- Capability Assessments (CAs) were conducted by each PSP.
- After the CAs, each factor team updated the strengths, weaknesses, and impacts based on the information received during the CA.
- The full set of strengths and weaknesses were considered in determining the rating and are contained in **Appendix B: Detailed Strengths and Weaknesses**. The strengths and weaknesses and their impacts most influential to determining the factor ratings are reflected in the body of this report.
- The TET Leads assembled the factor team results into this report.

TET Report at 2 (POE 151).

<u>Results of the Evaluation of the MEO and Lockheed Technical Proposals</u>

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Factor 1

66. With regard to the evaluation of the MEO's technical proposal under Factor 1, Phase-In, the TET report states the following:

> The TET's assessment regarding all of the findings of strengths and weaknesses and their impacts in [the MEO's] proposal led to an assignment of an overall rating of "**Good**" for the Phase-In factor. The impact of the strengths outweighs the impact of any weaknesses. This rating is not based on any single finding or its impact, but rather represents the TET's judgment regarding all the findings of strengths and weaknesses and their impacts when considered together.

TET Report at 45 (POE 151).

67. The TET lists two influential strengths and one influential weakness on which the MEO's "Good" rating for Factor 1 is based. The two strengths are:

- Retention of the Incumbent Workforce
- Communicating with the Incumbent Employees

The one weakness is:

- Cohesive Plan to Execute HR Activities

TET Report at 45 (POE 151).

68. In commenting on the MEO's lack of a cohesive plan of all the HR actions required for Phase-In, the TET stated:

> [The MEO] did not present a cohesive plan of all the HR actions required for Phase-In. [The MEO] listed various HR activities necessary during Phase-In (e.g., personnel actions, vacancy announcements, coordination of site visits, and other HR services), but did not demonstrate how all these activities can be carried out in a seamless manner. [The MEO] also proposed to bring on board an HR Liaison (to manage HR issues) after performance decision. During the CA, the PSP categorized the HR liaison as a critical position within its organization. Once hired, the HR Liaison will need time to become familiar

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> with [the MEO's] proposal. The Agency HR organization (AHR) cannot start executing a cohesive HR plan for [the MEO] until after performance decision and [MEO] hires the HR Liaison. The delayed start in executing HR activities may lead to a period of uncertainty for the incumbent workforce. [The MEO's] lack of a cohesive HR plan that can be executed upon performance decision results in a moderate probability that the AHR will have to realign its resources to help assure [the MEO] meets its Phase-In goals. The TET cannot determine the impact realigning AHR resources will have on other AHR supported programs.

TET Report at 46 (POE 151).

69. With regard to the evaluation of Lockheed's technical proposal under Factor 1, Phase-In, the TET report states the following:

> The TET's assessment regarding all of the findings of strengths and weaknesses and their impacts in [Lockheed's] proposal led to an assignment of an overall rating of "**Excellent**" for the Phase-In factor. This rating is not based on any single finding or its impact, but rather represents the TET's judgment regarding all of the findings of strengths and weaknesses and their impacts when considered together.

TET Report at 25 (POE 151).

70. The TET lists six influential strengths and no influential weaknesses as the basis for Lockheed's "Excellent" rating. The six strengths are:

- Management of Phase-In
- Incentivized Phase-In APLs
- Effective Communication With The Incumbent Workforce
- Recruiting The Incumbent Workforce
- Comprehensive Compensation/Benefits Package
- Recruitment Approach

TET Report at 25 (POE 151).

Factor 2

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71. With regard to the evaluation of the MEO's technical proposal under Factor 2, Staffing and Management, the TET report states the following:

> The TET's assessment regarding all of the findings of strengths and influential weaknesses in [the MEO's] proposal led to an assignment of an overall rating of "**Satisfactory**" for the Staffing and Management factor. The rating is not based on any single finding or its impact, but rather represents the TET's judgment regarding all the findings of strengths and weaknesses and their impacts when considered together.

TET Report at 47 (POE 151).

72. The TET lists two influential strengths and two influential weaknesses on which the MEO's "Satisfactory" rating for Factor 2 is based. The two strengths are:

- Understanding of Workload Fluctuations
- Ability to Secure Staff

The two weaknesses are:

- Bargaining with an Existing Union
- Failure to Provide Substantiated Staffing Plan

TET Report at 47 (POE 151).

73. In commenting on the MEO's weakness with regard to bargaining with the existing union, the TET made the following observation in its report:

> The [MEO's] proposal for staffing and management, including training, proposed productivity enhancements, relocation, and other changes in working conditions, will likely require union negotiations. These negotiations will require time for the Agency to complete. The [MEO] has recognized the requirement for negotiations and has addressed it through Agency management. The [MEO] has also stated management's right to move forward without negotiations being completed. However, this PSP has not comprehensively addressed the time needed for negotiations. Until these negotiations are complete, the PSP will have impediments in moving forward with any planned changes to staffing or architecture improvements.

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> Furthermore, some of the results of the negotiations could negatively impact the staffing and management elements of its proposal.
>
> If the MEO is unable to transition to the FSC as scheduled, [it] will be unable to realize planned staffing efficiencies based on assumptions for operational changes and technology infusion. If the operational efficiency gains are not realized, current staffing levels cannot be reduced as proposed by the PSP. Current incumbent staff would be required at the current AFSS sites and some sites may have to be augmented with additional personnel to maintain current service delivery standards. The requirement for union negotiations has a high probability of a negative impact on cost, schedule, and service delivery during the Transition.

TET Report at 48 (POE 151).

74. In commenting on the MEO's weakness with regard to failure to provide a substantiated staffing plan, the TET made the following observation in its report:

> The [MEO] failed to provide a substantiated staffing plan. The staffing plan did not identify the number of personnel that the PSP requires to staff each AFSS through the Transition. The absence of a substantiated staffing plan results in a moderate probability of an impact on continuous service delivery.

TET Report at 48 (POE 151). More specifically, in Appendix B of the TET Report, the TET stated:

> The Staffing Plan submitted provides only samples of staffing required at the Western FSC area. A review of both Vol. I and Vol. II finds no detailed staffing plan for the AFSSs during Transition. It does not account for staffing as the SIR requires. It is impossible to identify the number of personnel required to staff each AFSS through Transition.

Id. app. B (PSP3) at 187 (POE 155). Finally, in its rating rationale for Factor 2, the TET observes: #

> [The MEO's] ability to secure the required staff is offset by the PSP's unsubstantiated staffing plan, which failed to identify where and how the staff would be used. The PSP understands the need for staffing in accordance with

> demand fluctuations. However, the staffing plan failed to identify how the staff members would be assigned or utilized to meet these demand fluctuations.

TET Report at 49 (POE 151)

75. With regard to the evaluation of Lockheed's technical proposal under Factor 2, Staffing and Management, the TET report states the following:

> The TET's assessment regarding all of the findings of strengths and weaknesses and their impacts in [Lockheed's] proposal led to an assignment of an overall rating of "**Excellent**" for the Staffing and Management factor. This rating is not based on any single finding or its impact, but rather represents the TET's judgment regarding all of the findings of strengths and weaknesses and their impacts when considered together.

TET Report at 25 (POE 151).

76. The TET lists five influential strengths and no influential weaknesses as the basis for Lockheed's "Excellent" rating. The six strengths are:

- Compensation Package Retains Employees
- Three Year Guarantee of Employment for End-State Employees
- Management System Ensures Control
- Strategic and Tactical Planning Centralized
- Need for Relocations Minimized

TET Report at 28 (POE 151).

Factor 3

77. With regard to the evaluation of the MEO's technical proposal under Factor 3, Service Delivery, the TET report states:

> The TET's assessment of all findings of strengths and influential weaknesses in [the MEO's] proposal resulted in an overall rating of "**Satisfactory**" for Factor 3, Service Delivery. The rating is not based on any single finding or

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> its impact, but rather represents the TET's judgment regarding all the findings of strengths and weaknesses and their impacts when considered together.

TET Report at 50 (POE 151).

78. The TET lists six influential strengths and two influential weaknesses on which the MEO's "Satisfactory" rating for Factor 3 is based. The six strengths are:

- Local Area Knowledge Retention
- Overhead Displays
- Multiple Methods of Service Delivery
- Common Database
- Workstation Displays
- APLs
  - Employee Evaluation Index score
  - Validated Customer Complaints
  - Percentage of Error Free Flight Plans
  - Domestic Flight Plans Filed within Three Minutes
  - Emergency Services Evaluation
  - NOTAMs [Notice to Airmen] Accepted
  - Continuous Improvement

The two weaknesses are:

- Transition Schedule
- APLs
  - Customer Satisfaction Rating
  - Dropped Calls Exceeding 20 Seconds

TET Report at 50 (POE 151).

79. In commenting on the MEO's weakness with regard to transition schedule, the TET made the following observation in its report:

> The [MEO] has not adequately identified and substantiated the tasks required to accomplish its aggressive transition Schedule. [The MEO] did not adequately substantiate all of the necessary agreements and processes between the PSP and its primary subcontractor. In addition, the PSP did not

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> identify or adequately substantiate all of the necessary agreements, processes, and activities for the interface with the various FAA organizations necessary to implement this service. The PSP has not fully identified and substantiated the relationship with its system development subcontractor and agreements with other Government organizations, nor has it substantiated its transition schedule that calls for implementation of systems at the three FSM sites in nine months and Initial Operational Capability within 15 months. The PSP did not fully substantiate its specific requirements for Government support or plan for coordinating the use of Government resources. The PSP does not provide sufficient substantiation of the ability to meet the schedule based upon the required activities (e.g. planning, procedure implementation, site preparation, equipment installation and check out, system integration, system/operational test and final system deployment). The PSP does not allow sufficient time in its transition schedule for the software and hardware modifications to the current OASIS system. For example, the PSP proposes completion of the Critical Design Review (CDR) in 3.5 months after award. The PSP has not allocated sufficient time for Government review and approval. In addition, it may not have sufficient time for its own activities. There is a high probability that the PSP approach for the transition schedule, including identification of the relationships and required activities with the Government and the development contractor, will lead to significant schedule slippage and delay implementation of service improvements. Further, the PSP did not provide a contingency plan in the event it has difficulty obtaining sole source approval in the planned time frame. The lack of existing Government sole source approval for the PSP's teammate has a moderate probability of significant delay to the sub-contract award and, therefore, the transition schedule.

TET Report at 51 (POE 151).

80. In commenting on the MEO's weakness with regard to APLs, the TET made the following observation in its report:

> *Customer Satisfaction Rating* [The MEO] proposes an average customer satisfaction score of 83% during transition and FSM [Flight Service Modernization] Baseline (1). The FSM baseline (2) continues with a 2% increase every six months until 90% is reached. After FSM Baseline (2) is achieved, the APL increases by 1% every six months until 95% is reached.

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> This performance level does not contribute to effective service delivery and is a weakness based upon the existing benchmark of the MITRE survey's 92% customer satisfaction rating. The final value of 95% is not achieved until 62 months after Transition, therefore, reducing overall customer satisfaction for a significant portion of the contract. There is a high probability that [the MEO's] low custom er satisfaction rating during the Transition will be difficult to overcome and will lead to continued poor customer service ratings over the life of the contract.
>
> *Dropped Calls Exceeding 20 Seconds* [The MEO] proposes a Transition value of 7.7% decreasing to less than 3.7% at month 62 of contract performance. The percentage of calls being dropped on an annual basis at Transition and at month 62 do not contribute to effective delivery of Flight Services and are not a realistic solution to maintain current customer satisfaction levels. There is a high probability that this percentage of dropped calls will not contribute to effective service delivery and overall customer satisfaction with the AFSS performance.

TET Report at 55 (POE 151).

81. With regard to the evaluation of Lockheed's technical proposal under Factor 3, Service Delivery, the TET Report states the following:

> The TET's assessment regarding all of the findings of strengths and weaknesses and their impacts in [Lockheed's] proposal resulted in a rating of "**Excellent**" for Factor 3, Service Delivery. The impact of strengths significantly outweighs the impact of any weaknesses. This rating is not based on any single finding or its impact, but rather represents the TET's judgment regarding all of the findings of strengths and weaknesses and their impacts when considered together.

TET Report at 31 (POE 151).

82. The TET lists nine influential strengths and no influential weaknesses as the basis for Lockheed's "Excellent" rating. The nine strengths are:

- Transition Approach
- Transition Schedule

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- Clearance Delivery via Conference Calling
- Workstation Displays
- Common Database
- Technical Development
- Multiple Delivery Methods
- Local Area Knowledge Retention
- APLs

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**********.

TET Report at 31 (POE 151).

83. With regard to Lockheed's transition approach, the TET observed:

> The Transition Approach presented by [Lockheed] is a strength due to its comprehensive, well substantiated concepts and approaches which result in a high probability of meeting the planned schedule and incorporating the concepts planned for operations.
>
> . . . .
>
> [Lockheed] proposes a realistic and viable method of ensuring that the old and new systems will effectively co-exist and communicate during the transition and consolidation. The PSP plans to distribute and share flight plan, weather, and NOTAM data ********** **********
> **********
> **********. ***
> **********
> **********
> **********. The proposed risk management and mitigation plans are comprehensive and substantiated, reducing the probability of unexpected results during transition.

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TET Report at 32 (POE 151).

Factor 4

84. With regard to the evaluation of the MEO's technical proposal under Factor 4, Performance Management (PM), the TET report states:

> The TET's assessment regarding all of the findings of strengths and weaknesses and their impacts in [the MEO's] proposal led to an overall rating of "**Satisfactory**" for the PM Factor. The rating is not based on any single finding or its impact, but rather represents the TET's judgment regarding the cumulative impact of all the findings of strengths and weaknesses within the proposal.

TET Report at 57 (POE 151).

85. The TET lists four influential strengths and two influential weaknesses on which the MEO's "Satisfactory" rating for Factor 4 is based. The four strengths are:

- Progressive Continuous Improvement Initiatives
- Strong Approach to Quality Management System Implementation
- Comprehensive Customer and Stakeholder Outreach Approach
- Extensive Customer Survey Methods

The two weaknesses are:

- Problematic QM/QA Program Management Structure and Alignment
- Lack of Performance Penalties

TET Report at 57 (POE 151).

86. In commenting on the MEO's weakness with regard to problematic QM/QA program management structure and alignment, the TET observed:

> The limited commitment of managers' time and the management organizational structure of the [MEO's] QM program weakens the overall effectiveness of the PSP's PM approach. The PSP proposes a QM and QA program that is directed and managed at the facility as a part time function of

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> the Facility Program Control Officer. His/her time is dedicated 30% to QA/QM which may not align with the activity scope of the End-State FSCs. The local quality program is linked to the national office through the FSC operations Manager and not a QA Specialist or QA Manager, which can lead to circumstances where competing priorities may bias reports. The national Quality Manager's role is focused on issuing policy and coordinating quality councils rather than managing and leading the program. QA/QM management and direction weaknesses create a moderate probability of biased QA reporting, weak program oversight, and conflicting priorities, decreasing the effectiveness and efficiency of QA/QM oversight.

TET Report at 58 (POE 151).

87. In commenting on the MEO's weakness with regard to lack of performance penalties, the TET wrote:

> [The MEO's] proposal does not associate negative monetary or non-monetary incentives with the failure to meet APLs. The lack of this mechanism to enforce the APLs minimizes the FAA's enforcement options for non-compliance and compromises the FAA's oversight process. The lack of performance penalties runs counter to the principals [sic] of performance-based contracting. This results in a moderate probability the FAA's ability to address and correct PSP failure to meet proposed levels of performance will be restricted.

TET Report at 58 (POE 151).

88. With regard to the evaluation of Lockheed's technical proposal under Factor 4, Performance Management, the TET report states:

> The TET's assessment regarding all of the findings of strengths and weaknesses and their impacts in [Lockheed's] proposal led to an assignment of an overall rating of "**Excellent**" for the PM factor. This rating is not based on any single finding or its impact, but rather represents the TET's judgment regarding all of the findings of strengths and weaknesses and their impacts when considered together.

TET Report at 39 (POE 151).

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89. The TET lists nine influential strengths and no influential weaknesses as the basis for Lockheed's "Excellent" rating. The nine strengths are:

- Proven and Mature Performance Management Approach
- Thorough Integration of Performance Management Systems and Tools
- High Degree of Automation throughout Performance Management Systems and Tools
- Substantiated Approach and Commitment to Quality Management
- Strong Process Improvement Commitment and Methods
- Substantive Approach for APL Establishment and Improvement
- Comprehensive Customer Outreach Approach
- Innovative Initiatives for Pilot Education and Service Acceptance
- Enhances User Satisfaction and Service Quality through Automation of Core Tasks.

TET Report at 39 (POE 151).

Technical Evaluation of Lockheed's FS21 System

90. An issue of particular importance in these two consolidated contests concerns FAA's technical evaluation of Lockheed's proposed FS21 system. The record shows that, although the system was addressed from various perspectives throughout Lockeed's proposal, the principal presentation on the system and the development and integration efforts required to field it by the beginning of the end-state period is to be found in the Concept of Operations section of the proposal. The presentation was well detailed and comprehensive. Lockheed's Proposal, vol. 1, § 5 (POE 241). The Concept of Operations was evaluated primarily under Technical Factor 3, Service Delivery. *See* Finding 19.

91. In the first round of technical discussions initiated on August 23, 2004, the TET issued to Lockheed a deficiency report (DR), no. LOC-T-0013, entitled Architecture Substantiation. It read:

> Volume I proposes a number of systems that have not been used in the FAA for the provision of flight services or which have not been fully tested and integrated to meet the required services.

(POE 81). The DR then went on to state that the proposal did not provide sufficient information and substantiation of (a) the ability of the proposed system architecture and

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individual systems to meet the requirements of the solicitation for functional capability and (b) the ability of the architecture and systems to be implemented and integrated without degradation of system effectiveness and safety. Lockheed, therefore, was directed to provide specifically listed information on all systems or capabilities not currently used to support AFSS in the NAS in order to substantiate its proposed architecture. *Id.*

92. In the second round of technical discussions, the TET issued further DIs on architecture substantiation. This time the DIs were in the form of CRs and were more pointed and specific than the original DR. With LOC-T-0118, the TET sought information concerning the potential need for customization of certain subsystems, prior operational use of systems, whether the ********** product had been previously integrated with other FS21 products, and the requirements for application level integration of ********** with the NAS. POE 92. The TET also issued a broad-based CR to Lockheed, no. LOC-T-0078, concerning the testing of NAS interfaces. *Id.* Lockheed responded to both the CRs with the submission of extensive additional information in the form of proposal revisions. Lockheed Proposal, vol. I, § 5.

93. On November 1, 2004, the contracting officer advised Lockheed of the dates for its CA and provided two attachments, the first listing items for discussion and the second identifying specific areas of interest. On the first attachment, under "Service Delivery, Architecture," the list reads: "Discuss your approach, plan, and schedule for design, engineering, testing, and implementation for all FS21 integration efforts." On the second attachment, the ninth specific area of interest reads: "Please describe your specific contingency plans in the event that the migration from the current concept of operations to your proposed concept of operations is unsuccessful." POE 119.

94. At Lockheed's CA on November 15-16, 2004, its slides presented a graphic depiction of the six principal system components of the FS21, identifying the nature and status of development within each component and the nature and status of each required integration effort between components. Lockheed CA Meeting Minutes, Slide 11 (POE 135). The CA presentation also included the approach, plan, and schedule for these efforts in specific reply to the architecture discussion item. *Id.*, Slide 56.

95. After the TET completed its evaluation of the Lockheed proposal, as revised in response to the discussion items and as supplemented with the information presented at the CA, it assigned Lockheed a strength related to the FS21 system architecture and the extent of the existing technical development. In discussing this strength regarding technical development, the TET report, in Appendix B, states:

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Assessment:

The Capability Assessment demonstrated an FS21 system that has considerable design, development and integration completed. The briefing and proposal information show some development to be accomplished (most appear[s] minor except for the ********** and integration activities that also appear to be relatively minor. The schedule shows activities starting on ********** **** ********** ******* ********* ********** *** **********. The schedule is aggressive, but is substantiated and viable. The design is comprehensive and substantiated by current system capability deployments and the results of the CA.

The PSP proposal for the FS21 System Architecture hardware and software development is a strength for the following reasons:

a. The elements making up the FS21 system architecture are systems that have been developed and implemented throughout the world in similar applications.
b. ******** and ******* are complementary products providing flight planning and weather information capability. Each is currently in operational use in the flight service environment of airline operations centers. Integration of the two was demonstrated at the CA.
c. The degree of tailoring to the specific flight service applications called for in the SIR is minimal, as was demonstrated at the CA[.]
d. The major elements ********** ********** ******* have a significant amount of integration complete, as demonstrated, and the remaining integration activities ******* *** ***** ********** ********** appear to be realistic and viable within the proposed schedule.
e. The schedule shows activities starting on ********** ********** **** ********** *** ******* ********* **** ********** *** *** ********** *** ********** **** **********.
f. The schedule is aggressive but is substantiated and viable.
g. The design is comprehensive and substantiated by current deployments and the results of the CA.

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Impact:

> The maturity and design of the Architecture has a high likelihood of supporting the proposed schedule for design, integration and implementation of the FS21, which calls for completion of all facility operational capability within ******** months of Contract Award. There is a moderate probability of successfully meeting the schedule and providing significant service improvements and improved customer satisfaction almost a year early.

TET Report, app. B (PSP2) at 111 (POE 154).

96. One of the components of Lockheed's proposed FS21 system is the Redflex voice switch. The record contains a declaration given under penalty of perjury by Mr. Bradley K. Kay, the chief executive officer of the Redflex subsidiary located in Reston, Virginia. He explains that the voice switch which Lockheed is utilizing in its FS21 system is the Redflex GEN3 Switch*plus*®. This is said to be an entirely different and upgraded version of the GEN2 switch that was offered by a vendor in 2001 on an FAA procurement of voice switches to replace the voice switches in FAA's then-existing AFSS systems. The vendor's proposal was rated ******** for several reasons including weaknesses the evaluators claimed to have found **** *** ******** ****** **********. Lockheed Comments,[9] Exhibit 2, Declaration of Bradley K. Kay (May 18, 2005) at 1-2.

97. Mr. Kay has also explained in his declaration that the GEN3 switch, introduced in 2003, ***** ****** ********* **** ********* ********** ******* **** **** **** **********. In addition, ********** ********** ********** ****** ******* ********* ***** ******* ******* **** *** ********* *** ******** *********. Mr. Kay also notes that, in addition to the difference in the switches offered in the two procurements, the technical requirements in FAA's 2001 procurement were entirely different from technical requirements for the voice switch in the Lockheed FS21 system. In the 2001 procurement, FAA was seeking a voice switch that would replace existing voice switches and fit in then-existing AFSS systems. In the current competition, offerors are being encouraged to propose new AFSS systems. Finally, Mr. Kay states that the GEN3 switch has been successfully deployed in six countries since 2003,

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[9] This reference is to comments filed by counsel for Lockheed on May 20, 2005, in reply to the Program Office Submission of May 9, 2005.

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including at a United States Air Force center in the United Kingdom (RAF Mildenhall). Kay Declaration at 3-4.

98. In this procurement, FAA is offering as government furnished equipment (GFE) its terminal data display system (TDDS). Included in the TDDS is a system referred to as SUA/ISE. Solicitation, Technical Exhibit C-1 (POE 195). This is a technical system used by FAA to keep track of special use airspace (SUA). SUA service is one of the specific tasks included in both preflight and inflight services. Counsel for Lockheed explains that to provide this service, data feeds must be obtained from outside data sources to reflect the most current SUA information and data must be displayed and provided in a way that takes into account time and scheduling issues, because some SUA restrictions apply only on certain dates or at certain times of the day. Lockheed Comments at 53.

99. In its technical proposal, Lockheed advised that it did not intend ********** **********. The rationale offered is: "********** **********." Lockheed Proposal, vol. 1, figure 5-6 at I-5-17.

100. The record contains a sworn statement from Richard Thoma, Director of Technical Operations Support within FAA's Air Traffic Organization. His program responsibilities include the Technical Operations Certification Program. This program is responsible for certification requirements within the national air space and renders positions on all NAS certification issues for legacy, new, and emerging systems. He explains:

> Certification is typically required for systems that enable the movement of aircraft in the National Airspace (NAS), i.e. Communication, Navigation, Surveillance, (CNS) and Information about the aeronautical environment.
>
> Systems that assist with the management of air traffic are typically not certified, i.e.: flow control systems, traffic count systems, and aircraft sequencing systems.
>
> Since certification is designed to limit the Agency's liability through the mechanistic application of maintenance procedures and review, the Agency does not certify systems that it does not own, even if those systems perform similar functions that the Agency would certify if it owned those systems.
>
> . . . .

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> The decision to require certification is based on the liability of ownership. If the Agency owns the system AND it provides one or more of the functions published as criteria in Order 6000.15D (CNS/I), then certification is required by my office.
>
> My certification program office reviewed the issue of whether service certifications would need to be done at the Automated Flight Service Station (AFSS) locations after transition of ownership. In the case of AFSS, my office has determined that the Agency will not require any system certifications; but rather will require service certifications. Additionally, the service provider must ensure it is maintaining its systems to the manufacturers' standards.

POE 218.

Difficulties within the Factor * Technical Evaluation Team

101. During the course of the technical evaluation, a problem emerged among the members of the Factor ***** Evaluation Team **********. According to several members of the team, including one technical advisor, one member of the team, **** ********, was particularly defensive of Lockheed's proposal. These other members of the team considered *** conduct offensive and inappropriate. ATO Comments, Exhibit 3.

102. One member of the Factor ******* Team, **********, went so far as to make contemporaneous notes regarding ********** behavior during some team meetings. On one instance ******** wrote:

> **********arguing on yesterday's work that it was not (w)[eakness]. I said we know you love Lockheed, but we have to do this work. ******** said several times "I am furious because my scenario is not being used." Late in the day we were working on ********'s [draft] weakness and ********* was arguing against it, and ******** said "********** it's like you won't let any weakness go forward for this vendor [Lockheed]." ********started screaming "Get management, this meeting's over. I've been accused. Get Management." Then, right in [the Team Lead's face] ******** said "Get F . . . mgmt." ********* *** was throwing ******** book and glasses across

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> the table and I said cut it out if you can't control your anger go walk around and cool off.

ATO Comments, Exhibit 2. ********* also recorded in ********* notes that during the course of the technical evaluation, ********* entered the room saying:

> I have a new favorite **********'s plans are not executable. . . .******** takes the longest. What part of Fantasyland were they in when they wrote this? Just declare ****** unacceptable and move on.

Id.

103. ********** subsequently testified in a deposition that on September 15, 2004, early in the technical evaluation process, ********** had talked to ****** ********** ***, where********* was already reviewing proposals. At that time, ****** expressed the opinion that the ********** proposal was the best and better than Lockheed's. Deposition of ********** (Apr. 19, 2005) at 50 (POE 208). When asked why this comment was of concern to ********* stated:

> Because we had been told to be impartial. We were not to compare the proposals to each other at all. We were only supposed to evaluate each proposal on its own merits. It was not our job to pick which was the best or not best or -- so I was concerned about ******** making those remarks.

Id. at 51-52. ********* also testified during ******** deposition that ******** had occasion to discuss privately with the Factor* Team Lead, ********** concerns about ** ********* general comments early in the evaluation process regarding the various proposals. In ******** deposition, ******** quoted the Team Lead as admitting that this is a problem and that ******** knew ********** has a "grudge" against the MEO. *Id.* at 64. *******. ******** also testified during ********deposition that, in mid-December, when the Factor* team was coming to the conclusion of its deliberations, ********** was not present, but rather, at home taking care of ********** and apparently not in contact even with the Factor* Team Lead. *Id.* at 154, 156-58.

104. FAA's Office of Competitive Sourcing (OCS) had the lead responsibility for the A-76 competitive acquisition which is the subject of these contests. Deposition of******* ******* (Apr. 20, 2005) at 54-55 (POE 209). ******* was a member of that office and **********. *Id.* at 88. ********** had been assigned to serve on

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the Factor *Evaluation Team. Following the incident involving **********'s angry outburst, recorded by ********** first line supervisor met with ******* reported ******* to be "remorseful and visibly upset." Following this meeting, ******* sent ******** home on administrative leave. ****** then assigned an OCS staff member, **********, to look into the situation. ATO Comments, Exhibit 3.

105.******* thereupon spoke to several persons with firsthand knowledge of what was occurring during the evaluation sessions. ******** subsequently provided the Deputy Director with written summaries of ********discussions with these persons. The Factor* Team Lead was said to have described ******** as "always abrupt, rude, insulting, and loud." The evaluator who had allegedly precipitated ****. ********** outburst, ***** *****, explained that ****** comment to ******* was the result of frustration at the lack of progress during the consensus discussions. ******. ********* explained that ****** apologized to ******. ******** following the incident but *** apology was not accepted. ******** also interviewed *******. All of those with whom ******* spoke confirmed the inappropriate behavior of **********. ATO Comments, Exhibit 3.

106. The OCS Director subsequently gave *******. ******** a verbal reprimand, as did ******** immediate supervisor. **** was advised by the Director that ******** behavior in the evaluation sessions was inappropriate and counter-productive and would not be tolerated. The Director also called for ********** thereafter during Factor ****** team sessions. ******** was not permitted to participate thereafter in Factor ****** team deliberations **********. ******* Deposition at 92-99 (POE 209).

107. Various members of the Factor ****** Evaluation Team who confirmed the objectionable behavior of ********** have, nevertheless, stated in sworn declarations that *********s behavior during team sessions did not impact adversely their evaluation of proposals. POEs 214-217.

108. ******* has stated in ****** affidavit that with the exception of ******** and, on occasion, the Team Lead, *******, all other evaluators on the Factor **** Team listened to each other's views and collegially debated the individual merits of each proposal. ****** is of the opinion that the Factor ***** strengths and weaknesses included in the TET report are accurate and that the factor ratings given to the PSPs are accurate. Affidavit of ******* (Apr. 28, 2005) (POE 214).

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109. ********, the Factor * Team Lead, explains in ********** sworn statement that, although ****** participated in discussions, ******** did not act as an evaluator. ******* stated reason for this was that, as Team Lead, ****** thought this would permit ****** to lead discussions in an objective manner. ****** further states that ******** believes all Factor *** team members, including ******** listened to each other's views. Although it may have been perceived by others that ******** did not listen to them, ****** believes that **. ******** did listen. Nevertheless, if the discussion was not backed by fact and presented in an orderly fashion, ******** considered it a waste of time. In the final analysis, the Factor * Team Lead likewise expressed the opinion that the strengths and weaknesses included in the TET for all PSPs are accurate. Affidavit of ********** (Apr. 29, 2005) (POE 216).

110. ********** , another member of the Factor *** Evaluation Team has likewise confirmed in a sworn statement that, although ********** actions were characterized by some as an impediment to the efficient workings of the team, they did not impact ****** assessment.***** has further stated that ***** believes that the Factor ******* strengths and weaknesses included in the TET Report are accurate. Affidavit of ********** (May 4, 2005) (POE 217).

111. *********, in ******** own sworn statement, observes that although *******. *********s actions were an impediment to the efficient workings of the team, they did not impact ****** own assessment of the proposals. ****** likewise is of the conviction that the Factor * strengths and weaknesses included in the TET report for all PSPs are accurate -- as are the ratings given to the PSPs by the Factor **** team. Affidavit of ****** (Apr. 28, 2005) (POE 215). Furthermore, in ********* deposition, ******** repeatedly affirmed that ****** did not believe the competition which is the subject of these contests is "slanted in favor of Lockheed." ******** Deposition at 172-74 (POE 208).

112. Notwithstanding*******'s alleged favoritism for the Lockheed proposal, FAA counsel has provided for the record data retrieved from the Decision Point data base indicating that, with regard to the MEO proposal, ********* entered ******** strength and ******** weaknesses and, with regard to the Lockheed proposal, *******strengths and ********* weaknesses. POE 206.

113. In addition to recording remarks by ********* during the evaluation process, ******* also recorded a remark made by Factor ***** Team Lead,******. It reads: "Team Lead . . . said at 9:45 a.m., this A-76 effort is all about union busting anyway." ******* Deposition at 73 (POE 208). When asked about this remark at ******* deposition,

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******** explained that **** considered the comment very inappropriate for the Team Lead. Nevertheless, **** further stated that **** was not aware of any other comments from the Team Lead which might be considered anti-union. **** claims to have no idea why the remark was made and was not aware of any other remark from the Team Lead which might have indicated a desire or preference to eliminate or harm the union. *Id.* at 74-76.

114. The Factor ***** Team Lead in ***** sworn statement readily admits that **** stated that the competition was all about "union busting." ****** explains that this was an obviously poor way to make a joke to relieve tension. ***** states that **** made the comment at the end of a very confrontational discussion during which ******* had half-jokingly suggested that the MEO should get additional points just because it is the MEO.******** believes that, to defuse what ******* describes as a "very tense situation" at the time, ********* may have replied, as the team was preparing for a break, something to the effect: " . . . you just don't get it, this is all about union busting." ******** Affidavit (POE 216). As to *****. ********* claim that********** once admitted to ******* that *****. ********** had a "grudge" against the MEO, ****** is not even certain that **** made the remark. Nevertheless, ******* states that, if ****** did make such a statement, ******* believes that it grew out of heated debates in which ****** was vigorously arguing in favor of the MEO and********* had an equally vigorous opposing view. *Id.*

Designation of *Influential* Strengths and Weaknesses in the TET Report

115. Appendix B of the TET Report contains the full set of detailed narratives for all strengths and weaknesses the technical factor evaluation teams concluded to be in each proposal they evaluated. Each narrative contains multiple references to those sections of each offeror's proposal which support the team's conclusion regarding the existence of the specific strength or weakness. POEs 153-157.

116. With regard to the origin of the designation of certain strengths and weaknesses as "influential," in the TET Report, the TET Lead has provided the following explanation:

> In the course of performing my duties, I never had the occasion to make TET final decisions when consensus could not be reached. All of the findings o[f] strengths and weaknesses, including those identified as influential, were the result of team consensus.
>
> . . . .

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> As part of its duties, the TET assigned a rating for each Technical Factor. To ensure a complete record of its deliberations, each Factor Team included a Rating Rationale for each offeror to explain to the SSEB why the Factor Team assigned a particular rating. Although the Ratings were based on all of the strengths and weaknesses and their impacts, each Factor Team believed that for each vendor, there were some strengths and weaknesses with a greater impact than others. The Factor Teams described these as influential strengths and weaknesses because they had more influence in determining the factor rating. What caused some strengths and some weaknesses to bear more heavily was a result of each Potential Service Provider's unique solution and the judgment of the Evaluators. The determination of strengths and weaknesses as influential was done in consensus by each Factor Team and was included in the TET report signed by each Evaluator. There was not a single occurrence of any strength or weakness being designated as influential other than as part of the Factor Team consensus process.

********** Affidavit at 2 (POE 212).

117. In **********deposition, ********* testified that the designation of some strengths and weaknesses as "influential" was not done by the technical evaluators and that ******** did not know who had made them. ********** also stated that the evaluators were not consulted about the designations. ******* Deposition at 176-79 (POE 208). Upon further reflection, however, ********** has corrected ****** testimony in an affidavit signed after ******* deposition. In it ********** states:

> To the best of my knowledge and belief, prior to developing the report and the Factor Rating, the Team had not prioritized the strengths and weaknesses nor had it declared any of the strengths to be more influential than others.
>
> In the TET Report, the entire group decided the strengths and weaknesses that most influenced the factor rating in consensus before the report was signed.

***** Affidavit (POE 215). Three other members of ******** Factor **** Evaluation Team have likewise provided affidavits attesting that the determination of the influential strengths and weaknesses was the result of the team's consensus process. ******* Affidavit (POE 214); ******* Affidavit (POE 216); ********* Affidavit (POE 217).

<u>The Cost Evaluation Process</u>

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118. The Cost Evaluation Team Report (the CET Report) for this competition provides the following summary description of the process followed for the cost evaluation of the cost proposals submitted by the five PSPs:

- The CET began the evaluation by reviewing each Technical Proposal submitted by the PSPs. This was done to gain a general understanding of the technical approaches to meeting the SIR RFO requirements.
- Members and advisors of the CET then reviewed the Cost Proposals individually and in a collaborative group. The CET established a consensus and released Discussion Items (DIs) consisting of Clarification Requests and Deficiency Reports, to the PSP . . . . In addition to responding to the CET's DIs, the PSPs were required to identify any corresponding changes in their Cost Proposals that were in response to DIs from the Technical Evaluation Team (TET).
- Following the initial review, the CET conducted a second review of each proposal. In addition, the CET reviewed the PSPs' responses to the initial set of DIs. Following each member's individual review, the CET met again in a group to establish a consensus for issuing a second set of DIs to the various PSPs.
- The CET reviewed the PSPs' responses to the second set of DIs and conducted a third review of the PSPs' proposals. Any outstanding issues were formulated into cost risks and are identified in the [CET's] report.
- Two members of the TET participated as members of the CET in the evaluation process. Following their review of the Technical Proposals, technical advisors joined the CET in reviewing the Cost Proposals. This review consisted of working with other CET members to verify that the items identified in the Technical Proposals were adequately addressed in the Cost Proposals. Any areas in the Cost Proposals that did not appear realistic were introduced in team consensus and submitted as DIs by the CET, as discussed above. These technical advisors originally reviewed redacted versions of the Cost Proposals; however, the redacted versions did not provide sufficient information to determine cost realism. Thus, the technical advisors were given full access to the Cost Proposals to ensure a thorough analysis.
- Each PSP conducted a Capability Assessment (CA), which was an opportunity for each PSP to demonstrate its technical solution and answer a set of pre-formatted questions submitted by the TET. Several

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> CET members were assigned to attend the CAs to verify that elements of the PSP's technical solution were consistent with their Cost Proposals (e.g., FTEs [full time equivalent positions], capital equipment, and facility locations). The CET members participated in break-out sessions and in proposing questions to the PSPs. At the conclusion of the CAs, each PSP was given an opportunity to modify its Cost Proposal in response to any changes in its Technical Proposal.

CET Report at 3 (POE 169).

Evaluation of MEO's and Lockheed's Cost Proposals

119. The CET Report states that each of the PSPs' cost proposals was evaluated in accordance with Section M of the solicitation. As stated in Section M, the team calculated the total evaluated cost (TEC) for each proposal in accordance with the standard competition form as called for in OMB Circular A-76. Although the TEC varied among PSPs due to differences among the PSPs' technical approaches, pricing methodology, indirect rate structure, proposed profit, and other factors, all contained estimates of cost that the CET deemed both reasonable and realistic for the work proposed. The results, in millions of dollars, were as follows:

PSP 1	PSP 2	PSP 3	PSP 4	PSP 5
*********	[Lockheed]	[The MEO]	**********	**********
*********	$1,900	$2,066	**********	**********

CET Report at 1 (POE 169).

120. In addition to calculating the TEC for each proposal, the CET also reviewed the cost proposals for compliance with section L of the solicitation, cost realism, reasonableness, and total ownership cost (TOC). *See* Findings 22, 25-26. All proposals were found to be compliant with the information requirements in section L of the solicitation. The TOC of each proposal was found to fall below the annual ceiling, the five-year aggregate ceiling for the base period, and the option period provided in the solicitation. *See* Finding 25. The CET Report likewise confirmed that the CET found all five of the PSPs' total evaluated prices to be reasonable based upon competition and below the Government's own independent

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estimate. The proposed costs of each PSP, including labor rates for flight service specialists, were found to be realistic for the work to be performed, to reflect a clear understanding of the requirements, and to be consistent with the unique methods of performance and materials described in the PSPs' technical proposals. CET Report at 4-6 (POE 169).

121. At the conclusion of the cost evaluation process, the CET found no remaining issues in the Lockheed proposal which suggested any potential cost risk. Two such risks, however, were identified in the MEO cost proposal. The first concerned the relocation costs proposed by the MEO. The agency tender had allocated $10,000 per employee for relocation assistance. This was lower than the minimum budgetary estimate of $25,000 used by the FAA HR office for standard Government permanent change of station costs. The CET concluded that, if the relocations did not occur as planned, the MEO might incur delays and/or additional costs. In view of the aggressive relocation and staff reductions planned, this was perceived as an increased business risk. Given the $15,000 difference between the FAA estimate and that used in the MEO proposal, the CET concluded that, for the proposed number of 1101 individuals to be relocated, there was a potential $15 million cost for the transition period. CET Report at 7 (POE 169).

122. The second cost risk identified for the MEO's proposal concerned a ****** ******* reduction in the ********** subcontract with ********** Corporation, which the MEO had included in its proposal. Since negotiations were still ongoing on this reduction, the amount in question was seen as a potential cost risk. CET Report at 7 (POE 169). Counsel for Ms. Breen has provided for the record a declaration given under penalty of perjury by **********, an employee of ********* Corporation who was a key interface with the MEO on the overall development of the MEO's proposal. ********** states that, at the time of the CA, ******** was fully cognizant of, and in agreement with, the adjustments the MEO had made to the ********** proposal. ********* further explains that, at the time of the award to Lockheed, negotiations between ******* and the MEO were "at an advance state." **** explains: "Even though the MEO and ******** had not completed final negotiations, agreement had been reached on all the major points of the ******* contract." Declaration of ********** (May 17, 2005) at 3.

123. During the course of the evaluation of Lockheed's cost proposal, a member of the CET noticed that, for the ********* the proposal ********** ***** ********** ********** **********. A CR was generated asking the PSP to clarify this apparent inconsistency between its technical and cost proposals. Breen Comments, Exhibit 4.

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124. In a response dated November 5, 2004, Lockheed replied that the ********** related to the concept of operations which ********** **********. The cost proposal, ********** related to the entire ten-year plan. For the ********** Lockheed explained that it ********** its FS21 productivity improvements and the ********** ********** ********** *** ***. Breen Comments, Exhibit 5.

125. Lockheed's explanation regarding ********** ********** raised a question in the mind of the TET Lead. In a sworn statement, ******* writes:

> It was clear to me that the TET had fulfilled its obligation to evaluate the ********** part of the end-state as defined in the SIR and the full 10 year staffing plan; but it was also clear that I, as the TET Lead was responsible to ensure that contradictory or ambiguous results among evaluators was [sic] resolved. Having the apparent inconsistency in hand, I met individually with each of the affected Factor Leads to ask if having the "new" information ********** would have generated any weaknesses or strengths not already identified and if that information would have any impact on the consensus based rating. I asked that those Team Leads discuss the information with their team and report back to me with the results. Each Team Lead reported that no additional weaknesses (or strengths) would have been generated and that the Factor Rating would not have been impacted. I considered the information at hand and ensured that the information was included in both the Technical Evaluation Report and SSEB Report as a fact related to the Lockheed Martin Proposal.

********* Affidavit at 2 (POE 212).

<u>The Deliberations of the SSEB</u>

126. The SSEB Report summarized the TET's technical ratings as follows:

Factor/PSP	PSP 1 **********	PSP 2 [Lockheed]	PSP 3 [MEO]	PSP 4 **********	PSP 5 *********

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Technical Factor 1: Phase-In	**********	Excellent	Good	**********	**********
Technical Factor 2: Staffing and Management	**********	Excellent	Satisfactory	**********	**********
Technical Factor 3: Service Delivery	**********	Excellent	Satisfactory	**********	*********
Technical Factor 4: Performance Management	**********	Excellent	Satisfactory	**********	**********

SSEB Report at 7 (POE 185).

127. The SSEB report contains the following statement regarding its review of the TET Report:

> The SSEB has reviewed the strengths and weaknesses and associated impacts in the [TET Report] including Appendix B. The SSEB has determined that the strengths and their impacts which most influenced the factor ratings are benefits, except where specifically noted. Similarly, the weaknesses and their impacts which most influenced the factor ratings are risks, except where noted. The SSEB also concluded that the strengths and weaknesses noted in Appendix B of the Technical Evaluation Report for each PSP, in general support and are consistent with the ratings assigned by the TET.

SSEB Report at 5 (POE 185).

128. The SSEB did not accept one weakness identified by the Factor 2 Evaluation Team, namely, that the MEO had not comprehensively addressed the time which would be needed for negotiations with the union. (Findings 72-73). In its report, the SSEB explained that it did not consider the TET's finding in this regard to constitute a risk. The SSEB Report reads:

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> The SSEB has received information from the Agency's HR organization that sufficient time exists between the decision and the end of Phase-In to conclude any bargaining necessary to implement the necessary changes. The SSEB therefore does not consider it to be a risk in making the overall best value recommendation.

SSEB Report at 24 (POE 185).

129. Another weakness reported to the SSEB by the TET which was not accepted by the SSEB was that found in the MEO proposal concerning the lack of an approved sole source justification for the MEO's major subcontractor. This, however, was not among the weaknesses identified by the TET as most influential but rather appears amidst the less influential weaknesses listed in Appendix B. TET Report, app. B (PSP3) at 202. In its report the SSEB stated:

> The SSEB considered the TET's weakness with the lack of an approved sole source justification for [the MEO's] major subcontractor. The SSEB has reviewed the information presented by the PSP and found that sufficient information was provided to substantiate the existence of [a] single source determination. Therefore, the SSEB did not consider it a risk in making the overall best value recommendation.

SSEB Report at 32 (POE 185).

130. Once it had completed its review of the TET Report, the SSEB undertook a comparative analysis of the five proposals, bearing in mind all benefits and risks determined to exist in each proposal with regard to the four technical factors. SSEB Report at 20-21, 24-25, 31-33, 38-40 (POE 185).

131. Having completed this comparative analysis, the SSEB concluded:

> [T]he PSPs' technical proposals fall into three categories
>
> - In the first category is PSP 2 [Lockheed], which in the opinion of the SSEB clearly provides the best technical solution with the greatest benefits and lowest risk. This is demonstrated by the fact that for each technical factor, PSP 2 provided greater benefits than any other PSP.

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- In the second category are PSP 3 [the MEO] and ********. ********* These two PSPs had identifiable benefits and risks in all the factors and when compared to PSP 2 have proposed technical solutions of lesser merit. However, it is the opinion of the SSEB that given enough time and attention, the PSPs in this group could perform the contract.
- In the third category are ********* and **********. It is the opinion of the SSEB that many of the risks associated with PSP******* and PSP ******** proposals that they [sic] could not be remedied without a substantial delay in schedule and substantial Government oversight in order to perform the contract.

SSEB Report at 40 (POE 185).

132. With regard to the SSEB's review of and reliance upon the CET Report, the SSEB Report states that the SSEB did take into consideration the various cost risks identified by the CET. Noteworthy for this case, however, is the fact that the cost risk the CET found in the MEO's proposal relative to relocation assistance was rejected as a risk by the SSEB. The reason given is that the agency budgetary estimate on the cost of relocation was not deemed to be sufficient evidence of risk. SSEB Report at 44 (POE 185).

133. The SSEB Report also notes that, although cost risks identified by the CET were identified and quantified, they were not added to the TEC or the TOC and that the TEC was recognized as being the cost factor to be considered by the SSEB and subsequently the SSA in the best value analysis. SSEB Report at 41, 44 (POE 185). Using the TEC for comparison purposes, and based upon the information provided by the CET, the SSEB arrived at the following conclusions regarding overall cost assessment:

- PSP ********* is the low cost solution, but there is a cost risk associated with the TEC.
- PSP 2 [Lockheed] is minimally higher (*%) than PSP 1 and the proposal contains no identified cost risk to the Government.
- PSP 3 [the MEO] is ****% higher than PSP 1 and the proposal contains cost risk.
- PSP 4 **********is*% higher than PSP 1.
- PSP 5 ********** is *% higher than PSP 1, and contains cost risk.

Id. at 44.

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134. The SSEB Report describes the SSEB's best value analysis as follows:

In performing its Best Value analysis, the SSEB considered carefully the definition in Section M of the SIR which states in pertinent part "Best value will be the combination of the impact of the overall benefits, risk, and cost for the delivery of effective Flight Services to support safe and efficient flight." The SSEB also was mindful of the fact that the established Best Value analysis explicitly states that the combined Technical Factors are more important than cost. [A footnote to this paragraph states "'Cost' as used in this analysis refers to the Total Evaluated Cost that is the cost evaluation factor to be considered in the Best Value analysis in accordance with Section M."]

The SSEB began this best value analysis by analyzing the PSP with the best technical solution, PSP 2 [Lockheed]. This proposal clearly provided the greatest benefit to the Government. All other PSPs provided fewer benefits and had greater risks.

Next, the SSEB considered PSP 2's cost relative to the other PSPs. The SSEB noted that PSP 1 ******** proposed a lower cost, with an associated risk, than PSP 2. The remaining analysis focused on whether the greater benefits and lower risks in PSP 2's proposal were worth the difference in cost between PSP 2's proposal and the presumably lower cost PSP 1 proposal.

In doing its analysis, the SSEB took several facts into account that it believed were relevant to the comparison. First and foremost, the SSEB considered the substantial difference in benefits and risk versus the minimal difference in cost between the two PSPs. In particular, the SSEB considered that many of the technical risks associated with PSP 1's proposal not only lead to a delay in reaching End-State, but also indicate[ ] possible long term problems in the solution. These would be present throughout contract performance and affect service delivery on a continuing basis.

Overall, the SSEB considered that the benefits PSP 2 offered were far superior to those offered by PSP 1. In the SSEB's opinion, even without the risks to PSP 1's Total Evaluated Cost as considered above, the benefits to the agency offered by PSP 2 would more than offset the minimal cost difference.

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SSEB Report at 45 (POE 185).

The SSA's Performance Decision

135. The SSA for this competition is FAA's Executive and Air Traffic Organization's Vice President of Acquisition and Business Services. In a sworn statement he explains:

> In mid-January of this year, in my role as Source Selection Authority, I was given the drafts of the Source Selection Evaluation Board Report, the Technical Evaluation Report, and the Cost Evaluation Report. Included with these draft reports were Appendix B, the detailed analysis of the strengths and weaknesses of each proposal, and Appendix C, the detailed discussion items. I reviewed each of these reports, but focused my attention on the Source Selection Evaluation Board report, the Technical Evaluation report and the Cost Evaluation Report. As I had requested, these reports did not disclose the names of the Potential Service Providers (PSPs) and instead referred to the PSPs by number (PSP 1, PSP 2 and so forth).
>
> I then met at least twice, for several hours each time, with various members of the Source Selection Evaluation Board, the technical evaluation team, and the cost evaluation team, to go over their reports. In each case I asked a series of questions based on my review of their reports, and in particular, to make sure that what was stated in the reports was accurate and fully substantiated. I also probed to see that the evaluation process described in the solicitation and in the evaluation guides was followed. One area of concern to me was the lack of any risks associated with the PSP 2 [Lockheed] proposal. I asked a number of questions to assure myself that although there were weaknesses associated with this proposal, none of those weaknesses constituted a risk, and that the Source Selection Evaluation Board's Technical Evaluation Team's and the Cost Evaluation Team's position concerning their evaluation of PSP 2 were fully supported. All of my questions were answered to my satisfaction. The reports, which had been drafts, were then finalized based on the discussions I had with the team members.

Affidavit of Dennis DeGaetano (May 6, 2005) at 3-4 (unnumbered) (POE 210).

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136. In his performance decision memorandum, the SSA explained his selection of PSP 2, Lockheed, as follows:

> I considered whether the technical differences between the technical proposal with the greatest merit (i.e., PSP 2) and the technical proposal of the one offeror with a lower cost (i.e., PSP 1) were worth the price difference between the two proposals. I did not consider PSP 3, PSP 4 or PSP 5 in the "best value" trade-off analysis because they all had proposals with higher costs and lesser technical merit than PSP 2. In making my decision, I took into account that technical factors, in aggregate, were more important than cost factors. For the reasons stated in the SSEB Report I also find the benefits of PSP 2's proposal to more than compensate for the minimal price difference between the two proposals even without considering any cost risk to PSP 1's proposal. When the cost risk identified with the PSP 1's proposal is also considered, however, the decision of best value in favor of PSP 2 becomes even more apparent.
>
> It should also be noted that throughout my review and consideration, all of the information provided to me referred only to the offerors by their numbers (i.e., PSP 1 - PSP 5) and that no names of companies were attached to its corresponding PSP number.

POE 186.

Discussion

Standard of Review

ODRA's Procedural Rules for Contests of A-76 Competitions provide:

> In arriving at findings and recommendations relating to contests, the DRO [Dispute Resolution Officer] or Special Master shall consider whether or not the action(s) in question had a rational basis, and whether or not the performance decision under question was arbitrary, capricious or an abuse of discretion. Findings of fact underlying the recommendations must be supported by substantial evidence.

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ODRA Contest Rule 15(j). Moreover, the ODRA will not recommend that the Administrator overturn Agency actions, so long as they have a rational basis, are neither arbitrary, capricious, nor an abuse of discretion, and are supported by substantial evidence. *Protest of Four Winds Services, Inc.*, 02-ODRA-00219 *and cases cited therein.*

In a best value procurement such as that which is the subject of these contests, ODRA has held that it "will not substitute its judgment for that of a Product Team, so long as the Team's source selection decision is consistent with the FAA's Acquisition Management System (AMS) and the specific evaluation criteria and is supported by the record." *Protest of L. Washington & Associates Inc.*, 02-ODRA-00232, at 7.[10]

It is well established that in a case such as this, the contester bears the burden of establishing prejudice. Even where agency actions are found to have lacked a rational basis or were otherwise erroneous, a contest will not be sustained unless the contester "demonstrates a reasonable possibility of prejudice, that is, unless the protester demonstrates that, but for the Agency actions, it would have had a substantial chance of receiving the award." *Protest of Enroute Computer Solutions*, 02-ODRA-00220, at 9; *see also Protest of L. Washington & Associates* at 9 (even if one of protester's ratings were improved, the best value result would have been the same given the awardee's generally better ratings).

FAA's performance decision and selection of Lockheed will be evaluated against these standards of review.

The contesters in these two cases have challenged virtually every phase of this procurement once proposals were submitted. They have questioned the adequacy of discussions, the reasonableness of the technical evaluation, the accuracy of the cost evaluation, the validity of the SSEB deliberations, and the correctness of the SSA's performance decision. For the sake of clarity, it seems best to consider their complaints in a chronological sequence, starting with the allegation that FAA did not conduct meaningful discussions with the MEO. Before doing so, however, the allegation of bias should be addressed as a threshold issue since, in the minds of the contesters, this alleged bias has tainted the entire procurement.

Contesters' Allegations of Bias

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[10] All ODRA decisions cited herein are available at http://www.faa.gov/agc/odra.

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Ms. Breen in her contest alleges overt bias against the MEO and favoritism toward Lockheed by at least two of the evaluators, including a team evaluation leader -- referred to by the parties as a team "lead." She likewise contends that the product team took no action to mitigate that bias or to determine the extent to which it impacted the evaluation process, the performance decision, or the integrity of the procurement. Breen Comments at 3.[11] In a similar vein, the ATO contends that the Program Office's evaluation of the agency tender was biased and, as a result, the agency tender official suffered irreparable competitive prejudice. ATO Comments at 3.

Both contesters base their allegations on a relatively limited number of facts. Counsel for the ATO writes:

> The best evidence of the anti-MEO and pro-Lockheed bias and resulting competitive prejudice are ******. ********* contemporaneous notes, *** deposition testimony, and the notes prepared by ********, the [FAA] employee who investigated ********* complaints about **********.

ATO Comments at 7.

There is little reason to doubt the accuracy of the contemporaneous notes of ******. ******** deposition testimony, or the notes prepared by *******. They do not, however, establish anti-MEO and pro-Lockheed bias. What has been established is simply that the members of one of the four technical factor evaluation teams, the Factor* Team, had strong opinions as to the merits of every proposal they evaluated and one member in particular did not conduct ******** in accordance with guidance provided to evaluators prior to the start

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[11] Rather than cite to the multiple allegations in the contesters' initial and various supplemental pleadings, this discussion cites instead to allegations contained in extensive comments (briefs) filed by the contesters on May 20 in response to the Program Office's Report of May 9. In filing these comments, counsel for the contesters have integrated and reorganized their initial allegations into a helpful and more manageable format. To the extent that an allegation made in the initial pleadings was not addressed in those comments, it is treated as either abandoned or unproven. In the discussion that follows, the ATO's submission is referred to as the "ATO Comments," and that of Ms. Breen as "Breen Comments." The Program Office Report of May 9 is referred to as the "Agency Report." The submission of the intervenor, Lockheed, also filed on May 20 and already identified in Finding 96, is referred to as "Lockheed Comments."

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of evaluation and was offensive and overbearing to *** team members once the evaluation was under way. Findings 101-03. This, however, does not constitute bias or prejudice.

Bias or prejudice -- as the term "prejudice" implies -- involves prejudging in advance of the facts. As the Program Office's counsel point out: "Central to the concept of bias is that it is a preconceived opinion based on something other than the facts at issue." Agency Report at 121. In a similar vein, Black's Law Dictionary defines "prejudice" as "a preconceived judgment formed without a factual basis; a strong bias." Black's Law Dictionary 1198 (7th ed. 1999). The United States Supreme Court itself has recognized that a principal source of bias is the prejudgement of facts. *Gibson v. Berryhill*, 469 U.S. 45, 105 (1973).

Nothing in the testimony of ******** suggests that ********** harbored any predisposition or predilection toward Lockheed prior to the evaluation. Rather, ***** favorable opinion was based on what ******* learned from a review of Lockheed's proposal. Indeed, according to ******** notes, at one point in the evaluation process, ****** had a "favorite" other than Lockheed. Finding 102. Nor is there any evidence in the record to support the contesters' allegation of institutional bias. The Program Office is charged with responsibility for managing the FAA's A-76 competitions in accordance with its adaptation of the OMB Circular. Finding 104. This by itself certainly does not establish any basis for attributing bias to those officials -- especially where, as here, there is a record detailing this competition's evaluation of proposals, its deliberations, and the rationale for the selection of Lockheed. Finding 104.

Neither would it appear that ********** unacceptable and burdensome behavior had any adverse impact on the deliberations of the Factor **** team members. ****** reported that, although********* actions were an impediment to the efficient workings of the team, they did not impact ****** own assessment of the proposals. Finding 111. Three of ********** team members also confirmed in their own affidavits that the determination of influential strengths and weaknesses was the result of the teams's consensus process. Finding 117. ******* also repeatedly affirmed that this competition was not "slanted in favor of Lockhead." Finding 111. The record indicates that the team did not hesitate to confront ****** in a constructive fashion, and when management became aware of the problem, prompt action was taken to rectify the situation. Restrictions were put on ********* ********** at the team meetings while still ensuring that ****** would have input into the team's deliberations. Any personal impact *******did have was further lessened when, toward the end of the evaluation exercise, ****** was unable to participate in subsequent meetings because of **********. Findings 104-

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06. In sworn statements the technical evaluation team members profess themselves to be entirely satisfied with the outcome of their deliberations. Findings 107-11. The record also suggests that ********** was likewise satisfied with the team's findings and technical conclusions since ******** never filed a minority report to indicate ******* dissension or disagreement with the team, and because ****** joined the other team members in signing the TET final report, thus signaling ****** approval of the evaluation's outcome.

It also should be noted here that the factual situation on which the contesters base their claim of bias was limited to incidents involving only one of the four factor teams, the Factor* Team. If there had been bias operative in Factor* Team, as alleged, then one would expect that team's rating to contrast to some degree with ratings issued by the other three teams. This, however, has not occurred. All of the teams rated Lockheed as excellent and three -- ********** -- rated the MEO as satisfactory. Finding 126.

Turning to Team Lead ******** unfortunate comment regarding union busting, in the absence of other supporting evidence, this comment taken alone is hardly enough to conclude that **** or the agency had a pre-existing bias against the union. To *** *****credit, ******* in ******* deposition states that ****** is not aware of any other remark by ******** which might confirm a negative attitude towards the union. Finding 113. This only serves to add credibility to *******. ******** own explanation of what ***** believes was the origin of the remark -- a poor effort to joke so as to relieve tension. *See* Finding 114.

As to ******* references to ********* "grudge," it is difficult to know what one should make of this remark, isolated as it is from the context in which it may have been made. Unlike *** "union busting" remark, ******* is not even sure ****** made the comment attributed to ****** regarding a possible grudge against the MEO on ********** part. Perhaps the only significant finding to be drawn from all this is that ****** own notes confirm that ********** did not limit ******* criticism to the MEO. Early in the evaluation process, after reviewing the proposals, ******** made the intemperate and gratuitous observation that, in ****** opinion, the MEO proposal had been written in fantasyland and, along with another proposal, was not executable. Finding 102. Apparently any "grudge" ******* may have had was against more than the MEO. Interestingly enough, ********'s explanations indicate that *****. ***** engaged in heated debates with ******** in which ****** vigorously argued in favor of the MEO while ****** had an equally vigorous opposing view. Finding 114. It is not implausible that under such circumstances ******* would seek and perhaps even receive from the Team Lead a half-hearted concurrence that ******* debate opponent had a grudge to bear.

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In any event, the record, in its current state, does not permit any conclusion based on this alleged statement.

The Team Lead, while confirming ********** obnoxious behavior, nonetheless also portrays ****** as one who has little patience for unsubstantiated or poorly expressed statements. Finding 109. The input from the Decision Point data base likewise confirms that, in the final analysis, ******** is capable of objective evaluation and did enter both weaknesses and strengths with regard to the proposals of both Lockheed and the MEO. Findings 112.

There is, of course, a strong presumption that government contract officials exercise their duties in good faith. *Am-Pro Protective Agency, Inc. v United States*, 281 F.3d 1234, 1239 (Fed. Cir. 2002). To overcome that strong presumption and establish that the Government acted in bad faith, a challenging party must show improper conduct by clear and convincing evidence. *Id.* at 1239-40. ODRA has held protesters to the same kind of high standard requiring "well nigh irrefragable proof" to overcome the presumption that public officials act conscientiously and in good faith. *Protest of Royealea'L Aviation Consultants,* 04-ODRA-00304 at 6; *Protest of Information Systems & Networks Corp.*, 99-ODRA-00116, at 8. Clearly the evidence relied upon here to establish bias falls woefully short of that standard. The contesters simply have not proven bias and consequently cannot claim the serious consequences that might otherwise flow from its existence.

The Adequacy of Discussions

One of the most serious allegations regarding the adequacy of communications from the Program Office is Ms. Breen's contention that the product team admits that it did not inform the MEO of alleged material deficiencies in its proposal that were later deemed influential weaknesses for two of the four technical factors. Breen Comments at 59. I can find nothing in the record to confirm that there were any "material deficiencies" in the MEO's proposal which were later deemed to be the source of influential weaknesses.

The term "material deficiency" is defined in the solicitation as "a significant failure of a proposal to meet a Government requirement or a combination of weaknesses in a proposal that increases the risk of unsuccessful contract performance to too high a level." Finding 14. While weaknesses -- indeed, "influential weaknesses" -- were found by the TET in the MEO proposal, I find nothing in the TET's comments on the MEO's weaknesses which would suggest that any of them stemmed from material deficiencies. *See* Findings 48, 51. The record shows that both Lockheed and the MEO were each

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advised of the existence of a material deficiency early in the discussion phase. Finding 48-49. These deficiencies, however, apparently were addressed early on, for neither Lockheed nor the MEO could have received the technical ratings they did for each of the four technical factors had these initial two deficiencies remained uncorrected.

Under the terms of the solicitation, FAA was required only to advise PSPs of material deficiencies in their proposals. Finding 14. Strictly speaking, therefore, FAA was not obliged to advise the MEO of every deficiency in its proposal from which weaknesses might flow. In point of fact, however, FAA did go the extra mile and provided both the MEO and Lockheed with numerous opportunities to improve upon and clarify their proposals by responding to numerous DRs, CRs, and items to be addressed during the course of their CAs. Findings 48-64.

The contesters allege, however, that these DIs and other inquiries received from the contracting officer were not handled by FAA in an evenhanded fashion, but rather, were distributed in a disparate manner in such a way as to afford Lockheed with more of an opportunity to improve on its proposal than was afforded the MEO. Lockheed is said to have been the beneficiary of DRs and CRs that addressed "every" potential influential weakness and risk considered by the TET, thus giving Lockheed the chance to cure them. Breen Comments at 59-60.

For example, Ms. Breen complains that, for evaluation Factor 1, the TET expressed no concern that the MEO could not fill the HR Liaison position before award; that, for Factor 2, the TET did not clearly and explicitly express its concerns regarding the MEO's staffing plan; that, for Factor 3, the TET was not more forthcoming regarding its concerns with the MEO's transition schedule and APLs 1, 8, and 20 (especially where an allegedly similar lack of detail on these same APLs in Lockheed's proposal did not lead to an influential weakness in its proposal); and that, for Factor 3, no DIs or other inquiries afforded the MEO with an opportunity to address its QM/QA program or credit structure. *See* Breen Comments 62-65. The Program Office and counsel for Lockheed argue in reply that various DIs did provide the MEO with an opportunity to recognize that its proposal was weak in the areas later identified by the TET. *See* Agency Report at 53-57, 66-67, 84-85, 96-97; Lockheed Comments at 133-35, 142-44, 154-57, 166-69.

Admittedly, this is a very difficult area. Under AMS § 3.2.2.3.1.2.2, the agency has broad discretion when it comes to discussions with offerors, and the exercise of the discretion not to seek clarifications or discussions under the AMS is reviewable only to ensure that it was reasonably based under the particular circumstances of the procurement.

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See Consolidated Protests of Consecutive Weather, Eye Weather, Windsor Enterprises and IBEX Group, Inc., 02-ODRA-00250, 02-ODRA-00251, 02-ODRA-00252, and 02-ODRA-00254. This is because, unlike the Federal Acquisition Regulation, the AMS does not distinguish between "clarifications" and "discussions" or mandate communications with all offerors or require the submission of new best and final offers. *See AMS § 3.2.2.3.1.22* and *Protest of Ibex Group, Inc.*, 03-ODRA-00275. Instead, under the AMS, the purpose of such communications is essentially to assure that there are no misunderstandings about the procurement, *id.*, and, as the ODRA has observed previously, to permit an FAA Product Team to "consider an offeror's failure to follow written proposal instructions as part of its evaluation of the services that might be expected of an offeror under an awarded contract." *See Protest of OPTIMUS Corporation, 98-ODRA-00096.*

Of significance to these contests, the AMS provision governing communications also cautions that such communications should not afford any offeror an unfair competitive advantage and warns against the perils of technical tranfusion and leveling. In Attachment B, ¶ D.5.c.(2) of OMB Circular A-76, the reader is referred to Federal Acquisition Regulation 15.306, where similar warnings regarding unfair competitive advantage and technical leveling are found. POE 6. Clearly, in this competition, FAA, even with the broader discretion it enjoys under the AMS, must not in its discussions with offerors accord to one any special competitive advantage or run the risk of technical transfusion or leveling.

The Program Office's counsel write that it is important to remember that the DIs issued by the contracting officer were not issued in this procurement to cure every weakness in a proposal. Rather, they were intended to ensure a mutual understanding of the requirements addressed in each offeror's proposal and to advise offerors of material deficiencies. Agency Report at 48. This, of course, is the basic purpose of all discussions in a negotiated procurement.

It is not difficult to find fault with discussions when viewing them in retrospect -- especially when this is done by those more intimately acquainted with an unsuccessful proposal than were the evaluators at the time they drafted the many DIs. Upon reading the various allegations of favoritism allegedly shown to Lockheed during the discussion process and the counter-arguments presented by counsel for FAA and Lockheed, I do not detect any pattern of favoritism towards Lockheed -- *intentional* or *unintentional.* The record confirms that there was a high volume of DIs and CA items provided to both Lockheed and the MEO. Findings 48-51, 55, 57-60. While I have not read all of the

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numerous inquiries served upon these two offerors, I have read those cited by the contesters and enough others to convince me that discussions were conducted in a fair fashion. Undoubtedly the Lockheed proposal improved considerably as a result of these exchanges -- as undoubtedly that of the MEO did as well. From this fact, however, I cannot conclude that during discussions Lockheed was accorded more favorable treatment than the MEO.

The Designation of Strengths and Weaknesses as "Influential"

Before turning to the reasonableness of the technical evaluation, there is a threshold issue which needs to be addressed. Both contesters have challenged the propriety of the Product Team's selection and designation of strengths and weaknesses as "influential." They assert that this designation appears nowhere in the solicitation, the Technical Evaluation Plan, or the Technical Evaluation Guide. Further, they contend that none of these documents provides for the elimination of strengths and weaknesses based on such a determination. Breen Comments at 18-24; ATO Comments at 9-15.

Much of the mystery which the contesters claim exists regarding the origin of the "influential" designations has been cleared up by the factual determinations set out at the start of this opinion. The initial testimony of ******** that ********* did not know who had made these designations has been withdrawn and the designations have been demonstrated to be the result of a consensus process carried out by each of the four factor teams. Findings 116-17.

The agency defends its action on the basis of the solicitation terms themselves. It notes that, under Section M.3.4, the Government is expected to review, analyze, and consider all information received in response to the Technical and Past Performance Factors, at the CA, and in any discussions. It is then required to identify the strengths and weaknesses of all factors and then to rate each factor by assessing the impact of the strengths and weaknesses of the elements using a rating scheme provided in the solicitation. Finding 21. For the reader's convenience, the rating scheme is repeated here:

Table M-1: Rating Scheme

Rating	Definition

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Excellent	The impact of strengths significantly outweighs the impact of any weaknesses.
Good	The impact of strengths outweighs the impact of any weaknesses.
Satisfactory	The impact of any strengths is equivalent to or somewhat outweighs the impact of any weaknesses.
Unacceptable	The impact of weaknesses outweighs the impact of any strengths.

Under this scheme, when a factor team considers "strengths" and "weaknesses," it obviously must consider *all* strengths and weaknesses identified, as well as *any* strength or weakness. However, reference in the provision to the assessment of impact obviously indicates that the team's evaluation should be both qualitative and quantitative. Hence, the decision was made at the close of the technical evaluation process to review all of the strengths and weaknesses agreed upon by the factor teams in their deliberations and then to determine which, in the opinion of the team members, had the greatest impact on the overall factor rating the team had decided upon. Those strengths and weaknesses identified by the team were thus designated as the most influential. Agency Report at 48-50.

Ms. Breen states that, even if it is true that the factor teams did reach consensus as to the influential strengths and weaknesses, the consensus is meaningless because it was reached after the ratings had been finalized and assigned by the four teams. Breen Comments at 22. It is difficult to comprehend how the determinations could have been made prior to the assignment of a rating. The team exercise in agreeing on the most influential strengths and weaknesses was, by it very nature, an analysis, in retrospect, of the strengths and weaknesses which the evaluators believe most influenced them in coming to a conclusion on the rating given for the factor in question. One would expect, therefore, that these determinations would be among the last to be made by a factor team.

The ATO criticizes the assignment of influential strengths and weaknesses on the ground that, as a result, the TET reported to the SSEB only the strengths and weaknesses and their impacts most influential to determining the factor ratings. ATO Comments at 10. Fortunately, this did not in fact occur. It is true that the basic TET Report refers only to influential strengths and weaknesses. Appendix B of the report, however, contains a detailed narrative of all strengths and weaknesses agreed upon by the factor team members, including those designated as most influential. These individual narratives are complete with multiple references to the relevant sections of the proposal in question. Finding 115.

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If the SSEB members were unaware of the strengths and weaknesses to which the TET members looked in making their rating determinations, it was not because this data was not provided to the SSEB.

The ATO also expresses reservations regarding the credibility of the statements made by the TET Lead, *****. ********, regarding the determination of influential strengths and weaknesses through the consensus process. The ATO contends that the statement made by ******** in ****** affidavit that ****** never intervened in the consensus process is in direct conflict with statements made by ******** during the MEO debriefing that ******* resolved any disagreements/questions and was also the person who determined the supposed consensus technical scores. ATO Comments at 12. The paraphrase of ******'s statement in ****** affidavit is less than accurate. *See* Finding 116. It would be unrealistic to assume that every consensus reached during the course of the technical evaluation was reached amicably and without at least temporary dissent. It was the task of the TET Lead to step in when necessary to promote consensus and resolve existing conflict. Presumably, it was to this role that ******* referred in comments made during the course of the MEO debriefing. In any event, the absence of any minority report in the record supports ******** contention that all decisions were, in the final analysis, arrived at by consensus. Finding 40.

The ATO dismisses as a "mincing argument" based on "a Thesaurus that has yet to be published" the agency's contention that the term "influential" when used in reference to strengths and weakness is indicative of the impact the particular strength or weakness has on the factor team's rating decision. ATO Comments at 14. I disagree. On balance, I am convinced that the manner in which the TET factor teams identified the strengths and weaknesses of the different proposals, rated them according to the evaluation factors, and highlighted for the SSEB those strengths and weaknesses which had the most influence on their rating decisions was both effective and useful and entirely in keeping with the terms of the solicitation.

<u>The Allegedly Undisclosed ******** Plan</u>

Another threshold issue which must be addressed before turning to a consideration of the reasonableness of the TET's determinations concerns Lockheed's allegedly undisclosed ******** plan. Both contesters state that Lockheed had an undisclosed ******** plan that was not evaluated by the TET. This, in their opinion, vitiates many of the determinations, if not the entire report, of the TET. *See* Breen Comments at 3-18; ATO Comments at 15-20. Because this allegation poses a fundamental challenge to the

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integrity of the entire TET effort, it must be addressed before any specific discussion of the reasonableness of the technical evaluation.

The incident to which the contesters refer concerns the FAA's learning, in response to a CR issued during the cost evaluation phase, that Lockheed planned, ************ **********************, *** *******************. Findings 123-24. The contesters argue that if the TET members had been fully aware of this fact during the technical evaluation, their determinations regarding the relative strengths of the Lockheed proposal would have been considerably different.

The ultimate issue here is whether, under the terms of the solicitation, FAA was required to include in its technical evaluation Lockheed's plan to **************** **. A close reading of the applicable provisions of the solicitation indicates that it was not necessary.

As noted earlier, the solicitation envisions distinct periods of performance, i.e., the phase-in period, the base period, and the two option periods. All told, if all options are exercised, the contract could last as long as ten years. Finding 10. The informational requirements set out in Section L of the solicitation make reference to these distinct phases of contract performance. Particularly significant among these provisions is the requirement in Section ************************ ************************ ** ***. **** ***************************, Section L.6.2 calls for staffing plans from phase-in through the end of the contract. Similarly, Section L.12.6.1 requires offerors to include pricing for all ten years of contract performance, ***** ******** *** ****** *****. Findings 29, 31.

The implication of these provisions is clear. *************************** ****************************** **** ********************************* ********* *** ********* ** *** *** ********* ** ************************** ********************** ******************** ** ***.

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Given the circumstances under which the Government became fully aware of Lockheed's plan to ********** ********** ****** ******, the decision on the part of the TET Lead to confer with the TET on this matter was a prudent one -- as was mention of the matter in the final TET Report. Finding 125. I remain unpersuaded, however, that this represented a tacit admission on his part that, under the terms of the solicitation, this aspect of Lockheed's plan should have been included in the TET's evaluation of the PSP's proposal.

The parties view Lockheed's plan in vastly different terms. The Program Office simply looks upon it as an effort on Lockheed's part to make efficiency improvements **********. Agency Report at 115. The agency notes that it was well known that the FAA was interested in continuous improvement ***** ****** *** ****** *******. In the standard questions issued to PSPs prior to the CA, Question 11 specifically requested information about improvements contemplated ****** ********** and Question 12 requested information on where those improvements were priced. POE 119.

The contesters, in contrast, accuse Lockheed of deliberate deceit. The ATO writes:

> In blatant sleight of hand, Lockheed's technical proposal addressed only its plan to ********** ********** ***** ****. Lockheed was thus able to deflate the cost of its solution **** ********** *** **********

ATO Comments at 16. Counsel for Ms. Breen contend that Lockheed hid its real ******** plan from the TET by including it only in its cost proposal and thus the Product Team fell for "one of the oldest tricks in the procurement book." Breen Comments at 2.

The contesters' allegations are less than convincing. Lockheed's plan is a creative one and appears to flow logically from expected productivity improvements and the ********** **********. As already indicated, the solicitation did not require that this plan be included in Lockheed's technical proposal. The Product Team did not "fall for one of the oldest tricks in the book." Rather, the anticipated reduction in costs was identified during the course of evaluation of Lockheed's cost proposal and a CR was

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issued. Lockheed was forthcoming in its explanation that, ******************** ** ** ************* ********************************* ****** *************** ***. As a precautionary matter, the ramifications of this explanation for the technical evaluation were carefully examined. Findings 123-25.

Based upon the record before me, I find no intent on the part of Lockheed to conceal its ******** plan nor do I have any reason to question the veracity of the TET Lead or the Factor Team Leads who reported on the response of the TET members when advised of Lockheed's plan to ************** **** **** ***** **** *** ***** **** *******************.

<u>The MEO's "Incumbency"</u>

One final threshold issue concerns the general complaint of the contesters, particularly the ATO, that the technical evaluation of the MEO proposal was particularly unfair because it failed to take into consideration the status of the MEO as incumbent. *See* ATO Comments at 48-57. Indeed, the ATO contends that the record clearly establishes that the Program Office intentionally ignored the value of incumbency. *Id.* at 50. I find no persuasive evidence to support this allegation.

The very notion that there is an incumbent in this competition is itself open to question. One of the express goals of the competition is to "achieve significant process improvements, to lower costs and maximize operational efficiency of the AFSS." Finding 2. This was not simply a program contracting out the FAA's current AFSS program. The solicitation explains that any proposed solution would have to represent at least a 22% savings over the current cost of performance. Finding 25. The solution proposed by the MEO contained a radical reduction in the number of AFSSs. Three flight service centers (FSCs) and one satellite facility in Hawaii were proposed as replacement for the fifty-eight AFSSs currently in operation. A **% reduction in staff was likewise contemplated. Finding 46.

One of the major components of the system architecture which the MEO proposed was the Operational Supportability Implementation System (OASIS). However the GFE matrix in Technical Exhibit C-2 of the solicitation shows that this system is currently available in only sixteen of the current fifty-eight facilities in operation. Furthermore, the

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MEO has specifically stated that OASIS will require enhanced technology development by end-state. Finding 46.

In short, the MEO is the incumbent only in a very limited sense. To the extent that it does enjoy incumbent status, however, the MEO does appear to have reaped some benefit in the course of technical evaluation. For example, under Factor 2, it was given a strength for its ability to retain the incumbent workforce based on the presumed desire of federal employees to remain federal employees with federal benefits, and it was given a strength for its ability to understand workload fluctuations. *See* Finding 72. Accordingly, I find the complaint that the MEO was unfairly deprived of credit to which it was entitled during the technical evaluation to be unsupported by the record.

The Reasonableness of the Technical Evaluation

Were the Findings of the TET Disparate and Irrational?

Ms. Breen alleges that the product team's technical evaluation of the MEO and Lockheed proposals was disparate and irrational. Breen Comments at 66-90. The ATO similarly contends that the program office failed to evaluate rationally the relative benefits and risks of the Lockheed proposal and the agency tender. ATO Comments at 20-57.

In a case such as this, the contesters bear a heavy burden of showing that the agency's evaluation of the relative benefits and risks of the Lockheed proposal and the agency tender were without a rational basis. Mere disagreement with the agency's evaluative judgments is not enough to prevail on these counts. Clearly, the TET was staffed with individuals well qualified for the task before them. Finding 45. The explanations offered for the conclusions reached in their deliberations appear rational and persuasive despite the contesters' strong disagreements.

Factor 1 Determinations

The Factor 1 Evaluation Team concluded that one influential weakness of the MEO's proposal was the lack of a cohesive plan to execute HR activities. The summary explanation provided in the TET report in support of this finding is certainly rationally based. Findings 67-68.

Both contesters strongly disagree, however, with this conclusion of the TET. They argue this weakness unfairly penalizes the MEO as a government entity. Their focus is

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primarily on comments made by the TET regarding the possibility of delay resulting from the MEO's hiring an HR Liaison to manage HR issues after the performance decision has been made. The contesters point out that, pursuant to section 4.a.(1)(a) of Attachment B of OMB Circular A-76 (POE 6), the ATO is not permitted to hire employees to new staff positions based on the MEO proposal unless the agency is the selected provider. *See* Breen Comments at 66-67; ATO Comments at 53.

The Program Office in reply points out that the inability to hire the HR Liaison was not the principal reason for the assessment of this weakness. The principal problem was of a broader nature, namely, as the TET report says, the lack of a cohesive plan for *all* the HR actions required for phase-in. While the MEO listed various HR activities necessary during phase-in (e.g., personnel actions, vacancy announcements, coordination of site visits, and other HR services), it did not demonstrate how all these activities can be carried out in a seamless manner. *See* Finding 68. Such a plan could have taken into consideration and compensated for the inability to hire the HR Liaison until after award. While the contesters take issue with the TET's conclusion, I cannot find that it is in any way irrational.

Ms. Breen, building on her argument that the one weakness found by the Factor 1 Evaluation Team was unjustified, further argues that the rating for this factor should be raised from "Good" to "Excellent" because the two strengths found in the MEO proposal by the same team promote a seamless and effective transition of services. The argument must fail since it ignores the fact that the Factor 1 Team's overall rating stems from far more than the few premisses mentioned in the contester's argument. The TET Report expressly states that the team's rating is not based on any single finding or its impact, but rather represents the TET's judgment regarding *all* the findings of strengths and weaknesses and their impacts when considered together. Finding 66.

The Factor 1 Evaluation Team found six influential strengths in Lockheed's proposal. Findings 69-70. Both contesters claim that this would not have occurred if the TET had been aware of Lockheed's intention to ********** ********* **********. Breen Comments at 68; ATO Comments at 54. This amounts to nothing more than speculation on the contesters' part. As already noted, the TET members were advised of Lockheed's plans before the submission of their final report. No changes in the teams' consensus were considered necessary. Finding 125.

Ms. Breen also questions the reasonableness of six influential strengths found in Lockheed's proposal by the Factor 1 Evaluation Team on the ground that certain

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weaknesses entered into the Decision Point data base by individual members of the TET regarding Lockheed's proposal were "quashed." Breen Comments at 68-70. What the contester is referring to are certain entries made by TET members in the Decision Point data base which are not reflected in the ultimate consensus reached by the Factor Team 1 toward the end of the evaluation process. Ms. Breen contends that these entries refer to weaknesses in Lockheed's proposal which are far more significant than problems posed in the MEO's proposal by a prohibition to hire an HR Liaison prior to award.

There does not appear to be a record of the fate of each and every entry made in the "candidate area" of the Decision Point tool. This is not surprising given the high number of entries made by evaluators and advisors assigned to the TET. What is evident from the record is that these entries, during the course of Factor Team evaluations, were subject to a winnowing process which reflected the deliberations of the teams. The Technical Evaluation Guide instructed the TET members to arrive at all evaluation decisions by consensus. Finding 40. As a result, the number of initial weaknesses and strengths entered by TET members would normally be reduced dramatically as the teams met and discussed and revised the entries and worked their way toward consensus on specific weaknesses and strengths. Findings 42-44.

In this allegation, Ms. Breen would substitute her judgment for that of the members of the Factor 1 Evaluation Team. I can find no justification for her doing so in the absence of substantive evidence that the evaluators were not dealing with the Decision Point entries in a reasonable fashion during their consensus building sessions. Indeed, as already noted, the presumption is that they were working correctly and in good faith.

Factor 2 Determinations

For Factor 2, the TET found two influential weaknesses in the MEO proposal. It concluded that the MEO has not comprehensively addressed the time needed for negotiations with the union and that the MEO's staffing plan was not adequately substantiated. Finding 72. The TET's explanation for these two weaknesses is certainly rationally based. Findings 73-74. Moreover, the record shows that the SSEB rejected the TET's conclusion that the need for union negotiations constituted a risk. Finding 128.

Ms. Breen is critical of the TET's determinations for several reasons. She does not believe that a complete detailed breakdown in staffing for each AFSS during the transition period was required and contends that the MEO's submitted end-state sample staffing plan was adequate. She also believes that, in view of the TET's conclusion that one strength

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of the MEO proposal was its ability to secure staff, this strength should be seen as compensating for any alleged problem with the MEO's staffing plan. Breen Comments at 74-75. The contester is certainly entitled to her opinions, but those opinions hardly demonstrate that the conclusions reached by the TET were without a rational basis.

As to the second influential weakness found by the TET in the MEO proposal, Ms. Breen states that this weakness should be rejected because **********. ********** **********. The observation must be rejected. As discussed ****** not only does the record fail to substantiate the ******* ****, it also shows that the weakness was, in fact, included in the report as a result of consensus reached by the Facctor 2 Team members.

Ms. Breen further disagrees with three other weaknesses found in the MEO's proposal pursuant to Factor 2. Breen Comments at 76-78. These were not identified as influential weaknesses but were listed in Appendix B of the TET report. One concerns the MEO's proposed use of technical operations personnel via a service level agreement (SLA) to provide maintenance at the FSCs. This was deemed to be a weakness because the personnel involved will have a different chain of command and line of supervision than those of the MEO organization. TET Report, app. B (PSP3) at 188 (POE 155). The second concerns the existence of governmental and union restrictions precluding the MEO from identifying and selecting specific individuals for the FSCs prior to award. This was deemed a weakness since these restrictions could delay the MEO's schedule. *Id.* at 186. A third weakness involves the lack of collegiate training initiative (CTI) agreements. The TET found that the CTI teaming agreements were not yet in place at the three FSC locations. This was seen to be a weakness since, without these agreements, it was unknown what the curriculum would look like or what the associated costs to the Government would be. *Id.* at 185. Although Ms. Breen disagrees with the TET's reasons for these weaknesses, mere disagreement with the agency analysis does not render the evaluation unreasonable. *See Protest of DMS Technologies,* 04-ODRA-00306.

The Factor 2 Evaluation Team determined that the Lockheed proposal has five strengths and no weaknesses. Findings 75-76. Ms. Breen and the ATO have both assailed the reasonableness of this conclusion. Breen Comments at 70-73, 78-81; ATO Comments at 55. The contenters' arguments are unpersuasive. This is primarily because the arguments are based upon the contention that the outcome of the technical evaluation of Lockheed's proposal would have been entirely different had the TET been aware of Lockheed's plan to ********* **** ***** **** ****** **** ********** *** ***** **********. Since it is clear from the record that the TET was advised of that fact and saw no need to change its determinations, these arguments fail. Finding 125.

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Ms. Breen also challenges the reasonableness of the TET's findings regarding Lockheed's strengths based upon entries made by individual evaluators in the Decision Point data base which did not become influential weaknesses but either became "quashed" or found their way to Appendix B of the TET report. Breen Comments 78-81. The difficulty with this line of argument, as already noted in the discussion of the Factor 1 evaluations, is that the elimination or modification of individual entries during the course of the evaluation process should not be viewed as evidence of machinations or deviousness on the part of evaluators, but as part of the natural process of consensus building. So, as previously stated, in the absence of substantive evidence that the evaluators were not dealing with the Decision Point entries in a reasonable fashion during their consensus building sessions, the contester's challenge to the rationality of their determinations is rejected.

Factor 3 Determinations

For Factor 3, the TET identified two influential weaknesses in the MEO proposal. First, it concluded that the MEO had not adequately identified and substantiated the task required to accomplish its aggressive transition schedule. Second, it was critical of two APLs, namely, one concerning customer satisfaction rating and one concerning dropped calls. The grounds for these two influential weaknesses appear reasonable enough. *See* Findings 78-80.

Ms. Breen takes issue with the TET's conclusion regarding the MEO's transition schedule. Breen Comments at 83-84. Specifically, she challenges the statement that the MEO had not substantiated all of the necessary agreements and processes between itself and its primary subcontractor and the various FAA organizations necessary to implement its service. She argues that during the CA, the MEO informed the Product Team that its draft agreements with both its subcontractor and an FAA organizational unit were ready for signature if the MEO were to receive the award. Apart from the fact that mere assurance that agreements are ready for signature does not necessarily meet the requirement to substantiate all necessary agreements and processes, Ms. Breen's criticism focuses on only one of the many concerns expressed by the TET regarding the quality of the MEO's transition schedule. The remaining portions of the TET's summary criticism still appear to be rationally based. *See* Finding 79.

Ms. Breen and the ATO are both critical of the TET's position regarding the APL relating to customer satisfaction rating. They contend that the TET's use of a MITRE survey's benchmark of 92% customer satisfaction rating constituted the use of an undisclosed evaluation factor. Breen Comments at 85; ATO Comments at 56. The program office convincingly argues that the MITRE figure was used not as an evaluation factor, but rather, as a tool to measure the degree to which the PSPs' APLs contribute to the delivery of effective services to support safe and efficient flight as specifically listed

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in element D of this factor in Section M of the solicitation (Finding 19). Agency Report at 83.

What particularly troubles Ms. Breen about the influential weakness found in two of the MEO's proposed APLs is that weaknesses were identified in the Lockheed proposal with regard to the same APLs but were not deemed to be influential weaknesses. This is held up as an "egregious" example of the disparate treatment which allegedly pervaded the entire evaluation process. Breen Comments at 85.

This line of argument is hardly persuasive. The record confirms that the explanation for the different weight given to Lockheed's and the MEO's weaknesses regarding the same APLs is that the TET found a difference in the severity of the weaknesses. For example, on the customer satisfaction rating, the TET found in the MEO proposal that the final value of 95% could not be achieved until ********* months after transition. Finding 80. By contrast, the TET found that, under the Lockheed proposal, the ******* value would not be achieved until ********* months after transition. TET Report, app. B (PSP2) at 149 (POE 154). Although still a weakness, the time required by Lockheed to reach the ****** level was considerably less than that required by the MEO. Similarly, with regard to the dropped-calls APL, the TET found that, under the MEO proposal, the MEO proposed a transition value of * % decreasing to less than * % at month ********* of contract performance. Finding 80. By contrast, Lockheed's weakness was less severe. Lockheed was found to propose a transition period value of less than*% decreasing to less than * % at month *****. TET Report, app. B (PSP2) at 152 (POE 154).

The ATO contends that the APL weaknesses simply cannot be reconciled with the facts. In particular, he notes that the TET's criticisms are inconsistent. He questions how the TET could find that as many as seven APLs constitute a strength and still determine that two are weaknesses. In the same vein, he points to the inconsistency of identifying as a less influential weakness the MEO's number of calls receiving a busy signal, but nonetheless identifying as a less influential strength the MEO's number of calls answered. ATO Comments at 56.

For an explanation of this alleged inconsistency, again, one should look to the reasons given by the TET for the conclusions reached. As already stated, we find the weaknesses regarding these APLs reasonably based -- notwithstanding the number of APLs accounted as strengths. As to the APLs regarding phone service, it is clear, from the assessment of the strength of the percent-of-calls-answered APL, that the TET was favorably impressed with the degree of anticipated improvement from 70% to 90% during the course of the contract. TET Report, app. B (PSP3) at 225 (POE 155). On the other hand, the TET found that, on the percentage-of-blocked-calls APL, the MEO in its

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proposal had indicated the number to be 3% per day when the baseline for transition is less than 1%. *Id.* at 239. The different conclusions reached are both clearly reasonable.

The ATO also challenges the TET's assessment of what the ATO contends is an "influential weakness" based upon the MEO's proposed use of two voice switches in each proposed FSC facility. Although the ATO challenges this evaluation finding as irrational, *see* ATO Comments at 46-47, the record shows that the ATO has misunderstood the TET's assessment and that the weakness in question was not identified or recorded among the most influential weaknesses listed in the main body of the TET Report for Factor 3. Rather, it is found among the less influential weaknesses listed in Appendix B. TET Report, app. B (PSP3) at 220 (POE 155).

The proposal provision prompting the TET to conclude that this was a weakness reads:

> Each FSC facility uses two voice switches to provide the required number of ports for supporting flight services in a regional geographic area. Tie lines between voice switches enable voice calls to be answered, transferred, or forwarded to other operational positions within the facility.

MEO Proposal, vol. I at 1-5-16A. The TET's assessment is rational. It reads:

> [The MEO] proposes using multiple voice switches in a single facility which the TET considers a weakness because it limits flexibility to reconfigure inside the facility and limits the ability to utilize the ACD [Automated Call Director] functionality. Positions will only have access to trunks and frequencies on their switch limiting the facilit[y's] ability to reconfigure. With limited tie lines between switches in a facility, positions will not have direct access capability to all other positions in the facility, limiting the flexibility to move to other positions when a position fails.
>
> Impact: Use of multiple switches in a single FSC has a significant likelihood of reducing the operational effectiveness for call routing and impacting customer satisfaction.

TET Report, app. B (PSP3) at 220 (POE 155).

The summary sheet for this weakness, as recorded in Appendix B of the TET report, also has the following entry regarding information submitted on this issue during the capability assessment: "None." TET Report, app. B (PSP3) at 220 (POE 155). The ATO claims this is incorrect because during its CA, the MEO explained that the Solacom switch consisted of two physical switch chassis that operated as a single logical switch. The ATO

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also notes that, during the MEO's debriefing, the Program Office advised that this "None" statement was an administrative error.

The Program Office agrees that the identified "None" is misleading -- and readily acknowledges that during its CA, the MEO provided information on this issue. The Program Office reports that instead of referring to the lack of a submission, the term "None" was used to indicate that despite the MEO's explanation during the CA, the TET's position remained unchanged. *See* Agency Report at 87-88. That the TET did, in fact, continue to be convinced that the MEO's proposed use of two voice switches was a weakness is strongly supported by the text of slide 14, which was presented by the MEO during the CA. The slide reads:

> **Multiple SolaCom Voice Switches in single facility**
> - Multiple switches are configured as a single logical Voice Switch system
> One SMART position reconfigures entire system (resources of both switches)
> - Tie lines between switches allow access to all resources
> Position, radios, trunks accessed from either switch
> Position on Switch A communicates with radios and/or trunks on Switch B
> - Positions are located on common & redundant Voice Switch LAN
> - Total failure of one switch does not affect resources of other switch

POE 136. In sum, this record shows that the TET remained convinced that the MEO intended to use multiple switches at single FSCs. While the ATO contends that this was not the intent of the MEO, he does not challenge the reasonableness of the TET's conclusion that use of multiple switches at a single FSC would, in fact, reduce operational effectiveness for call routing and impact customer satisfaction.

Both contesters have concentrated considerably more on the unreasonableness of the TET's conclusions regarding the strengths found in Lockheed's proposal than on weaknesses said to be in the MEO's proposal. Not surprisingly, Ms. Breen contends that the strengths found in Lockheed's transition schedule and approach are entirely unjustified because the TET was unaware of Lockheed's plan to ***** ********** **********. Without this information the TET allegedly was unaware of Lockheed's real ********** approach and schedule. Breen Comments at 84. This argument is rejected in view of the earlier finding that the TET was, in fact, apprised of Lockheed's plan for the ********** and given the opportunity to revise its findings if it deemed this appropriate. *See* Finding 125.

The ATO has mounted a particularly detailed attack on the TET's determination that the technical development of the FS21 system proposed by Lockheed is an influential

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strength. ATO Comments at 20-48. Among the various arguments raised is that an earlier version of the Redflex voice switch was rejected in 2001 when the FAA undertook a purchase of voice switches to replace those in its existing AFSSs. The ATO contends that there is no evidence in the record that the TET ever considered the serious technical problems and risks associated with the Redflex switch that the FAA had previously evaluated in the earlier procurement. This is said to be particularly perplexing and unforgivable since the chairman of the SSEB on the previous procurement is now the leader of the TET on the current procurement. ATO Comments at 43-45.

As already noted above, the record for this case does not contain an account of the fate of every individual observation entered into the Decision Point data base by the TET members. Neither does it contain verbatim minutes of each of the numerous discussions the four factor teams engaged in which led to eventual consensus. There is a presumption operative here that the Factor 3 Evaluation Team worked steadily and consistently toward the consensus which was ultimately memorialized in the TET Report.

Lockheed has provided evidence that the Redflex switch it proposes to use in its FS21 system is scarcely the same at that proposed in the earlier procurement. Findings 96-97. More importantly, as is pointed out in the declaration of a Redflex official, the FS21 system proposed by Lockheed is altogether different from the AFSS system for which the earlier version of the switch was proposed. In addition, the fact that at least one highly placed FAA official in this procurement also played a significant role in the prior procurement should not be viewed with anxiety, but rather, be seen as an asset for the TET. If any of what was learned in the switch procurement has any application to the present competition, presumably this official would not hesitate to share the information during the evaluation process. Accordingly, the ATO's comments do not persuade me that the TET's conclusions regarding the viability of the proposed FS21 system lacked a rational basis.[12]

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[12] In her initial pleadings, Ms. Breen challenged the use of the Redflex switch on the ground that it is imported from and made in Australia and not a domestic end product. Its use, therefore, would allegedly be in violation of the contract provision regarding the Buy American Act. *See* 41 U.S.C. § 10a (2000). Breen Contest VI. D.4. FAA appropriately points out that the Act, by its very terms, applies to the purchase of *supplies* and not services. Agency Report at 104-05. The point is well taken. The solicitation does have a Buy American Act provision. Finding 12. The contract is, however, primarily one for services. Finding 4. The Redflex switch is being purchased by Lockheed for use in its FS21 system, which will be used by Lockheed to provide services under the contract. Use of the solicitation provision, therefore, would be limited to the few T&M CLINs in the contract.

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In a similar vein, the ATO contends that the SUA/ISE system proposed by Lockheed and the subcontractor from which it planned to secure the system are unreliable and pose a risk apparently ignored by the TET. An additional risk is seen to exist in the amount of time Lockheed will allegedly require to have its FS21 equipment and system certified. ATO Comments at 34-36. These concerns appear to be exaggerated. It has already been found that Lockheed does not, in fact, plan to use the ******* system, but rather, to replace it with Lockheed's own FS21 system.[13] Findings 98-99. As to the threat posed to Lockheed's schedule by any need to certify its equipment, it has also been found that the FS21 equipment will not require certification. Finding 100.

The ATO attempts to challenge the reasonableness of the TET's conclusion regarding the technical development strength of Lockheed's FS21 system by contrasting the enormous amount of software development and integration that allegedly will be required for Lockheed's solution with a comparatively small amount of development and integration allegedly required for the enhancement of the OASIS solution. ATO Comments 29-30. To the extent that the information now provided on this point by counsel for the ATO was not contained in the MEO's proposal, it can hardly be relied upon at this point to impugn the reasonableness of the TET's determination made at the time of evaluation based upon information provided in the MEO's proposal. In the absence of such assertions, the ATO's criticism becomes nothing more than a difference in opinion between itself and the TET members -- in which case, the deference must go to the TET. *See Global Systems Technologies, Inc.,* 04-ODRA-00307.

The ATO observes:

> Over *** technical deficiencies and questions about Lockheed's solution were raised by the members of the TET. . . . Some of those deficiencies were identified as "material." In some cases, the TET warned that Lockheed's schedule was unachievable and its systems were unproven. Nevertheless, somehow a "consensus" was reached within the TET that Lockheed's solution presented no risk whatsoever and, in fact, presented nothing but technical strengths. Besides its defiance of all logic and reason, the TET's purported consensus is not supported by the facts.

ATO Comments at 21. The ATO clearly disagrees with the TET's findings regarding the reliability of Lockheed's proposed FS21 system. The implication of his comments is that the consensus ultimately reached by the Factor 3 Evaluation Team was not rational. Obviously the ATO has little confidence in the expertise of the TET members or in the

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[13] Counsel for Lockheed explains that the services of the contractor in question are necessary only to assist in the **********. Lockheed Comments at 54-55.

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efficacy of the evaluation procedure they followed. The record demonstrates, however, that the findings were rationally based.

First, even though questions have been raised about various entries, on the whole, the evaluation record in this case indicates thoughtful and well considered evaluations of each proposal. The very fact that there were as many initial entries in the Decision Point data base regarding various aspects of the FS21 system is itself reassuring. This is convincing evidence that the TET members were very much alert to the issues requiring their attention. Questions raised during discussions and at the CA likewise indicate that the TET pursued the concerns of the evaluators and their advisors aggressively. Findings 90-94. The apparent success of their efforts is reflected in the consensus they ultimately reached, which is described in the final TET report. Finding 95. I find the report's comments on the FS21 system highly credible and well reasoned.

The ATO and Ms. Breen remain unconvinced. Having read their comments in their entirety, I believe that there may be merit in some of what they have written. Presumably, however, the concerns they raise were considered by the TET as it worked toward a consensus regarding the proposed FS21 system. Given the complexity of the issues, some of the decisions ultimately made by the Factor 3 Evaluation Team may have been extremely difficult with much to be said on both sides of the many issues considered. Nevertheless, from my review of the record, I remain convinced that the TET members were competent, responsible, and thorough and that the conclusions they reached regarding the strength of Lockheed's proposed system remain reasonable despite the multiple reservations expressed by the contesters.

Factor 4 Determinations

For Factor 4, the TET found two influential weaknesses in the MEO proposal. First, it concluded that the MEO's proposed QM/QA program management structure was problematic. Second, it concluded that the lack of performance penalties in the MEO proposal was also an influential weakness. The reasons given by the TET for these two influential weaknesses are not irrational. *See* Findings 85-87.

Ms. Breen disagrees with the TET's evaluation of the MEO's proposed QM/QA program management structure. Although freely admitting that the program does assign part-time responsibility to FSC program control managers at each facility, she nonetheless offers a series of arguments as to why the TET should not have been unduly concerned about this or the fact that the local quality program is linked to the national office through the FSC operations manager. This contester complains that the solicitation contained no indication that a structure such as that proposed was not permitted or was discouraged. Breen Comments at 88.

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The reasonableness of Ms. Breen's comments on this subject is not at issue here. Some of the points she makes may well suggest a reasonable alternative assessment of the proposed plan. What must be determined here, however, is whether the TET's position on the proposed QM/QA program management structure is reasonable. I find the position taken by the TET, although in opposition to that now expressed by Ms. Breen in these contests, nonetheless has a rational basis.

The TET's conclusion that the lack of performance penalties was likewise an influential weakness is also challenged by Ms. Breen. She disagrees with the TET's observation that the lack of performance penalties runs counter to the principles of performance based contracting. She contends that the Government Accountability Office (GAO) has itself recognized that performance incentives can be either positive or negative or a combination of both, and that in this regard it should be sufficient that the MEO provided in its proposal for the positive incentive of performance awards. Breen Comments 86-88.

Based upon the provisions of Section H.18 and the spreadsheet called for under Section J.6's Performance Award - Credit Matrix, it is clear that the agency expected offerors to address both positive and negative incentives in their proposals. Findings 7-8. Under the circumstances, the TET's conclusion that the MEO's failure to provide for negative penalties was an influential weakness was certainly rational.

The agency effectively counters any argument that negative penalties would lead to illegal reduction in the salaries of government employees with two observations. First, it observes that a creative plan for negative incentives would not necessarily require a reduction in the salaries paid to government employees. Second, even if it the MEO could find no alternative to this, it is not bound by personnel restrictions stemming from title 5 of the United States Code, but rather, could rely upon the broader authority of FAA's personnel management system, 49 U.S.C. § 40122 (2000). *See* Agency Report at 95.

Ms. Breen also contends that the assessment of a weakness in the MEO proposal for the lack of performance penalties was improper in view of deficiencies in the CSO's approval of the performance award and credit structure. She notes that the legal memorandum provided to the CSO in support of the request for approval does not address the credit side of the incentive plan. Breen Comments at 91.

It is true that the legal memorandum dealt essentially with the agency's ability to expend award funds it might receive in conjunction with the incentive award/credit program. This, however, had been a matter of particular concern to the MEO. In a letter to the contracting officer dated June 22, 2004, the project manager for the MEO team had complained about the absence of any structure to allow the MEO to use award fees. POE 56. It is hardly possible to conclude at this point in time, however, that the CSO's

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determination was invalid simply because the supporting memorandum could have been more comprehensive. The fact stands that a clear presentation of the nature of the incentive/credit structure was provided in the letter requesting the CSO's determination and the determination itself expressly relates to both aspects of the program. Finding 9.

The Evaluation of Cost Proposals

Under the solicitation, the Government had four principal tasks to perform in evaluating cost proposals. It was to evaluate for cost realism; it was to calculate total evaluated cost (TEC); it was to determine that the total ownership cost (TOC) fell below the annual or five-year contract ceiling; and it was to determine price reasonableness. Findings 22-26. To determine whether the proposals were, in fact, evaluated in accordance with the solicitation terms, one must examine each of these requirements in turn.

Calculation of the TEC

The TEC was the sole cost factor in this evaluation and was clearly defined pursuant to OMB Circular A-76 in terms of the Standard Competition Form (SCF). For the agency tender, it was line 15 of the SCF and for the private sector offerors, it was line 16 of the SCF, as required under OMB Circular A-76.. Finding 24. Lockheed's TEC was found to be $1,900,000 while the MEO TEC was determined to be $2,066,000. Finding 119.

Ms. Breen is less than satisfied with the TEC as calculated by the CET. She notes that the TEC for the MEO proposal included $131 million in Government assessed costs (GAC). However, under Circular A-76, overhead is assessed against the MEO (but not private sector offerors) by the COMPARE software at 12% of the MEO's labor costs. In this procurement, the standard competition form for the MEO showed overhead costs slightly over $**** million. Ms. Breen believes that there is an overlap in the costs that are included in the GAC and the mandatory 12% overhead assessment and that, as a result, the MEO has unfairly been made to account for these costs twice. She contends that the CET should have examined the MEO proposal to ensure that there was no overlap. Presumably this would have led to a reduction in the GAC -- a component of the TEC -- and, therefore, in the TEC as well. Breen Comments at 58-59.

This argument of the contester appears to stem from an excess emphasis on the fact that overhead normally involves shared costs not 100% attributable to a specific activity.

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Ms. Breen is apparently convinced that there is overlap of some GACs with costs included in the 12% overhead assessment because some of the GACs include costs shared with other organizational components of the FAA. It should be clear, however, from the instructions provided to offerors in Section L.12.6.2, that the MEO's share of these costs is not included in the 12% overhead assessment, but rather, represents a cost which is 100% attributable to the MEO solution and, as such, should be included in the MEO's cost model. *See* Finding 32.

TOC within the Contract Ceiling

The CET reported the TOC for each offeror to be within the contract ceiling. *See* Finding 25, 120.

Price Reasonableness

The CET found all five of the PSPs' TECs to be reasonable, based upon competition. They were likewise found to be well below the Government's own independent estimate. Findings 26, 120.

Cost Realism

On the matter of cost realism, the solicitation was clear. Offerors were advised that their proposals would be evaluated to determine if they were realistic for the work to be performed, reflected a clear understanding of the requirement, and were consistent with the methods of performance and materials described in the proposal. They were also advised that cost deficiencies found might result in the Government quantifying these deficiencies. Finding 23.

The contesters state that the cost realism analysis in the AFSS competition was seriously deficient primarily because estimated costs were not scrutinized to the extent they should have been. Ms. Breen is critical of the Program Office's reliance on the fact that the contract contemplated in the solicitation is, in the final analysis, a fixed-price contract. She also is critical of the Program Office's reliance on the policy enunciated in AMS 3.2.3.2, which states:

> Defense Contract Audit Agency audits shall be requested on all cost reimbursement (CR) contracts that exceed $100 million. In addition, an audit will be requested on at least 15% of all CR contracts under $100 million. For other contracts, the FAA policy is to employ any method of cost or price analysis to determine fair and reasonable prices for the

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> procurement of products and services. Price analysis is the preferred method for evaluating competitive proposals.

Instead, Ms. Breen notes that a well-known treatise in Government contracting, *Formation of Government Contracts* by Nash and Cibinic, states that a fixed-price-incentive-fee contract is similar instead to a cost-plus-incentive-fee contract in that both provide for sharing costs on a predetermined percentage basis. Breen Comments at 25-26.

The contester's arguments on this issue suffer from the fact that the contract contemplated in the solicitation is, as the Program Office contends, a type of fixed-price contract. Granted, it does have some similarity to a cost reimbursement contract, but it is also fundamentally distinguishable from a cost reimbursement contract. To quote the treatise on which Ms. Breen relies:

> The FPI[C] contract is very similar in concept to the CPIF contract except that it contains a ceiling price in lieu of the minimum and maximum fees.

John Cibinic & Ralph Nash, *Formation of Government Contracts* 1128 (3d ed. 1998). It is precisely the presence of this ceiling which radically distinguishes the present contract from a cost reimbursement contract and diminishes significantly the risks associated with an offeror's estimated costs.

Ms. Breen and the ATO apparently believe that, for this procurement, a cost realism analysis such as that done by the Defense Contract Audit Agency (DCAA) is required.[14] As already noted, this is not required under AMS 3.2.3.2. What, however, of Circular A-76? Attachment B of section D.5.c(4)(a) of that circular states that the contracting officer shall perform price analysis and cost realism on all proposals received in an A-76 competition. POE 6. The same provision, however, refers the reader to Part 15 of the Federal Acquisition Regulation (FAR), 48 CFR pt.15 (2003) (FAR pt.15). While the FAR does not govern FAA procurements, it is a useful guide in this case in view of the Circular's reliance on FAR regulations. One provision in FAR part 15 is particularly pertinent to the discussion here. Section 15.404-1(d) states that cost realism analyses *may*

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[14] While the ATO has not expressly discussed these matters in his comments, he did make such an allegation in his own contest and has adopted and incorporated by reference into his own comments those of Ms. Breen regarding the cost evaluation of Lockheed's and the MEO's proposals and the Government's alleged failure to evaluate cost realism and cost risk of those proposals as required by the solicitation and OMB Circular A-76. ATO Comments at 3 n.1.

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be used on competitive fixed-price incentive contracts. Under the FAR, therefore, such analyses are not mandatory for competitive fixed-price incentive fee contracts even though they may be for cost reimbursement contracts. More significantly, the provision states: "However, proposals shall be evaluated using the criteria in the solicitation, and the offered prices shall not be adjusted as a result of the analysis." It would appear, therefore, that, despite the arguments of the contesters to the contrary, the procedures followed by the CET in the evaluation of cost proposals for cost realism, as described in the solicitation (Finding 23) and as reported on in the CET Report (Finding 120), were in accordance with the criteria set out in the solicitation.

Ms. Breen alleges that the cost risk identified by the CET with regard to the $** ******* reduction in the MEO's subcontract with ****** was an error. She states that there was no risk that the parties would not finalize their subcontract, which was contingent upon award. She likewise states that this fact was conveyed to the Product Team. Breen Comments at 57-58. The Program Office denies this claim and states instead that the MEO did not report at the CA that final agreement had been reached. The CA briefing slides provide no evidence of any such commitment, the CET personnel at the CA recall no such commitment, the notes taken by the Acquisition Team do not reflect any such commitment, and the cost proposal was not modified to reflect any such commitment even though the MEO was provided an opportunity to update its cost proposal following the CA. Agency Report at 100. The declaration of a ****** Corporation employee confirms that negotiations on the reduction had not been finalized with ****** even at the time of the award to Lockheed. Finding 122. The CET's determination regarding this cost risk, therefore, was entirely reasonable.

As to the CET's finding of a cost risk with regard to relocation costs, that too appears to be reasonable. Finding 120. However, even if it were not, this makes little difference since the SSEB, for its own good reason, chose to lay the CET's determination aside. Finding 132.

Lockheed's Allegedly Unrealistic Labor Costs

In addition to their objections to the determinations of cost risks made by the CET with regard to the MEO's proposal, the contesters also fault the CET for numerous determinations of cost risks allegedly present in Lockheed's proposal which the CET failed to identify. Perhaps the most controversial is the CET's alleged failure to find a cost risk in Lockheed's labor rates. In the final analysis, this allegation turns on the meaning of a specific solicitation provision. For the reader's convenience, it is repeated here:

> A PSP may propose any labor mix and associated labor rates that it deems to be appropriate for the scope of work to be performed. The Government will assess the realism of the proposed labor mix and rates using the

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> incumbent wage rate for a Full Performance Level (FPL) 2152 - AFSS Specialist, which is equivalent to a General Schedule (GS) 12 Step 5, plus GS locality pay, and not the current Department of Labor approved Service Contract Act (SCA) rates. PSPs shall include a strategy in their Staffing Plan that addresses any risks, including employee recruiting and retention, associated with their proposed labor mix and rates.

Finding 23. Ms. Breen contends that this language could not be clearer. She states that it is not limited in its applicability to incumbent FPL Specialist wages. Rather, it says that the incumbent wage rate will be used to evaluate the proposed labor mix -- not that the incumbent wage rate will be used to evaluate proposed incumbent wage rates. Thus, it is said to apply to all FPL AFSS Specialists -- incumbents and non-incumbents. Breen Comments at 28-35.

FAA understands Ms. Breen's position to be that any rate proposed which is lower than GS 12, step 5, is, *per se*, unrealistic. Agency Report at 110. Counsel for Lockheed appears to have a similar understanding of Ms. Breen's position. Lockheed Comments at 98-99. Admittedly, there are statements in Ms. Breen's comments which suggest that this is a correct interpretation of her position. *See* Breen Comments at 32 ("There is no question that the GS 12 Step 5 was intended to be a floor for evaluation purposes and that a GS 9 was completely unacceptable."). Of course, if this is a correct interpretation of Ms. Breen's position, then her position can hardly be sustained since it renders meaningless the solicitation's provision that a PSP may propose any labor mix and associated labor rates that it deems to be appropriate for the scope of work to be performed.

The application of this provision, however, is considerably more complicated. Some offerors, including the MEO, appear to have avoided the "floor" limitation by proposing non-FPL positions. Elsewhere in her comments Ms. Breen explains that the MEO proposed to pay its new hires at different, non-FPL positions at wages below the GS 12, step 5 level consistent with some of the positions FAA has today. Breen Comments at 29. Specifically, the MEO proposed Air Traffic Control Specialists (ATCSs) and Air Traffic Assistants (ATAs). Ms. Breen further explains that the MEO also proposed developmental ATCS and ATAs, which are people in training (not FPL). Ms. Breen also provided documentation reflecting other mixes of proposed labor rates based on different specialist positions. ********, for example proposed a specialist I, specialist II step 1, specialist II step 2, specialist III step 1, and specialist III step 2. *Id.*

Lockheed instead, distinguishing between incumbent specialists and new hires, proposed:

> While all WD [wage determination] covered positions will be hired at the prevailing DOL WD rates, the incumbent AFSS Specialist will be hired at

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> their present pay rates, including locality pay (equivalent to a schedule GS12 Step 5) in order to adhere to our soft landing approach.

Lockheed Proposal I-2-18.

The CET appears to have taken a tolerant approach to the different strategies used by the offerors in proposing their mixed labor rates -- and for good reason. The applicable language of the solicitation is simply not that clear. From it, one gleans the unmistakable notion that the Government is concerned about protecting the salary levels of incumbents who may be hired by the successful offeror. The invitation, however, to propose any labor mix and associated labor rates deemed appropriate for the work to be performed and to include in staffing plans a strategy addressing risks suggests that a high degree of discretion in these matters is left to the offeror. Under these circumstances, it was reasonable of the CET to conclude that Lockheed's proposed labor rates were realistic. The proposal clearly does justice to the principal purpose of the provision and, to the extent Lockheed proposed to pay SCA-compliant wages to new hires, they were arguably sufficiently realistic.

Cost Risks Associated with the Wage Determination

One is tempted to conclude that the real reason why Ms. Breen is critical of the CET's finding that Lockheed's proposed labor rates were cost realistic stems from the fact that she believes that the wage rate which Lockheed had in mind for new hires will be the equivalent of a GS 9 which, in her opinion, is far too low.[15] This takes us to another cost risk which the contester believes was also overlooked by the CET, namely the risk to the Government due to the alleged absence of a Service Contract Act wage determination. Breen Comments at 35.

It is somewhat surprising that issues regarding a wage determination for this procurement have again surfaced after settlement of the pre-award contest filed by Ms. Breen's predecessor on July 19, 2004, and involving the same issues and the same procurement. 04-ODRA-00310. Under the terms of the settlement agreement, FAA agreed to submit wage rate determination requests to DOL with detailed wage information of existing workforce and known places of employment. Under the agreement, FAA agreed

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[15] Ms. Breen also believes that the hiring of AFSS specialist at the GS-9 level three years after contract award to replace an FAA AFSS specialist hired at the time of award also violates, if not the letter, at least the spirit of the contract's Right of First Refusal provision Breen Comments at 57 n.40. While Lockheed has not spelled out the particulars of its personnel policy regarding individuals who would be hired at that specific level, it could well be that, by that point in time, the position at that level will not be the absolute equivalent of today's AFSS specialist.

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to incorporate any applicable revised wage rate determination generated by the requests into any contract awarded under the solicitation retroactive in the first year to the date that the collective bargaining agreement no longer would govern the wages, benefits, and working conditions of the employees. It was also agreed that FAA would not delay or suspend either the evaluation of the proposals or the award on the basis that DOL had yet to issue its response to the requests for wage rate determinations. Finally, it was agreed that the provisions of the settlement agreement would not require FAA to alter its evaluation of proposals. POE 85.

The settlement agreement also contained a mutual release which provided in part that the parties "relinquish, waive, release, acquit and forever discharge each other of and from any and all claims, disputes . . . of whatever nature, at law or in equity, known or unknown, . . . which they have now or may have in the future against one another, based on any actions or events which occurred prior to the date of this Settlement Agreement . . . ." POE 85.

Ms. Breen now formally alleges in this contest that the Product Team breached the settlement agreement by issuing in April of this year a letter to DOL representing that the appropriate wage rate for Air Traffic Control Specialist is at the GS 9 level and by "lobbying" DOL to issue a wage determination at that level to backfill its litigation position in this contest. Breen Comments at 42. FAA denies the allegation and claims instead that it is Ms. Breen who has violated the settlement agreement. Agency Report at 105-10.

Whether the pre-award contest settlement agreement has or has not been breached does not appear even to be a proper issue for resolution within the context of a contest. I, therefore, will not address it here. Instead, pending resolution of that issue in a separate ODRA proceeding, the settlement agreement should be deemed to be still in effect. Under its terms, the issues of whether there was a wage determination applicable to this procurement and, if so, what the wage rates would be -- have been laid to rest. Instead, the parties now await a reply from DOL to the wage rate determination requests previously filed by FAA.

Under these circumstances, it would be wholly inappropriate for the CET to conclude that a cost risk exists with regard to the Lockheed proposal based upon what the DOL may or may not say in response to the pending requests.

Software Development Costs

Ms. Breen lists a number of other cost risks which she contends the CET should have found to exist in the Lockheed proposal. She states that the CET should have determined that a cost risk existed in connection with Lockheed's proprietary FS21 system. She contends that FAA will be paying for a huge software development effort and

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assuming the substantial cost and schedule risks inherent in a development project of such magnitude. Breen Comments at 46-48. The argument is similar to that raised in regard to the technical evaluation of the FS21 system. There the TET conclusion that the FS21 system had considerable design, development, and integration already completed was found to be rationally based -- even if still challenged by the contesters. If the CET elected to rely on the TET's favorable opinion of the FS21 system, this was certainly a rational decision.

G&A Rates

Ms. Breen also contends that the CET missed another cost risk in not recognizing the risk associated with the use of ********** rates. In its proposal, Lockheed explained that to cost its proposal, it had used ********** ********** *****. This, according to the contester, could pose various problems if these ****** rates should later be **********. Breen Comments at 48-49.

The agency convincingly argues that because the contract is fixed price, ****** ********** ********** **********. Furthermore, cost overruns by Lockheed are limited to the price ceiling and thereby pose no additional risk to the FAA. Agency Report at 114.

Recurring Retirement Costs

Yet another cost risk said to exist in Lockheed's proposal relates to recurring federal retiree retirement costs. This argument of the contester is based upon the fact that these recurring retirement costs are significant in a situation such as this where some 1900 former federal employees, many of whom are eligible or nearly eligible for retirement, are going to work for a private sector contractor doing the same job for some period of time. At a minimum, approximately half of these may be collecting Lockheed salaries and federal retirement benefits. Thus, it is argued, the FAA will be reimbursing Lockheed for salaries of these employees and also paying their retirement costs. On the other hand, under the MEO proposal these employees will either be working or retired but not both. Breen Comments 55-56.

Both the agency and Lockheed point out that a cost risk such as this would be attributable for every private sector PSP in every A-76 competition. Yet the A-76 Circular does not take retirement costs into account. Instead, it expressly limits what costs may be

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assessed to private or public entities in competitions conducted under A-76. Lockheed persuasively argues that under A-76, other retirement-related costs are explicitly required to be considered. For example, the cost of retirement-related fringe benefits are so required. Accordingly, if OMB viewed retirement plus contractor pay as an additional cost that merited balancing in the cost comparison, it could and would have so stated in the Circular. Lockheed Comments 106-07. The points are well taken. In the absence of an applicable provision in the A-76 Circular, the CET cannot be faulted for not assessing a cost risk for recurring federal retiree retirement costs.

****** Costs*

Contester Breen also argues that a cost risk should have been assessed against Lockheed for its ********* reliance on **********. The ***** service provides ********** ********** to authorized users. The contester states that a risk for reliance on ***** was assessed against all PSPs who rely on this system except Lockheed. Breen Comments at 53-55.

Both the agency and Lockheed contend that it is not true that all PSPs who rely on ***** have been assessed a cost risk except Lockheed. They explain instead that a risk was assessed only against PSPs who plan to make significant use of ***** and thus will make it necessary for FAA to continue to procure the services by separate contract. This is confirmed in the SSEB Report. POE at 43-44. Although Lockheed will make **********, that system will not be required once the FS21 system is operative. Lockheed Comments at 108; Agency Report at 113.

Aviation Liability Insurance Costs

Another area identified by Ms. Breen in which she alleges that a cost risk should have been assessed concerns aviation insurance. The contester states that the cost of aviation insurance was not included in Lockheed's COMPARE cost model that was used to develop its TEC. She points out that Lockheed, in its proposal, initially stated that its assumed cost associated with aviation liability insurance would not be made a part of *** **********. When asked why in a DI, Lockheed replied that it understood ****** to ********** ********** **********. To ensure an accurate and equitable comparison, Lockheed assumed ********** **********. Although Ms. Breen is aware that there was further discussion of this issue, she contends that there was no close-out of this deficiency in the Cost Evaluation Report. Consequently, the absence of these costs from the COMPARE model constitutes a cost risk which should have been identified by the CET. Breen Comments at 50-51.

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In response to Ms. Breen's allegation, Lockheed explains in some detail that its proposal always included a total of $** million for the cost of aviation insurance and that it specifically ********** ****. Lockheed Comments at 112-14. The agency confirms Lockheed's contentions. Agency Report at 114-15. The record does, in fact, show that Lockheed included the cost of aviation liability insurance ********** ********. Lockheed Cost Proposal 3.3.2.2.6 at II-3-9. It likewise confirms that Lockheed ********** **********. *Id.* 3.6 at II-3-25.

Both Lockheed and the agency appear to have missed the basic thrust of Ms. Breen's allegation. Her contention is not that these insurance costs were not in Lockheed's proposal, but that they were not included in the COMPARE cost model. DR no. LOC-C-0123 sent to Lockheed on October 26, 2004, advised Lockheed that its assumption that ********** **********. The statement of deficiency read: "The PSP's assumption is unacceptable to the Government. Proposed costs associated with Aviation Liability Insurance are part of the Total Evaluated Costs." POE 114.

Ms. Breen's contention that there was no close-out on this issue, however, is not supported by the record. On November 5, Lockheed replied to the DR sent to it by the contracting officer on October 26. Finding 61. A change page to Lockheed's cost proposal addresses the deficiency noted in LOC-C-0123. It deletes entirely Section I.9.3, which described Lockheed's assumption that ***** ********* ***** ***** *** ********** ******* **********. This deletion is noted in the change page and a marginal note is made to the DR which prompted the change. Lockheed's Final Cost Proposal 1.9.3 at II-i-8. In view of this response, the burden now rests with Ms. Breen to prove that these costs were not included in the COMPARE cost model since the costs are in Lockheed's proposal and the assumption that **** ********** in the COMPARE cost model was specifically withdrawn. She has failed to make this showing.

Unrealistic Costs for Medical Care

Ms. Breen contends that Lockheed's proposed costs for medical care are also unrealistic and should, therefore, have been recognized as a cost risk. In particular, she notes that although Lockheed estimated a cost for physical examinations for employees over the life of the contract, no mention is made in the proposal for ********** ****** even though ********** are required under applicable FAA regulations. The contester notes that the MEO in its proposal did provide for both. Breen Comments at 52-53.

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This particular allegation is unusual to say the least. The medical costs proposed by the MEO are admittedly more detailed than those proposed by Lockheed. The MEO included costs for **** and ********** as well as for ********** and **********. Lockheed's proposal covers only ********** and **********. What is ironic, however, given the allegation that Lockheed's costs are unrealistic is that Lockheed has proposed a total of $ * for medical care. Lockheed Cost Proposal at II-3-24. The MEO, in contrast, has proposed a total of only $ *. MEO Cost Proposal at II-3-49. Notwithstanding the fact that Lockheed's estimated costs are significantly greater than those of the MEO, Ms. Breen's complaint is that Lockheed's costs pose a risk because the amount set aside per individual physical, although above what the MEO has estimated to be the average cost of an individual physical, still does not contain an excess sufficient to cover the average cost of ****** -- which Lockheed failed to provide for in its proposal. Breen Comments at 52-53.

While it may well be that Lockheed has overlooked a regulatory health requirement, it would not appear that this will have a significant cost impact on contract performance or that the CET's failure to recognize this defect would in any way improve on the MEO's prospects for award. Furthermore, if Lockheed's medical cost is unrealistically low, then the MEO's lower cost, covering more services, may well be even more unrealistically low.

In summary, the contester's criticism of the CET for not identifying more cost risks in Lockheed's proposal nets her very little. Aside from the lack of merit in many of her individual arguments, the evaluative scheme in this particular procurement hardly favors this line of argument. The solicitation provides that the technical factors, in the aggregate, are more important than the cost factors. Finding 17. Of cost factors, there is only one in this procurement, the Total Evaluated Cost (TEC). Findings 17 and 24. Finally, there is no separate factor for risk and benefit. Instead, these are simply to be assessed throughout the evaluation and, if need be, may be quantified. Finding 18. They cannot, however, be added to the TEC and are simply identified and passed on to the SSEB and the SSA for consideration in the best value analysis.

Cost vis-a-vis technical merit, therefore, counts for less in this procurement than in others and, in a case such as this where the technical superiority of the Lockheed proposal has already been well established, concerns over possible cost risks inevitably have a diminished importance. These considerations when linked to the fact that the contester's arguments in this area are, at best, weak, convince me that there is no merit in this line of argument.

<u>Inclusion of Profit in the MEO Proposal</u>

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Ms. Breen has challenged what she refers to as "the propriety of the $46 million profit assessed against the MEO." Breen Comments at 90. What she is referring to is the inclusion in the MEO's final cost proposal of a target profit of $46,104,856 for the first year of the basic contract. Final MEO Cost proposal at II-2-6. For the other years the target profit remains at zero. *Id.* at II-2-10, II-2-14, II-2-18, II-2-22, II-2-26, II-2-30, II-2-34, II-2-38, II-2-42. What is clear, therefore, is that it was the MEO and not the agency which ultimately placed that figure in the proposal.

Ms. Breen, however, lays the blame for the inclusion of this figure at the feet of the CET and alleges that the DIs it received were confusing and conflicting. Ms. Breen's characterization of the DIs is unpersuasive. First, there is no evidence that the MEO sought any clarification. Second, and more importantly, at least three of the DIs clearly identified the MEO's reference in its cost proposal to the target price being 115% of the target cost as an area of concern requiring clarification. *See* nos. MEO-C-0118; MEO-C-0120; MEO-C-0126; Breen Comments, Exhibit 53. Since the target price is the target cost plus target profit, this apparently suggested to the CET that the MEO was contemplating a target profit of 15%. This contrasted vividly with the statement made later in section 3.6.3 of the MEO's cost proposal that the target profit rate would be zero. MEO Initial Cost Proposal at II-3-59.

In response to the aforementioned DIs, the MEO deleted in its entirety section 3.6.3, along with reference elsewhere to the target price being 115% of the target costs. At the same time, for the first year of the basic contract, it entered a target profit of 15%, namely, $46,104,856.

The record simply is not clear as to why the MEO elected to enter a profit for this first year of contract performance. Some of the documentation suggests it may have been connected with the MEO's concern over termination for convenience costs that might be incurred during that period. In any event, it seems unlikely that the figure was included at the insistence of the contracting officer since there was apparently no objection to the MEO bidding no profit for the remaining years. In short, the contester's contention that the inclusion of this profit was somehow attributable to the agency appears to be without basis.

As an alternative argument against the inclusion of a figure for target profit in the MEO cost proposal for the first year of the basic contract, Ms. Breen suggests that this was in violation of Circular A-76. Under the Circular, before a solicitation may include an award fee for an agency source (in addition to other prospective providers) the agency CSO must first determine whether an agency source may receive such an award fee. This, according to Ms. Breen, did not occur. Breen Comments at 90-93. The argument is similar to that addressed earlier regarding the adequacy of the CSO's approval of the performance award and credit structure. The difference here is that the contester is now

alleging that the target profit is itself a fee award which requires CSO approval. Since the request for approval of the performance award and credit structure did not even address target profit as an award fee, she argues that its use in this procurement is in violation of Circular A-76.

The contester confuses "incentive fee" with "award fee." The solicitation states that a fixed-price incentive fee contract specifies a target cost, a target profit, a price ceiling, and a profit adjustment formula. Finding 5. In this scheme of things, the target profit is the incentive fee. Circular A-76 distinguishes between incentive fee and award fee. Appendix B, D.3.a reads in part:

> (11) **Incentive Fee**. In a solicitation for an incentive fee contract, the CO shall require the private sector offeror to propose a target cost and target profit or fee. The CO shall include the target cost and target profit or fee on SCF Line 7.
>
> (12) **Award Fee.** For solicitations with an award fee for all prospective providers, including the agency tender, the CSO shall determine if procedures are in place permitting an agency tender to receive such an award fee.

POE 6.

Understandably, the Circular does not require the agency tender to submit a target profit as private sector offerors are required to do. Nevertheless, it does not forbid this. If the MEO in this case elected to bid a profit for the first year of the basic contract, it was free to do so. By the same token, there was nothing prohibiting the MEO from bidding no target profit for the remaining years. In neither case, however, was it necessary that the CSO make a determination such as that required for an award fee.

<u>The Best Value Analysis</u>

The solicitation provided that the award would be made to the offeror whose proposal is judged to represent the best value to the Government. "Best value" was defined as "the combination of the impact of the overall benefits, risk, and cost for the delivery of the effective flight services to support safe and efficient flight." Finding 16. In assessing the combination of benefits, risks, and cost to determine best value, the solicitation required that the technical factors be viewed as more important than costs. Finding 17. The SSEB and the SSA proceeded in compliance with these requirements. The SSEB was responsible for providing the SSA with a recommendation for making an informed best value performance decision. The co-chairpersons of the SSEB were responsible for facilitating SSEB discussions and resolving discrepancies between and

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among members, preparation of SSEB recommendation(s), and resolving contradictory or ambiguous results from the evaluation teams. Finding 37.

First, the SSEB undertook a careful review of the TET Report (including Appendix B) and the CET Report. The strengths and weaknesses determined by the TET to be those most influencing the factor ratings were determined respectively to be benefits and risks. The SSEB further determined that the strengths and weaknesses listed in Appendix B in general supported and were consistent with the ratings assigned by the TET. This was obviously more than a "rubber stamp" exercise. In two instances, based upon its own investigation, the SSEB rejected one influential weakness and one lesser weakness listed in Appendix B of the TET report. Findings 128-29. The SSEB performed a similar analysis of the CET Report, working its way carefully through the various cost risks listed and rejecting one said to be present in the MEO proposal. Finding 132.

Once this analysis of the TET and CET Reports was complete, the SSEB proceeded to make a comparative assessment, technical factor by technical factor, of the various technical benefits and risks identified in each of the five proposals. Finding 130. Having completed this exercise, the SSEB made its own judgments regarding the comparative merit of the proposals. The conclusion reached was that the proposals basically fell into three categories. In the first, the SSEB placed Lockheed's proposal as the one which, in its opinion, provided the best technical solution with the greatest benefits and lowest risk. In the second category, it placed the proposals of the MEO and ********. The SSEB concluded that both proposals had benefits and risks under all technical factors but proposed technical solutions of lesser merit than that of Lockheed. Finally, in the third category, the SSEB placed the proposals of ******** and ******** based on the conclusion that the risks found to exist in these two proposals could not be remedied without a substantial delay in schedule and substantial government oversight in order to perform the contract. Finding 131.

The details of the SSEB's and the SSA's best value analyses have already been set out in Findings 134 and 136. In particular, the SSEB explained in its report that:

> In performing its Best Value analysis, the SSEB considered carefully the definition in Section M of the SIR which states in pertinent part "Best value will be the combination of the impact of the overall benefits, risk, and cost for the delivery of effective Flight Services to support safe and efficient flight." The SSEB also was mindful of the fact that the established Best Value analysis explicitly states that the combined Technical Factors are more important than cost. [A footnote to this paragraph states "'Cost' as used in this analysis refers to the Total Evaluated Cost that is the cost evaluation factor to be considered in the Best Value analysis in accordance with Section M."]

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> The SSEB began this best value analysis by analyzing the PSP with the best technical solution, PSP 2 [Lockheed]. This proposal clearly provided the greatest benefit to the Government. All other PSPs provided fewer benefits and had greater risks.
>
> Next, the SSEB considered PSP 2's cost relative to the other PSPs. The SSEB noted that PSP 1 [******] proposed a lower cost, with an associated risk, than PSP 2. The remaining analysis focused on whether the greater benefits and lower risks in PSP 2's proposal were worth the difference in cost between PSP 2's proposal and the presumably lower cost PSP 1 proposal.
>
> In doing its analysis, the SSEB took several facts into account that it believed were relevant to the comparison. First and foremost, the SSEB considered the substantial difference in benefits and risk versus the minimal difference in cost between the two PSPs. In particular, the SSEB considered that many of the technical risks associated with PSP 1's proposal not only lead to a delay in reaching End-State, but also indicate[ ] possible long term problems in the solution. These would be present throughout contract performance and affect service delivery on a continuing basis.
>
> Overall, the SSEB considered that the benefits PSP 2 offered were far superior to those offered by PSP 1. In the SSEB's opinion, even without the risks to PSP 1's Total Evaluated Cost as considered above, the benefits to the agency offered by PSP 2 would more than offset the minimal cost difference.

Finding 134.

Without further belaboring the details of those analyses, it should be sufficient to note that, once the SSEB and the SSA had concluded that Lockheed offered the technical proposal of the highest merit, the remainder of their analyses logically focused on the one PSP that had a lower price. The remaining question was whether the slightly higher price for Lockheed was justified by the superior technical merit. The conclusion reached by both the SSEB and the SSA that it was is hardly surprising. Both the SSEB and the SSA were of the opinion that the difference in price between the Lockheed and the ****** proposal was justified even without considering the risk associated with the latter proposal. Findings 134, 136.

Ms. Breen is of the opinion that the SSEB's recommendation and the SSA's best value determination were improper and irrational. Breen Comments at 94-98. She contends that any alleged tradeoff was illusory since only Lockheed was ever really

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considered for award. As part of this argument, the contester notes that ****** proposal had been rated as unacceptable under two technical factors and, therefore, was ineligible for award. Hence, she contends that only Lockheed was really seriously considered in the analysis.

The agency replies that under Section M.3.2.2 (Finding 21), a proposal rated as unacceptable for any technical factor *may* be excluded from further consideration. Agency Report at 125-27. Ms. Breen dismisses this argument as "just more word games." In the absence of a determination that the ***** proposal should be excluded from further consideration, turning to the ***** offer upon concluding that the Lockheed proposal was technically superior was clearly in accordance with the terms of the solicitation. The trade-off, elementary as it may have been, was nonetheless quite real -- namely, consider whether to trade off the lower price of the ***** proposal in exchange for superior technical merit of the Lockheed proposal.

It likewise is less than accurate to say that the MEO proposal was not even considered in the best value analysis. Obviously, all proposals initially figure in the analysis so far as their ranking as to technical and cost merit are concerned. The fact that three were eliminated from consideration was simply part of a logical decision process leading to the ultimate best value trade-off analysis in accordance with the terms of the solicitation.

The ATO contends that the SSA's trade-off was contrary to the solicitation evaluation factors. He states that the practical effect of limiting the trade-off to only two offerors was to convert the competition from best value to lowest priced, technically acceptable offer, which is directly contrary to the solicitation. ATO Comments at 58.

The solicitation defined best value as "the combination of the impact of the overall benefits, risk, and cost for the delivery of the effective flight services to support safe and efficient flight." Finding 16. The rationale described in the SSA's performance decision memorandum clearly does justice to this definition of best value. Finding 136. Circumstances in this case happened to lead to a factual situation similar to what occurs in the selection of a lowest priced, technically acceptable offer. This certainly does not mean that, in making his final decision, the SSA departed from the criteria in the solicitation for a best value selection.

In short, I find the objections of the contesters to the SSEB's recommendation and to the SSA's final selection to be without merit.

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Conclusion

Based upon the considerations set out above, as special master in these proceedings, it is my recommendation that both contests be denied in their entirety.

-S-

EDWIN B. NEILL
Board Judge