PUBLIC VERSION

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

FINDINGS AND RECOMMENDATION

Matter: **Protest of Optical Scientific, Incorporated**
Pursuant to Solicitation No. DTFAAC-05-R-02321

Docket No.: 06-ODRA-00365

Appearances:

For the Protester: Donald A. Williams

For the Agency: Linda M. Modestino, Esq.
Counsel for the FAA's Mike Monroney Aeronautical Center

For the Intervenor: Vaisala, Incorporated: Steve J. Callahan

I. INTRODUCTION

On January 26, 2006, Optical Scientific, Incorporated ("OSI") filed the above captioned Protest at the Federal Aviation Administration ("FAA") Office of Dispute Resolution for Acquisition ("ODRA"). OSI protests the award of an Indefinite Delivery/Indefinite Quantity ("IDIQ") contract to Vaisala, Incorporated ("Vaisala") by the Mike Monroney Aeronautical Center ("the Center") for an estimated quantity of between 60 and 208 Automated Weather Observation System (AWOS) Visibility Sensors, along with associated calibration equipment, technical manuals, and various extended warranties. *See Agency Response, Exhibit No. 2, Screening Information Request ("SIR")* at 3. Specifically, OSI contends that the Center's technical evaluation team improperly evaluated and unreasonably downgraded OSI's proposed visibility sensor without communicating [DELETED] "perceived" weaknesses, and that as a result of these "technical errors," the Center failed to realize that OSI had offered a "low risk, acceptable technical design" that is [DELETED] than the Vaisala sensor. *See Protest* at 4.

OSI also challenges the FAA's best value analysis and the selection of Vaisala because the written debriefing provided by the Center incorrectly reported that Vaisala's price was [DELETED] than OSI's, even though the FAA now concedes Vaisala's price was actually [DELETED] than OSI's. *See Agency Response* at 3, ¶ 11. The Protester maintains that, but for these identified evaluation errors, the Center would have recognized that OSI had submitted "a compelling and superior offer" which offered the "best value" to the FAA [DELETED]. *Protest* at 4. According to OSI, [DELETED]." *Protest* at 2.

For the reasons set forth below, the ODRA recommends that OSI's protest be sustained. The ODRA further recommends that the Center reevaluate the offers of OSI and Vaisala and make a new selection decision. If the Center determines that the OSI offer represents the best value to the Government, the Vaisala contract should be terminated forthwith for the Government's convenience, and award made to OSI.

II. FINDINGS OF FACT

A. The AWOS Visibility Sensor Requirement

1. The FAA's mission is to provide a safe, secure, and efficient global aerospace system that: contributes to national security and the promotion of aerospace safety in the United States; protects FAA critical infrastructure from unauthorized acts capable of disrupting operations; and enhances the safety of agency employees and users of the National Airspace System ("NAS"). *See Blueprint for NAS Modernization 2002 Update;*[1] *see also Protest of Johnson Controls*, 06-ODRA-00360, *Finding of Fact No. 1* at 3.

2. The FAA has deployed 174 Federal AWOS sites at airports located in the NAS throughout the United States to enhance aviation safety and the efficiency of flight operations by providing real-time weather data at airports that previously

[1] Available at http://ww.faa.gov/nasarchitecture/BlueprintURLs.htm.

did not have local weather reporting capability. *See Agency Response*, *Exhibit No.* 9, *Award Decision Document* at 1; *see also Department of Transportation Weather Programs, Appendix C.*[2] The AWOS is a computerized modular system that automatically measures, collects, and disseminates weather data to help meteorologists, pilots, airlines, and flight dispatchers prepare and monitor weather forecasts, plan flight routes, and provide necessary information for takeoffs and landings. *See Agency Response*, *Exhibit No.* 9, *Award Decision Document* at 1. Each AWOS broadcasts its weather report to aircraft operating up to 10,000 feet above ground level—or 25 nautical miles away—using an integral very high frequency radio or an existing navigational aid. *See United States Department of Transportation FAA Advisory Circular No.* 150/5220-16C, ¶ 3 at 1, and ¶ 1 at 5. While the AWOS does not predict weather, many currently send information to weather offices where forecasts are produced using computer model outputs, satellite photos and radar images. *See Agency Response, Exhibit No.* 9, *supra.*

3. Each AWOS is comprised of commercially available components which utilize a central processor to receive and analyze input from up to five different types of sensors. *Id.*, ¶ 1 at 5. The AWOS sensors measure weather parameters such as wind speed and direction, temperature and dew point, visibility, cloud heights and types, precipitation, and barometric pressure. *Agency Report*, *Exhibit No.* 9, *Award Decision Document* at 1. The type of AWOS sensors that are the subject of this protest are visibility sensors.

4. The Screening Information Request ("SIR") for the AWOS visibility sensors was issued July 13, 2005. The SIR required offerors to submit their proposal in three Volumes: Pricing/Business; Technical/Management; and Past Performance. *See Agency Response*, *Exhibit No.* 2, ¶ L.3(b) at 29. Each offeror's Technical/Management Volume ("technical proposal") was "limited to no more than 30 typewritten pages." *Id.*, ¶ L.3(c) at 30.

[2] Available at http://www.ofcm.gov/fp-fy97/text/app-c.htm.

5. The SIR required offerors to propose a "commercial-off-the shelf (COTS) or non-developmental item (NDI)" AWOS Visibility Sensor comprised of the following three "Products," which were described as follows:

   (1) "Hardware Items" as described in Appendix 1 to the SIR, "Visibility Specifications and Requirements," and

   (2) "AWOS Visibility Sensor(s) Configuration," specifying that "The preferred . . . configuration is a combined sensor that combines both visibility and present weather sensor hardware into a single unit. The FAA will consider a separate sensor configuration which would not have on adverse impact on system power consumption, system measurement and accuracy, system space requirements, or otherwise adversely impact system costs or performance," and

   (3) "Auxiliary Equipment"
   - Signal cables
   - Sensor mounts
   - Connectors

   See generally Agency Response, Exhibit No. 2, *Attachment* 1 to *SIR* at 3 and 4.

6. "Appendix 1" to the SIR, "Visibility Specifications and Requirements," listed sixteen mandatory "technical requirements" that were to "be used for the procurement of the AWOS Visibility Sensor(s)." *Agency Response, Exhibit No.* 2, *SIR, Attachment 1, Appendix 1* at 9. The following two technical requirements are at issue in this Protest:

   Technical Requirement No. 2:

   > The visibility sensor range shall be from 50 feet or less up to greater than 10 miles.

   Id. at ¶ 2.

   Technical Requirement No. 13

   > The visibility sensor shall also include present weather detection capability. *Presently the AWOS does not utilize present weather detection, but this will be implemented at a later date. Present weather detection capability shall include the capability to detect rain, drizzle, snow, hail, ice pellets, mix of rain and snow, fog, mist, haze, and clear.* The present weather sensor shall be able to output WMO

> [World Meteorological Organization] present weather codes.
>
> *Id*. at ¶ 13 (emphasis added).

7. The SIR also required each offeror's technical proposal to include a "Specification Compliance Matrix" demonstrating how its proposed visibility sensor met the following "Critical Specifications":

    1. Accuracy: +/- 15% over entire range
    2. ***Range: 50 feet or less up to <u>greater than 10 miles</u>***
    3. Interface: Adaptable, asynchronous, RS-232
    4. Message: Adaptable
    5. Power: 120 VAC +/ 1-%, 60 Hz, less than 20 amps
    6. Conditions: Operate -40 Celsius to +50 Celsius
    7. ***Present Weather Capable: rain, drizzle, snow, <u>hail</u>, ice pellets, mix of rain and snow, fog, mist, haze, and clear detection***.

    Id., ¶ L.3(c) at 30 (emphasis and underlining added).

8. The SIR instructed offerors to provide a detailed description of the technical features, engineering, performance history, and assembly requirements for the proposed visibility sensor, as well as a description of how each offeror would provide management over the life of the contract. *See Id.*, § L.3 at 29 - 34.

9. The SIR advised that the "preferred configuration for the AWOS Visibility Sensor is a combined visibility/present weather unit." *Id.* at 32. In addition, the SIR specified that each proposed sensor's "visibility shall be measured continuously and shall interface to the AWOS Data Collection Platform (DCP), model 223 and 233," which are currently in use by the FAA. *See SIR* at 32; *see also Attachment 1* to *SIR, Appendix 1*, ¶ 3 at 9. The SIR further instructed that:

> [T]he technical proposal must be sufficiently detailed to enable technically oriented personnel to make a thorough evaluation and to arrive at a sound determination as to whether the proposed supplies/services meet the

> requirements . . . . [t]he technical proposal must be specific, detailed, and complete to clearly and fully demonstrate that the offeror has a thorough understanding of the requirements for, and the technical problems inherent in, providing supplies/services of the scope outlined in the AWOS Visibility Sensor Product Description/Specifications.

Id., § L.3 at 32.

10. Each offeror was also required to warrant that its proposed "products (including equipment, fabrication processes, raw or finished materials, and intermediate assemblies) conform to contract requirements." *See SIR, Amendment No. 0001*, ¶ C.2 at 2. In addition, the SIR required offerors to guarantee that submitted "products have been tested and are free of design defects . . . and defects in materials and workmanship." *Id.*

11. The SIR provided that contract award would be made to the offeror "whose proposal is the *best value*," and that the Center would "utilize an integrated trade-off assessment to arrive at a best value award decision." *See SIR, § M.2* at 37 (emphasis in original). In addition, the SIR emphasized that for any best-value analysis, the "technical factor is of paramount importance," and would "be considered to be *significantly more important* than the price/cost and past performance factors, which will be secondary and co-equal." *Id.* at 38 (emphasis in original).

12. By the August 24, 2005 closing date, only two offerors—OSI and Vaisala—submitted proposals. *Agency Response, Exhibit No.* 9, at 2. On September 7, 2005, the FAA began evaluating the technical proposals; on December 12, 2005, following written discussions with each offeror, the FAA determined that the visibility sensor proposed by Vaisala offered the "best value" to the FAA. *Agency Response, Legal Brief* , ¶¶ 8 and 9 at 2. On January 19, 2006, the FAA awarded the AWOS Visibility Sensor Contract to Vaisala [DELETED]. *Id.*, ¶ 10 at 2.

B. The Technical Evaluation Plan

13. The FAA's Technical Evaluation Team was comprised of a Chairperson, three "Members," and two "Non-voting/Advisors." *See Agency Response, Exhibit No.* 6, "*Technical Evaluation Summary Report"* at 1. The record shows that under the established "Technical Evaluation Plan," each of the four voting members of the evaluation team (including the Chairman) were required to conduct independent evaluations of each submitted technical proposal according to the SIR's eight technical factors and subfactors, which were recorded by each member on an "Individual Evaluation Scoring Sheets." Each of these individual ratings were submitted to and discussed by the evaluation team as a group. *See Agency Response, Exhibit No.* 6. Under the Technical Evaluation Plan, each offeror's proposal was eligible for up to 100 technical points, which corresponded to the following "General Descriptor" and "Description and/or Definition" ratings:

Overall Scoring

Numeric Score	General Descriptor	Description and/or definition
95-100	Exceptional	Of exceptional merit, exceeding specified performance, qualifications, or capability in a way that is beneficial to the Government, indicates element with many superior features.
85-94	Exceeds	More than adequate, offers performance qualifications, or capability which is more than required but is not of an exceptional nature.
75-84	Meets	Adequate; responsive to requirements; meets specified performance or capability.
65-74	Marginal	Clarification is required . . . overall it fails to meet minimum specifications.
1-64	Poor/unacceptable	Less than meets, deficiencies throughout that can be corrected only by major or significant changes

See Agency Response, Exhibit No. 6, "Technical Evaluators Plan (Appendix A.1)," "Individual Evaluation Scoring Sheets," ¶ 5.3.1 at A1-7. In the Technical Evaluation Plan, the Contracting Officer was designated to serve as the Source Selection Official ("SSO").

C. The Evaluation of OSI's Technical Proposal

14. In its technical proposal, OSI proposed the "WIVIS" visibility sensor which [DELETED]. *See Agency Response, Exhibit No. 3, OSI Technical Proposal,* ¶ 1 at 1. According to OSI's technical proposal, [DELETED] *Id.,*¶ 3.6 at 10, and otherwise enable the sensor to be uniquely self-cleaning and self-calibrated. *Id.* According to OSI's technical proposal, [DELETED]. *Id*., ¶ 4.2 at 16. According to OSI's technical proposal, [DELETED]. *Id*.

15. OSI's technical proposal also explains that because its WIVIS sensor is powered by [DELETED]," i*d.,* ¶ 1 at 1, [DELETED] i*d.,* ¶ 2.3 [DELETED] *Id*., ¶ 2.5 at 6.

16. According to OSI's technical proposal, [DELETED]" *Id.* 7.

17. OSI's technical proposal also reports [DELETED]. *Id.*

18. The record shows that by September 13, 2000, each voting member of the evaluation team had completed an independent evaluation of OSI's technical proposal that resulted in the following reported technical scores:

    [DELETED].

    See Agency Response, Exhibit No. 5, *"Individual Evaluation Scoring Sheets."*

19. During the group evaluation of OSI's technical proposal, the team maintained handwritten "Pros & Cons" Notes ("OSI Pros & Cons Notes") in which some contemporaneous remarks and conclusions by the technical evaluators were recorded. *Id., OSI Pros & Cons Notes.* These notes report the following favorable observations about OSI's proposed visibility sensor, *see generally Agency Response, Exhibit No. 5,"Pros & Cons:"*

TECHNICAL EVALUATION FACTOR	FAVORABLE EXCERPTS FROM TEAM'S WRITTEN NOTES
[DELETED]	[DELETED]
[DELETED]	[DELETED]
[DELETED]	[DELETED]
[DELETED]	[DELETED]
[DELETED]	[DELETED]
[DELETED]	[DELETED]
[DELETED]	[DELETED]
[DELETED]	[DELETED]
[DELETED]	[DELETED]
[DELETED]	[DELETED]
[DELETED]	[DELETED]
[DELETED]	[DELETED]

20. The OSI Pros & Cons Notes also document [DELETED].

21. In addition to the OSI Pros & Cons Notes, [DELETED] *See Agency Response, Technical Exhibit No. 6, "DRAFT Final Technical Evaluation Summary"* at 4. [DELETED]. *Id.*

22. Ultimately, the technical evaluation team awarded OSI a consensus "team score" [DELETED] for its proposed technical approach. *Id.* In the OSI Pros & Cons Notes, the [DELETED]. *Id.* [DELETED]. *Id.*

D. The Evaluation of Vaisala's Technical Proposal

23. During the same time period (beginning September 13, 2005), the same technical evaluation team members completed individual evaluations of the Vaisala technical proposal, which resulted in the following preliminary scores:

    [DELETED].

    Id.

24. Vaisala's technical proposal offered the "PWD22 Visibility Sensor" ("PWD22") which differs from the OSI visibility sensor because [DELETED]," *id.*, [DELETED]. *Agency Response, Exhibit No.* 4, ¶ 9 at 6. [DELETED].

Id., ¶ 2.7.2 at 11-12.

25. There are several other aspects of Vaisala's proposed visibility sensor that are distinguishable from OSI's offered sensor. [DELETED]. *Id.*, ¶ 2.3 at 1.

26. Although the SIR required each proposed visibility sensor to have a "present weather detection capability" that can "detect rain, drizzle, snow, hail, ice pellets, mix of rain and snow," [DELETED].

    [DELETED].

    See Agency Response, Exhibit No. 4, ¶ 2.3 at 6 (underlining added) (emphasis in original).

27. [DELETED] at 1.

28. In addition, Vaisala included a [DELETED] section in its proposal which reports:

    [DELETED]

    Id., ¶ 2.4.1 at 9. (Underlining added.)

29. Vaisala's proposal also advised [DELETED]. *Id.*, ¶ 13 at 8.

30. In this regard, Vaisala's technical proposal further reported that [DELETED]." *Id.*, ¶ 3.2 at 13.

31. Notably, Vaisala describes its proposed [DELETED].

32. Vaisala's technical proposal [DELETED]. *Id.*, ¶ 2.7.1 at 11. Vaisala's proposal also describes the PWD22 [DELETED].

    Id., ¶ 2.5.3 at 10.

33. The [DELETED]. *Id.*, ¶ 27.2 at 12.

34. According to its technical proposal, Vaisala's proposed visibility sensor also requires [DELETED]. *Id.*, ¶ 9 at 7.

35. The handwritten "Vaisala Pros & Cons" Notes ("Vaisala Pros & Cons Notes") from the evaluation team's discussion of the Vaisala technical reveals [DELETED].

Agency Response, Exhibit No. 6, Vaisala Pros & Cons Notes, at 1.

36. One entry in the notes shows that the "history/track record" of the Vaisala visibility sensor was considered to [DELETED]. *Id* at 1-3.

37. Notably, the same evaluator who had submitted the highest evaluation ratings for OSI's proposed [DELETED]. *Id.*

38. The technical evaluation team's Vaisala Pros & Cons Notes confirm that the Vaisala visibility sensor [DELETED]." *Id.* at 1. In addition, the Notes show that at least [DELETED]. *Id.* at 2. [DELETED]. *Id.*

39. The following table summarizes the total number of evaluation points that were available to each offeror for each of the SIR's technical factors and subfactors, and also shows the technical "Team Consensus Scoring" evaluation that was assigned to the OSI and Vaisala technical proposals. According to the "Technical Evaluation Vendor Scoring" instructions, each proposal's evaluated "Primary Strengths" were assessed with individual point "scores which exceeded '3'," while all of the evaluated "Primary Weaknesses" received individual point "scores less than '3'." *See Agency Report, Exhibit No. 6, DRAFT Technical Evaluation Summary Report* at 2 (emphasis added).

"Team Consensus Scoring:"

Factors	Description	[Deleted]	OSI	Vaisala
1	Critical Specifications	[Deleted]	[Del]	[Del]
2	Visibility Sensor Engineering	[Deleted]	[Del]	[Del]

	Sensor Specifications	[Deleted]	[Del]	[Del]
	Risk Management	[Deleted]	[Del]	[Del]
	Reliability and Maintainability	[Deleted]	[Del]	[Del]
	Human Factors	[Deleted]	[Del]	[Del]
	Servicing and Maintenance	[Deleted]	[Del]	[Del]
3	Visibility Sensor Configuration	[Deleted]	[Del]	[Del]
	Mounting Hardware	[Deleted]	[Del]	[Del]
	Present Weather Requirement	[Deleted]	[Del]	[Del]
	Sensor Power Requirement	[Deleted]	[Del]	[Del]
	Sensor Weight and Space Requirement	[Deleted]	[Del]	[Del]
4	Visibility Sensor Performance	[Deleted]	[Del]	[Del]
5	Visibility Sensor Documentation	[Deleted]	[Del]	[Del]
6	Program Management	[Deleted]	[Del]	[Del]
7	Configuration Management	[Deleted]	[Del]	[Del]
8	Integrated Logistics Support	[Deleted]	[Del]	[Del]
	TOTAL SCORE	[Deleted]	[Del]	[Del]

40. As indicated above, following the initial technical evaluations of each proposal, OSI's initial technical score [DELETED]. In the context of the Technical Evaluation Plan's established descriptive rating, *see Finding No. 13, supra.*, OSI's technical score corresponded to an adjectival rating of [DELETED] while Vaisala's score qualified for [DELETED] rating category. *See Technical Evaluation Plan* at *Finding No.* 13, *supra.*

E. Technical Evaluation Team's Written Communications with OSI

41. The SIR advised offerors that "after evaluating written proposals," the FAA "may conduct written or oral discussions with all, or a limited number of offerors." *See SIR*, ¶ M.2 at 37. This "Discussions" provision also provided that "in the evaluation and best value decision," the FAA "may consider information obtained during discussions, whether or not it is reduced to written material." *Id.* The SIR further cautioned that because it was "also possible that discussions will not take place," offerors "should therefore submit their best . . . proposals in the initial proposal." *Id.* at 37-38.

42. The record shows that in its "DRAFT Technical Evaluation Summary," the technical evaluation team reported [DELETED]. *See Agency Response, Exhibit No.* 6, *DRAFT Technical Evaluation Summary Report* at 4. [DELETED]. *Id.*

43. By letter dated November 7, 2005, the Contracting Officer requested "additional information/clarification" from OSI, and asked it to respond to the following technical questions ("Technical Questions"):

    [DELETED].

    See Agency Response, Exhibit No. 5, *November 7, 2005 Letter to OSI.*

44. Notably, the contracting officer's "clarification" letter to OSI [DELETED]. *Id.*

45. In a [DELETED] dated November 11, 2005, [DELETED] *Agency Response, Exhibit No.* 5, *OSI Letter to Contracting Officer dated November 11, 2005* at 1. [DELETED].

46. In response to Technical Question No. 2, OSI submitted detailed [DELETED].

47. In response to Technical Question No. 3, OSI clarified that [DELETED].

F. Technical Evaluation Team's Written Communications With Vaisala

48. Vaisala also received an "additional information/clarification" letter dated November 7, 2005 from the Contracting Officer. [DELETED].

49. In addition, the Contracting Officer's letter asked Vaisala to clarify certain aspects of its [DELETED].

50. In addition, the Contracting Officer advised Vaisala that its proposal [DELETED].

51. Finally, and of relevance to the issues presented by OSI's Protest, the contracting officer advised Vaisala that its technical proposal had [DELETED] Vaisala was directed to respond to each of the contracting officer's identified questions by November 16, 2005. *Id.*

52. On November 16, 2005, Vaisala submitted "documentation" via e-mail to the contracting officer. [DELETED].

53. With respect to the contracting officer's request for [DELETED].

54. In response to the Contracting Officer's questions about [DELETED].

G. The Source Selection Process and Award Decision

55. On December 6, 2005, the technical evaluation team unanimously recommended the "Vaisala visibility sensor technical proposal because it was the most highly rated proposal, and therefore represents the best value in terms of technical merit." *Agency Report, Exhibit No.* 6 at 7. The results of the technical team's Final Technical Evaluation Summary for both the OSI and Vaisala technical proposals were as follows:

Final Technical Evaluation Summary

Factor	Description	Total Points Possible	OSI Final Score	Vaisala Final Score
1	**Critical Specifications**	[Deleted]	[Deleted]	[Deleted]
2	**Visibility Engineering**	[Deleted]	[Deleted]	[Deleted]
	Sensor Specification	[Deleted]	[Deleted]	[Deleted]
	Risk Management	[Deleted]	[Deleted]	[Deleted]
	Reliability and Maintainability	[Deleted]	[Deleted]	[Deleted]
	Human Factors	[Deleted]	[Deleted]	[Deleted]
	Servicing and Maintenance	[Deleted]	[Deleted]	[Deleted]
3	**Visibility Software**	[Deleted]	[Deleted]	[Deleted]
	Mounting Hardware	[Deleted]	[Deleted]	[Deleted]
	Present Weather Requirement	[Deleted]	[Deleted]	[Deleted]
	Sensor Power Requirement	[Deleted]	[Deleted]	[Deleted]
	Sensor Weight and Space Requirement	[Deleted]	[Deleted]	[Deleted]

4	**Visiblity Sensor Performance**	[Deleted]	[Deleted]	[Deleted]
5	**Visibility Sensor Documentation**	[Deleted]	[Deleted]	[Deleted]
6	**Program Management**	[Deleted]	[Deleted]	[Deleted]
7	**Configuration Management**	[Deleted]	[Deleted]	[Deleted]
8	**Integrated Logistics Support**	[Deleted]	[Deleted]	[Deleted]
	Final Comparison	[Deleted]	[Deleted]	[Deleted]

56. Of significance to this Protest, the Final Technical Evaluation Summary shows that OSI's technical score [DELETED]. However, Vaisala's technical score [DELETED]. *Id.*

57. While the Final Technical Evaluation Summary sets forth the final "scoring" results identified above, and also provides a narrative of "OSI's Primary Strengths" and "Primary Weaknesses," the final summary does not establish [DELETED].

58. According to the narrative in the Final Technical Evaluation Summary for OSI, [DELETED]. *Id.*

59. The OSI Final Summary also identified the [DELETED]. *Id.*

60. At the conclusion of the technical, pricing and past performance evaluations of each offeror, the Source Selection Official ("SSO") was presented with the following final evaluation results and scores:

Final Evaluation	**OSI**	**Vaisala**
Overall Technical Score	[DELETED]	[DELETED]
Evaluated Price	[DELETED]	[DELETED]
Past Performance	[DELETED]	[DELETED]

See Agency Response, Exhibit No. 9 at 2-3.

61. According to the his written justification dated December 12, 2005, because Vaisala's proposal had received [DELETED]. *Id.* (emphasis in original).

62. On January 20, 2006, the Center provided OSI with a written debriefing ("Center's Debriefing") which identified the following [DELETED] weaknesses in its technical proposal:

[DELETED].

See Protest at 1 and 2; *Agency Response, Exhibit No. 11, Debriefing Letter* dated January 20, 2006.

63. The Center's Debriefing also advised OSI [DELETED]. *Id.*

64. OSI filed this Protest on January 26, 2006. On February 2, 2006, the Director of the ODRA convened an initial Status Conference with the parties, as required by the ODRA Procedural Regulations. *See* 14 C.F.R. § 17.17(b). Following that Conference, the parties advised the Director that they had elected to pursue alternative dispute resolution (ADR) using the services of an ODRA Neutral that was designated by the Director. *See* 14 C.F.R. § 17.13(d).

65. On March 13, 2006, when the parties advised the Director that their ADR settlement attempts had been unsuccessful, the Director instructed the parties that further resolution of the Protest would be conducted pursuant to the ODRA's default adjudication procedures set forth in its Procedural Regulations. *See* 14 C.F.R. § 17.37. The Center's Response was filed on April 3, 2006, and included copies of an extended written debriefing which the Center had provided to the Protester during the ADR period. While submissions were requested from both OSI and Vaisala, only OSI submitted Comments.

III. DISCUSSION

A. Overview of the OSI Protest Grounds

OSI's Protest challenges [DELETED] reported in the Center's Debriefing, *see Protest*, at 1 and 2, and also challenges the Center's [DELETED] November 7, 2006 written clarifications. *Comments* at 6. According to OSI, the Center's technical evaluation team unreasonably—and mistakenly—concluded that the [DELETED]. *Id.*

OSI also challenges the technical team's conclusion that the OSI [DELETED]. *Protest* at 2. While OSI's technical proposal was downgraded for [DELETED].

Finally, OSI challenges the evaluation team's determination that the OSI proposed sensor [DELETED].

In addition to the [DELETED] technical evaluation errors alleged above OSI protests the Vaisala award because the Center: (1) failed to disclose these evaluated weaknesses to OSI and (2) the SSO's best value analysis—which led to the selection of the Vaisala visibility sensor relied on [DELETED]. *Protest* at 4. As relief, OSI's Protest seeks correction of the Center's technical evaluation errors, and a new best value analysis and source selection determination. *See Protest* at 4; *Comments* at 8.

B. Summary of The Center's Response

The Center defends its evaluation of both technical proposals as rational and properly performed in accordance with the SIR's stated requirements. [DELETED]. *See Center Brief* at 9. [DELETED].

Id at 18.

Finally, the Center reports that [DELETED]. *Id.* In defending its evaluation, the Center also maintains that because this Protest "involves only the analysis done by the Evaluation Team," the Supreme Court's decisions in *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 377 (1998) and *Kleppe v. Sierra Club*, 427 U.S. 390, 412 (1976), compel the ODRA to "defer to the highly technical expertise opinions of the Agency." *Center Brief* at 19.

C. The Standard of Review

In accordance with the ODRA Procedural Regulations, 14 C.F.R. Part 17, and the FAA's Acquisition Management System ("AMS"), the ODRA will not recommend that a post-award protest be sustained where a contract award decision has a rational basis and is neither arbitrary, capricious, nor an abuse of discretion and is supported by substantial evidence. *Protest of Ibex Group, Inc.*, 03-ODRA-00275. Moreover, in "best value" procurements such as this one, the ODRA will not substitute its judgment for those of the designated evaluation and selection officials as long as the record demonstrates that their decisions were consistent with the AMS and the evaluation and the award criteria set forth in the underlying solicitation. *Protest of PCS*, 01-ODRA-00184. Notably, an offeror's mere disagreement with the agency's judgment concerning the adequacy of its proposal is not sufficient to establish that the Agency acted irrationally. *Protest of En Route Computer Solutions*, 02-ODRA-00220. The Protester bears the burden of proof, and to prevail in this Protest, OSI must demonstrate a reasonable possibility of prejudice; specifically, OSI must show that but for the Center's evaluation and source selection errors that are alleged here, OSI would have had a substantial chance of receiving the award. *See Protest of L. Washington & Associates, Inc.*, 02-ODRA-00232.

As explained below, the ODRA concludes that this record shows the Center treated OSI in a disparate manner because it failed to seek clarifications and apprise OSI of the [DELETED] weaknesses in its technical proposal. In contrast, the record shows that the Center engaged in communications with Vaisala that fully disclosed each of the [DELETED] in its submitted proposal. The ODRA also concludes that the disparate treatment of offerors led to a distorted best value analysis because it was based on an

incomplete technical evaluation and pricing evaluation errors. Absent the disparate treatment and these errors, the ODRA concludes that OSI would have stood a substantial chance of winning the competition.

D. The Center Improperly Failed [DELETED] In OSI's Technical Proposal

As noted above, on November 7, 2005, the contracting officer issued separate letters to each offeror requesting "clarifications." *See Finding Nos.* 43 and 48. It is well established that the AMS does not distinguish between "clarifications" and "discussions"—nor does the AMS mandate communications with all offerors or require the submission of new best and final offers. AMS § 3.2.2.3.1.2.2. However, even where—as here—a solicitation states that discussions may not be conducted prior to award, the Agency's discretion to refrain from holding discussions is not unfettered, but is reviewable to ensure that it was reasonable in light of the particular circumstances of the procurement. *Protest of Ibex Group, Inc.*, 03-ODRA-00275. The particular circumstances evident from this record show that although Vaisala was apprised of every "primary weakness" in its technical proposal during the technical evaluation team's written "clarifications," OSI did not receive the same "clarification" opportunity because the technical evaluation team failed to identify and communicate [DELETED].

Although the record shows that the technical evaluation team had recorded [DELETED] in OSI's proposal, the Center's November 7, 2005 written clarifications only asked OSI about [DELETED]. *See Finding No.* 43. The other [DELETED] never communicated by the Center to OSI. *See Finding Nos.* 20-21, *supra.* On this record, for the reasons explained below, the ODRA is persuaded that had [DELETED] disclosed to OSI—in the same manner that the Center disclosed to Vaisala every evaluated weakness in its submitted proposal—OSI could have provided the team with additional technical information and clarifications potentially affecting the evaluation and scoring.

1. The Center's Conclusion That The OSI Technical Proposal Presented a [DELETED] Problem

The record shows that because the OSI visibility sensor [DELETED]. *See Finding No.* 59*, supra.* OSI challenges the Center's failure to advise it of this proposal weakness in the November 7, 2005 clarifications, and [DELETED].

OSI also argues that its proposed sensor does not reasonably present the [DELETED] that was evaluated by the Center because the OSI sensor is equipped with [DELETED]. *Protest* at 2; *Comments* at 2 and 3. According to OSI, these technical features—which were also evaluated as a clear "strength" by the technical team, *see Finding No. 63, supra*—[DELETED]. *Protest* at 2; *Comments* at 3 and 4. In this regard, OSI emphasizes that the Center's evaluation that [DELETED]. *OSI Protest* at 2.

As a preliminary matter, the failure to apprise OSI [DELETED]—especially since the Center [DELETED] during the November 7, 2005 written communications. *See Finding Nos.* 48-51, *supra.* [DELETED] could have been resolved by communicating an appropriate request for clarification to OSI. This type of communication is exactly what is contemplated by the AMS, and what should have occurred here. *See Ibex, supra.*

The ODRA also concludes that there is much in this record—especially the Center's Debriefing and the Technical Evaluation Summaries—to support OSI's contention that the technical evaluation of this aspect of its proposal was unreasonable. The record clearly confirms that the technical evaluation team agreed that the [DELETED]. *See Finding* No. 63, *supra*. In addition, while the Center first reported that [DELETED] presented a [DELETED]. *See Agency Response, Exhibit No.* 14, *Additional Questions dated February 21,* 2006, ¶ 2 at 2. This admission that [DELETED] that were initially reported by the Center as the [DELETED] do not present a valid basis for downgrading OSI's technical proposal.

2. The Center ‘s Allocation [DELETED]

While the solicitation stated that each offeror propose a hail detection capability as part of its technical proposal, *see Finding Nos.* 6-7, the SIR also provided that this “present weather capability” feature would be implemented at a “future date.” *See Finding No.* 6, *supra.* The SIR also specified that a “combined visibility/present weather unit” configuration was “preferred.” *See Finding No.* 9, *supra.*

The record shows that the technical evaluation team concluded that OSI’s [DELETED]. The record shows that the Center evaluated this feature by identifying whether or not each submitted technical proposal “meets” or “exceeds” the hail detection specification. *See Finding Nos.* 19 and 35. [DELETED]. *See Finding Nos.* 51-55, *supra.*

Notably, while the Center downgraded OSI’s technical proposal for [DELETED]. *See Finding No.* 54, *supra.* Vaisala’s proposal clearly explains that [DELETED].

As noted above, the Center never apprised OSI prior to award [DELETED]. *See Finding No.* 43, *supra*. [DELETED]. Such disparate treatment by the Center renders the current technical evaluation results unreliable, and cannot stand.

3. The Center’s Evaluation [DELETED]

The record shows that the technical evaluation team concluded that OSI’s proposed sensor [DELETED]. *Id*.

In its Response, the Center [DELETED].

Curiously, when this [DELETED] in OSI’s technical proposal was first evaluated, the record shows that the Center never approached OSI for clarification, [DELETED]. The Center’s decision to identify each of the evaluated weaknesses in the [DELETED] and communicate them during clarifications created the same obligation to disclose each of the evaluated [DELETED].

Even though the Center has since recanted this evaluated "weakness" in OSI's technical proposal, [DELETED].

4. Irregularities and Inconsistencies [DELETED]

There are several technical scores in the evaluation record which appear inconsistent with the reported strengths and weaknesses that were evaluated in each offeror's technical proposal, and are not otherwise explained by the record. As a preliminary matter, the ODRA's review of the record shows that the Center never disclosed a [DELETED]. According to the team's Final Technical Evaluation Summary, the OSI proposal was [DELETED].

See Agency Response, Exhibit No. 6, Final Technical Evaluation Summary, at 2.

The record shows that although OSI was earlier asked in the November 7, 2005 clarifications [DELETED]. *See Finding No.* 43, *supra*. [DELETED].

The technical evaluation record similarly fails to show that the Center conducted a complete [DELETED]. First, there is no evidence in the record to support the Center's [DELETED]. Nor does the record reveal why OSI's technical proposal score remained [DELETED]. *See Agency Report, Exhibit No.* 6, *Final Technical Evaluation Summary*, at 2 – 4. Notably, while the Final Summary of OSI's technical evaluation sets forth [DELETED]. *Id.* at 4-6.

Moreover, while some of the Center's evaluation narrative for each proposal's "Primary Strengths" and "Primary Weaknesses" [DELETED] several of the Center's assigned scores are inconsistent with the corresponding evaluation narrative for that technical factor or subfactor. [DELETED] did not propose a sensor currently equipped with the hail detection capability that OSI proposed. *Agency Response, Exhibit No.* 6, *Final Technical Evaluation Summary*, ¶ 3.2, at 3 and 6. Similarly, while the Center's evaluation narrative emphasizes [DELETED] the record nevertheless shows that the [DELETED].

As another example, while the evaluation record clearly describes [DELETED] fails to reflect [DELETED]. *Id.* at 4.

The portions [DELETED] technical evaluation for which the Center failed to provide any narrative are similarly problematic. First, the Final Summary's silence on each of the following technical evaluation requirements—[DELETED]—defeats the purpose of the technical evaluation record because, without more, there is no way to determine if there was any technical premium that would warrant paying a price premium. Since the record fails to [DELETED].

In recommending this review, the ODRA is not attempting to replace the Center's technical expertise with its own. To the contrary—and as emphasized by the United States Court of Federal Claims—the ODRA will hold the Center to a "consistent, equal and rational application" of its technical evaluation process. *See Metcalf Construction Company, Inc. v. United States,* 53 Fed. Cl. 617 (2002). As discussed above, the Center's process during this procurement was clearly unequal and prejudicial to OSI; the point scores awarded to OSI do not reflect the evaluated technical strengths in its proposal, and the disparate treatment of OSI undermined its ability to compete because it was deprived of the opportunity to respond to the Center's evaluated technical weaknesses. The ODRA concludes that but for the errors discussed above OSI stood a reasonable chance of receiving the award. *Id.; see also Day & Zimmermann Services v. United States, supra*.

5. The Resulting Best Value Analysis Was Defective

As noted above, the SIR provided that contract award would be made to the contractor whose proposal offered the "best value" to the Center, based on an integrated assessment of technical merit and price—and offerors were also advised that for the "integrated trade-off assessment, the technical factor will be . . . *significantly more important* than the price/cost and past performance factors, which will be secondary and coequal." *See SIR* at 38 (emphasis in original). Here, the record shows that at the time of the best value analysis, the SSO was unaware of the Center's disparate treatment of OSI and the

incomplete technical evaluation. As a result, the SSO did not know that the technical evaluation report was not rationally based. In addition, the record shows that the SSO was incorrectly advised that Vaisala's evaluated price [DELETED].

IV. CONCLUSION

AMS Section 3.9.3.2.2.4 conveys to the ODRA "broad discretion" to recommend remedies for both protests and contract disputes. In light of the findings discussed above, the ODRA concludes that the best value analysis and source selection decision lacked a rational basis because of the Center's disparate treatment of the offerors. To establish prejudice, a protester must demonstrate that but for the alleged errors, there was a substantial chance it would have received the contract award. *See Statistica, Inc. v. Christopher,* 102 F.3d 1577 (Fed.Cir.1996). Notably, when the Agency violates its procurement requirements, any doubts concerning the alleged prejudicial effect of the Agency's action will be resolved in favor of the protester. *See Day & Zimmermann Services v. United States,* 38 Fed. Cl. 591 (1997).

The AMS strongly encourages communication throughout the entire procurement process. *See* AMS § 3.2.2.3.1.2.2; *see also Protest of Ibex Group, Inc.*, 03-ODRA-00275. For the reasons discussed above, the ODRA finds that the Center's failure to advise OSI of the primary weaknesses in its technical proposal was unreasonable and prejudicial to OSI, and it was also inconsistent with the AMS policies. *Id*. Under these circumstances, the ODRA cannot conclude that the ultimate award decision was not affected by the disparate treatment of proposals during the technical evaluation, the unexplained and otherwise distorted technical scoring, as well as the understated price differential that was provided to the SSO. *See Protest of Raytheon Technical Services Company,* 02-ODRA-00210 (*Request for Reconsideration No. 1 denied* April 10, 2002; *Request for Reconsideration No.2 denied April 22, 2002).*

The ODRA recommends that the Protest be sustained, and that the Center be directed to reevaluate the technical proposals in light of this decision, taking into account additional clarifying information now included in the record. The Center is further directed to

complete the technical reevaluation and new best value analysis within 45 calendar days, and report the outcome of its reevaluation to the FAA Administrator through the ODRA. If the Protester's proposal is found to represent the best value to the Government, the Center should take appropriate action to terminate the Vaisala contract for convenience, and make award to OSI.

/s/

Behn M. Kelly
Dispute Resolution Officer
FAA Office of Dispute Resolution for Acquisition

APPROVED:

/s/

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