

## PUBLIC VERSION

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

### FINDINGS AND RECOMMENDATIONS

**Matters:**        **Protest of HyperNet Solutions, Incorporated**  
                  **Protest of Essential Administrative Services, LLC**  
                  **Pursuant to Solicitation No. DTFAAC-07-R-02224**

**Docket Nos.:** **07-ODRA-00416 and 07-ODRA-00418 (Consolidated for Decision)**

*Appearances:*

For the Protesters:    HyperNet Solutions, Incorporated  
                                  G. Lindsay Simmons, Esq., J. Eric Whytsell, Esq.

                                  Essential Administrative Services, LLC  
                                  Inslee T. Bennett, Protester’s Designee

For the Agency:        FAA Mike Monroney Aeronautical Center  
                                  A. Lester Haizlip, Esq., Senior Center Counsel  
                                  Michael R. Burton, Esq., Senior Center Counsel

For the Intervenor:    CNI Aviation, LLC  
                                  David L. Nimmo, General Counsel  
                                  Robert K. Tompkins, Esq., Michael J. Carrato, Esq.  
                                  and Elizabeth M. Gill, Esq.

### **I. INTRODUCTION**

The above Protests involve separate challenges to the Federal Aviation Administration (“FAA”) Mike Monroney Aeronautical Center’s (“Center”) award of a contract (“Contract”) to CNI Aviation, LLC (“CNI”). The Contract was awarded pursuant to Solicitation No. DTFAAC-07-R-02224 (“Solicitation”), which requires the performance of Center-wide administrative support services for approximately 5,000 personnel for up to five years. *Center Response to HyperNet Protest (hereinafter “H-CR”), Legal Brief at 2.* HyperNet Solutions, Inc. (“HyperNet”) filed the first Protest (“HyperNet Protest”) at the Office of Dispute Resolution for Acquisition (“ODRA”) on August 17, 2007. The

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HyperNet Protest contends that it should have been selected for the Contract award because it offered the “highest technically rated [and] lowest priced” proposal. *See HyperNet Protest* at 2. HyperNet also contends that CNI is not eligible for award of this Contract because it does not qualify as a Small & Economically Disadvantaged Business (“SEDB”) or as a Small Business Administration (“SBA”) certified Section 8(a) concern (*hereinafter* “8(a) concern”).<sup>1</sup> *See HyperNet’s September 7, 2007 Clarification Letter; see also HyperNet’s September 13, 2007 Response to ODRA Show Cause Notice.*

Essential Administrative Services, LLC (“EAS”) filed the second Protest (“EAS Protest”) at the ODRA on August 25, 2007. The EAS Protest challenges the award to CNI based on the following three “prejudicial failures” in the procurement: (1) the Center’s refusal to provide an in-person debriefing; (2) the Center’s improper technical evaluation of EAS’ proposal as evidenced by identified “strengths and weaknesses” which are “conflicting and do not logically correlate” to the EAS scoring and technical rank; and (3) an “insufficient and incomplete” evaluation of EAS’ cost/price. *See EAS Protest* at 3 and 4.

As relief, EAS seeks—“in order of preference”—the following remedies:

- (1) A directed award to EAS;
- (2) A recompetition; and/or
- (3) The award of EAS’ proposal preparation and protest costs.

*See EAS Protest* at 1 and 5.

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<sup>1</sup> The SBA’s 8(a) Business Development Program, named for a section of the Small Business Act, 15 U.S.C. § 637(a) *et seq.*, is a program created to help small disadvantaged businesses compete in the American economy and access the federal procurement market. *See* [www.SBA.gov](http://www.SBA.gov). In this regard, while federal law expressly exempts the FAA from the Small Business Act, *see Public Law* No. 104-50, § 348. 109 Stat. 436, 460 (1995); *Public Law* No. 106-181, Title VII, § 704, 114 Stat. 157 (*codified at* 49 U.S.C. § 40110(d)(2)(D)(2002)), the FAA frequently looks to SBA policy and precedent for guidance in its procurements. To that end the FAA Acquisition Management System (“AMS”) encourages the FAA’s use of SEDB/8(a) set-asides. *See* AMS § 3.6.1.3.4. The size challenge ground of the HyperNet Protest is not discussed in these Findings and Recommendations. The Center—without objection from the other parties, and with the ODRA’s approval—has requested an advisory opinion from the SBA on the issue. The ODRA informed the parties that it would review the size challenge, including the SBA’s advisory opinion, if necessary. In light of these Findings and Recommendations, and the Final Order adopting them, the ODRA will retain this matter on its inactive docket pending the completion of the recommended corrective action; the advisory opinion of the SBA on the size challenge is not relevant to the findings and the recommended remedy herein.

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For the reasons explained below, the ODRA recommends that the HyperNet Protest be sustained. As a remedy, the ODRA recommends that the CNI Contract be terminated and award of a contract be made to HyperNet. The ODRA further recommends that, notwithstanding the faulty evaluation of the EAS Proposal, the EAS Protest be denied for lack of prejudice. Finally, the ODRA recommends that: the HyperNet Protest be maintained on the ODRA docket pending completion of the recommended corrective action; and the Center report to the ODRA periodically on the status of its implementation of the corrective action.

### II. FINDINGS OF FACT

#### A. Overview of the Solicitation

1. An initial version of the Solicitation was issued on April 11, 2007, but was subsequently revised into its current final form—which was issued via an amendment on May 2, 2007—as an exclusive small business set aside for SEDB and 8(a) concerns. *See HyperNet Center Response (“H-CR”) and EAS Center Response (“E-CR”), Exhibit Number (“Exh. No.”) 3, “Final [Screening Information Request], Amendment A0001 (hereinafter, “the Solicitation”)* at 1. The Solicitation contemplated the award of an “Indefinite Delivery/Requirements” type contract with “Time and Material Labor Hours Provisions.” *Id.* at ¶ 3.2.4-1, “*Type of Contract*” at 70. The Solicitation contemplated contract performance for a base year and up to four option years. *Id.*

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2. In outlining the scope of the contract's required work, the Solicitations specified that the:

contractor shall furnish all personnel, management, supervision, transportation, equipment, materials and subcontract items or services as necessary to perform various administrative support services as stated in specific performance work statements for each individual task order(s).

*See Solicitation, Performance Work Statement (hereinafter, "the PWS"), ¶ 1.0, "Scope of Work" at 2.*

3. The Solicitation's "*General Instructions*" similarly emphasized that:

It is very important that all Offerors understand that it is their responsibility to ensure they meet all requirements stated in the Performance Work Statement (PWS) and these instructions, such as terms and conditions, representations and certifications, and performance requirements, in addition to those terms identified as evaluation factors and sub-factors, to be eligible for award.

*See Solicitation, "Attachment No. 1, Section L, Instructions to Offerors (ITO) and Instructions for Proposal Preparation," (hereinafter "ITO"), ¶ 2.0(a), "PWS Compliance" at 58. Instructions to adhere to the Solicitation criteria appeared throughout the Solicitation—for example, in the instructions for the Solicitation's "Part 1—Section B—Supplies/Services & Price/Cost" (hereinafter "Section B Pricing Schedules") at 2-17, as well as the evaluation criteria. *Id.*, Section M, "Evaluation Factors for Award," (hereinafter, "Evaluation Factors"), ¶ M003, "Solicitation Requirements, Terms and Conditions" at 84.<sup>2</sup>*

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<sup>2</sup> Notwithstanding the Solicitation's emphasis on compliance with each requirement, the Solicitation stated that the Center would "consider exceptions" if the offeror's proposal identified the relevant Solicitation term or condition being excepted, stated the reason for the exception(s) and provided "any other information concerning the exception" in the submitted proposal. *See ITO, "Exception to Solicitation Terms and Conditions" at 74.*

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4. The Solicitation required offerors to submit their proposals in six volumes, as follows:

- Volume I: Executive Summary and Certificate of 8(a) Eligibility
- Volume II: Business Approach/Strategy  
Proposal Risk  
Key Resumes
- Volume III: Sub-Factor Plans
- Volume IV: Relevant Past Performance
- Volume V: Cost/Price
- Volume VI: Contract Documentation

*ITO*, “Table 2.2: Proposal Organization” at 60.

5. According to the procurement’s Technical Evaluation Plan (“TEP”), *see H-CR* Exh. No. 4, award of this Contract was to be made by the Source Selection Official (“SSO”)—who in this case was the Contracting Officer. *See TEP* at 1. According to the “Source Selection General Information” section of the Solicitation, the SSO would:

select the best *Section M* overall offer, based on an integrated assessment of Business Approach/Strategy and Sub-Factor Plans, Proposal Risk, Past Performance and Cost/Price.

*See Evaluation Factors*, ¶ M001 (a), “Basis for Contract Award” at 5.

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### The Award Criteria

6. Pursuant to the specified Evaluation Factors, each proposal would be evaluated according to the following factors and sub-factors, which were identified in the Solicitation as follows:

FACTOR No. 1: BUSINESS APPROACH/STRATEGY

Sub-Factor No. 1: Program Management

Sub-Factor No. 2: Supervision Plan

Sub-Factor No. 3: Recruit/Retention Plan

Sub-Factor No. 4: Orientation Phase-In Plan/  
Transition Phase-Out Plan

Sub-Factor No. 5: Quality Control Plan

FACTOR No. 2: PAST PERFORMANCE

Sub-Factor No.1: Contractor Experience

Sub-Factor No. 2: Key Personnel & Qualifications

FACTOR No. 3: COST/PRICE

FACTOR No. 4: PROPOSAL RISK

*Id.*, ¶ M002(a), “*Evaluation Factor and Sub-factors and Order of Importance*” at 76.

7. The Solicitation’s Evaluation Factors emphasized that while Factor No. 3, “Cost/Price,” would “contribute substantially to the award decision,” the other evaluation factors—*e.g.*, Factor No. 1 (Business Approach/Strategy); Factor No. 2 (Past Performance) and Factor No. 4 (Proposal Risk)—were “significantly more important than cost/price.” *Id.*, “*Importance of Cost*” at 76.

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8. The Evaluation Factors also warned that a proposal could be rejected if it were to be “evaluated as unrealistic in terms of program commitments, includ[ing] contract terms and conditions or an unrealistically” high or low price. *Id.*, ¶ M001(c), “*Rejection of Unrealistic Offers*” at 75.

9. Notably, the Solicitation incorporated Acquisition Management System (“AMS”) § 3.2.2.3.1.2.2, *Communications with Offerors*, which allowed the Center “to communicate with one or more Offerors at any time during the [Solicitation] process.” *See ITO*, ¶ 1.1(c). To that end, the procurement’s TEP similarly emphasized that “communications with an offeror or offerors may be desired where there is a need to seek clarification or address weaknesses and deficiencies reported to the [Product Team] and/or the Contracting Officer.” *See TEP*, ¶ 3(c), “*Communications with Offerors*” at 3.

### **The Required Categories of Personnel**

10. The Solicitation required offerors to propose three different categories of personnel to perform this work. *See PWS* at 2-3 and 12. First, the Solicitation specified that offerors were required to propose a Project Manager (“PM”) and an Assistant Project Manager (“APM”) who would be charged with management responsibility “for all aspects of the contract.” *Id.* at ¶2.2, “*Program Management*” at 2.

11. Next, the Solicitation required offerors to propose “qualified, experienced, and skilled employees” in twenty-six labor categories—or positions—classified according to the Service Contract Act (“SCA”)—which were listed in: PWS Attachment No. 2: Labor Category Skills” (*hereinafter* “*PWS Attachment No. 2*”); PWS Attachment No. 3: Labor Category/Definitions of Skills (“*hereinafter* *PWS Attachment No. 3*”); as well as in the Section B Pricing Schedules at 2-17. Employees assigned to the identified SCA positions were to perform the bulk of the work ordered under the Contract. *Id.*, *PWS Attachment No. 3*. For example, according to the Solicitation, employees in the designated SCA positions would

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be performing tasks such as “Administrative Assistant,” “Technical Writer/Editor,” “Administrative Analyst,” “Training Program Assistant,” “Inspector,” “Direct Superviso[r]” or in a position “with added lead responsibilities.” *Id.* Each SCA position was classified with a “I,” “II” or “III” which referred to the level of work experience required by the identified position. *Id.*

12. The third category of personnel which offerors were required to propose involved supervisory personnel. *See Schedule B Pricing Schedules* at 3, 6, 9, 12 and 15. The Solicitation classified these positions as “Task Supervisor I,” “Task Supervisor II,” “Task Lead,” and “Functional Lead.” *Id.*; *PWS Attachment Nos. 2 and 3*. For these positions, each proposal was required to include a “Supervisory Plan” demonstrating how “sufficient day-to-day supervision of each employee and each current task order” would be performed “to insure successful performance. *See PWS*, ¶ 2.6., “*Supervision of Contractor Employees*” at 3; ¶ 8.2.2, “*Task Lead Premium*” at 12; ¶ 8.2.3, “*Functional Lead Premium*” at 12, and ¶ 8.2.4, “*Task Supervisor I and II (full time)*” at 12. The Solicitation specified that the Task Supervisor I and Task Supervisor II were required to “provid[e] supervision as a full time job of forty hours per week,” and that “[t]his category of employee will be considered on site supervisors for the contractor’s personnel . . . provid[ing] cross talk supervision for all areas. *Id.*, ¶ 8.2.4, *supra*; see also Solicitation, “*Part I—Section C—Description/Specs/Work Statement*,” ¶ C.1(d), “*Definitions: Task Supervisor*,” (*hereinafter “Supervisor Definitions”*) at 18.

13. The Solicitation further explained that if a “task . . . require[s] unique/temporary combinations of expertise, competence, and/or responsibility that are available, but not at established contract wage rates,” a “premium” or supervisory employee could be designated to perform that task at a higher rate of pay. *See PWS*, ¶ 8.2, “*Scope*” at 12. To that end, the Solicitation defined qualified “premium level” employees as follows:

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### Expertise Premium:

Unique or upper level expertise that is definable and apparent in the labor market . . . including expertise gained through performance under this PWS;

### Task Lead Premium

Small tasks or subtasks that can best be supervised by a working supervisor, rather than a full-time supervisor.... [n]o more than 4 hours per week supervision;

### Functional Lead Premium

Geographic separation or functional responsibilities often dictate that a secondary level of supervision be provided to contract performance . . . . [n]o more than 12 hours per week supervision.

### Task Supervisor I and II (full time)

These personnel will be providing supervision as a full time job of forty hours per week. This category of employee will be considered on-site supervisors for the contractor's personnel [and] shall provide cross task supervision for all areas. Level [of supervision] will be dependent upon Task and personnel supervised.

*Id.*, ¶ 8.2.1—¶ 8.2.4, at 12.

## **B. Volume II Requirements and Evaluation**

14. The Solicitation's "Instructions" for Volume No. II—the Business Approach/Strategy and Risk section of the required proposal—advised that this "Volume should be specific and complete," and emphasized that "all the requirements specified in the solicitation are mandatory." *See ITO*, ¶ 4.1, "General Instructions" at 62. These Instructions further stated that:

[t]he proposal must describe in detail a sound and rational approach to meeting the FAA's requirements and demonstrate a clear understanding of the PWS requirements.

*Id.* at 62-63.

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15. As noted above, *see Finding of Fact Number (hereinafter “FF No.”) 7*, each offeror’s submitted Volume II was required to be evaluated according to the following two Factors and five Sub-Factors:

### FACTOR NO. 1: BUSINESS APPROACH/STRATEGY

- Sub-Factor No. 1: Program Management
- Sub-Factor No. 2: Supervision Plan
- Sub-Factor No. 3: Recruit/Retention Plan
- Sub-Factor No. 4: Orientation Phase In Plan/  
Transition Phase-Out Plan
- Sub-Factor No. 5: Quality Control Plan

### FACTOR NO. 4: PROPOSAL RISK.

*See Evaluation Factors* at 76.

16. Under Factor No. 1, the Solicitation’s evaluation criteria specified that each offeror’s Volume II would receive a numerical rating reflecting the Technical Evaluation Team’s (“TET”) assessment of the offeror’s “capability to satisfy the Government’s requirements.” *Id.*, ¶ M002(b), “*Business Approach Strategy*” at 76 and ¶ M002(c), “*Business Approach/Strategy Factor 1*” at 76. The numeric ratings were set forth in the “Business Approach/Strategy and Sub-Factor Ratings” chart set of the Solicitation’s Evaluation Factors section. *Id.* at 77.

17. The first two Sub-Factors for Factor No. 1—which the Evaluation Factors identified as a combined “Subfactor 1/2: Program Management/Supervision Plan,” required offerors to demonstrate an “adequate methodology for hiring, recruiting and retaining personnel qualified with the skills for each labor category identified in the PWS.” *See Evaluation Factors*, ¶ M002(c) at 77. The Solicitation also directed offerors to set forth a detailed description of a “sound and rational approach,” *ITO*, “*Sub-factor 1-2—Program Management Supervision Plan*,” ¶ 4.2.3(a), and to identify the proposed personnel with “key authority.” *Id.* According to the evaluation criteria instructions, Sub-Factors 1

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and 2 would be evaluated to see whether each offeror's proposed plans and descriptions were "sufficiently described." *Id.*, see also *Evaluation Factors, supra*.

18. Sub-Factor No. 3 of Factor No. 1 required offerors to propose a Recruit/Retention Plan (*hereinafter*, "*Recruit/Retention Plan*") primarily designed to address the offeror's "hiring of incumbent employees." See *ITO*, ¶ 4.2.3 (b) at 63. The Solicitation advised that under this Sub-Factor, Volume II would be evaluated to see: whether the offeror had proposed a sufficient plan to provide and retain qualified and skilled personnel; whether the proposal provided an adequate labor skill mix; and whether the offeror proposed a "detailed plan to manage disciplinary actions and to reduce problems." See *Evaluation Factors, "Sub-Factor 3--Recruit/Retention Plan"* at 78.

19. Sub-Factor No. 4 of Factor No. 1 required an "Orientation Phase-in-Plan/Transition Phase-out Plan" (*hereinafter* "*Orientation/Transition Plan*"). See *ITO*, ¶ 4.2.3(c) at 63. In this Plan, offerors had to demonstrate how personnel, materials and equipment would be used throughout all phases of contract start-up, performance, and shut-down. *Id.* Offerors were also required to describe their approach to minimizing delay and disruption to on-going Center projects and activities. *Id.* The Solicitation advised that this Plan would be evaluated for sufficiency—assessing such items as the number of personnel, and the "timeliness" of the offeror's proposal for phase-in and phase-out. See *Evaluation Factors, Sub-factor No. 4--[Orientation/Transition Plan]* at 78.

20. Sub-Factor No. 5 of Factor No. 1 required a Quality Control Program Plan (*hereinafter*, "*Quality Control Plan*") in which offerors were to "describe the methodology and actions necessary to provide quality control" in accordance with the Solicitation's terms. See *ITO*, ¶ 4.2.3(d) at 63. The Solicitation advised that each offeror's proposed Quality Control Program Plan for this Sub-Factor would be evaluated for sufficiency, including whether or not the proposal "adequately

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described the test and evaluation process employed for hiring services”. See *Evaluation Factors*, “Sub-factor 5—Quality Control Plan” at 78-79.

21. Factor No. 4, “Proposal Risk,” required each offeror to identify those sections of its proposal which the offeror “consider[ed] to have the potential for disruption of schedule, increased cost” or “poor performance.” See *ITO*, ¶ 4.2.4, “Proposal Risk” at 63-64; see also *Evaluation Factors* at 79. Once identified, the offeror was to classify each risk in accordance with a “Proposal Risk Ratings Table” set forth in that same section of the Solicitation. *ITO* at 64; *Evaluation Factors* at 79. Next, each offeror was to “address” or explain how its proposed approach would mitigate against the identified risks. *Id.*

22. The technical evaluation team (“TET”) that reviewed and scored each offeror’s Volume II was comprised of three Center officials. See *TEP*, ¶1(b) at 1.

23. Each TET member performed an individual evaluation of each offeror’s Volume II; these handwritten notes were subsequently transcribed almost verbatim and compiled into a catalogue of separate evaluation summaries which comprise the sole Technical Evaluation Report (“TER”) in this matter. See *Award Decision Document (“ADD”), “Technical Evaluation Summary of Each Offeror.”* Each offeror’s technical evaluation summary is approximately three pages in length. *Id.*

### **The Evaluation of CNI’s Volume II**

24. The TET evaluated several strengths under Factor No. 1 of CNI’s Volume II, including its “[e]xperienced personnel,” its “[g]ood focus on avoidance of problems,” a PM [that] has autonomy and [DELETED]. See *ADD, CNI Technical Evaluation Summary (hereinafter “CNI TES”)* at 1-2. Evaluated “weaknesses” under this Factor included a concern that there “may not be sufficient time for [DELETED],” and questions about CNI’s failure to describe or define the duties of its proposed “[DELETED].” *Id.*

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25. Under Sub-Factor No. 1, CNI's Program Management Plan was awarded numerous strengths. *Id.* The sole weakness identified under this Sub-Factor reiterated the evaluators' earlier reported weakness under Factor No. 1—pertaining to CNI's failure to explain or define the “[DELETED].” *Id.* at 1-2.

26. For the Supervisory Plan required under Sub-Factor No. 2, CNI's Volume II was cited for several strengths including its “good use of supervision,” “well defined” leadership and “detailed responsibilities for positions.” Two weaknesses were also reported—the most notable being that the evaluators did not “[DELETED]” *Id.* (*emphasis added*).

27. CNI's proposed Recruit/Retention Plan for Sub-Factor No. 3—received the [DELETED] score of its Volume II sections. *Id.* at 1. As strengths, the TET reported that CNI offered a plan that “covers all required areas,” contained a “[c]ommendable [DELETED]” and set forth an “[o]utstanding [DELETED].” *Id.* However, an almost equal number of “weaknesses” were cited in the CNI plan including remarks that the plan was “[DELETED]” and confuses the concepts [DELETED] and “retirement.” *Id.* The evaluators also reported that CNI's plan lacked “details on how [DELETED] and failed to clearly define the [DELETED] associated with each [DELETED].” *Id.*

28. Under Sub-Factor No. 4, CNI's Orientation/Transition Plan received only strengths—noting that “[b]oth Phase-In and Out processes [were] well described” and covered “all required areas.” *Id.* at 3.

29. CNI's proposed Quality Control Plan—required under Sub-Factor No. 5—was largely evaluated with strengths. *Id.* at 3. However, one weakness was noted; specifically, the evaluators commented that CNI “[DELETED].” *Id.*

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30. Finally, under Factor No. 4, Proposal Risk, CNI’s proposal was rated strongly for proposing a “[s]olid plan [DELETED]” and because CNI’s proposal demonstrated “the experience to [DELETED].” *Id.* Only one proposal weakness was reported for this plan pertaining to CNI’s definition of risk. *Id.*

31. In sum, out of a possible eighty-four (84) points, CNI received a technical score of [DELETED] points for Volume II of its Proposal, as follows:

<b>FACTOR No. 1</b>	<b>Sub-Factor No. 1</b>	<b>Sub-Factor No. 2</b>	<b>Sub-Factor No. 3</b>	<b>Sub-Factor No. 4</b>	<b>Sub-Factor No. 5</b>	<b>FACTOR No. 4</b>
<i>Business Approach/Strategy</i>	<i>Prog. Mgmt. Plan</i>	<i>Superv. Plan</i>	<i>Recruit/Retainmt. Plan</i>	<i>Orientation/Transition Plan</i>	<i>Quality Control Plan</i>	<i>Proposal Risk</i>
<i>Score: [DEL.]</i>	<i>Score: [DEL.]</i>	<i>Score: [DEL.]</i>	<i>Score: [DEL.]</i>	<i>Score: [DEL.]</i>	<i>Score: [DEL.]</i>	<i>Score: [DEL.]</i>

*See ADD, CNI Technical Evaluation at 1.*

**The Evaluation of HyperNet’s Volume II**

32. The record shows that HyperNet’s Volume II was assessed with numerous strengths under Factor No. 1 including its use [DELETED] and a [DELETED]. *See ADD, HyperNet Technical Evaluation (hereinafter, “HyperNet TES”)* at 1. HyperNet’s proposal was also credited for a “good summary” of its “Business/Approach/Strategy.” *Id.* The reported weaknesses in HyperNet’s Volume II under this factor were: its “[l]ack of [DELETED]”; “[DELETED]”; a lack of detail [DELETED] and a general need for “[DELETED].” *Id.*

33. HyperNet’s proposed Program Management Plan (Sub-Factor No. 1) was credited with being “well defined” and for establishing a “[d]efinite” [DELETED]” *Id.* at 2. Identified weaknesses included reported concerns about “[DELETED]” and “[n]ot much [being] said [DELETED].” *Id.* HyperNet’s proposed Supervisory Plan (Sub-Factor No. 2) was also awarded several strengths, including credit for its “very realistic approach” and [DELETED]. *Id.*

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As weaknesses, the TET questioned whether [DELETED] and also expressed concern about the plan’s lack of detail regarding [DELETED]. *Id.*

34. HyperNet’s proposed Recruit/Retention Plan was praised for being “realistic” and for providing a simple process for “[DELETED].” *Id.* at 2. Some weaknesses were assessed because some of HyperNet’s proposed “[DELETED]” might be “[DELETED]” and because [DELETED]. *Id.* at 2-3.

35. HyperNet’s proposed Orientation/Transition Plan was deemed a “[w]ell defined plan” along with five other strengths; no weaknesses or deficiencies were assessed. *Id.* at 5. Similarly, HyperNet’s Quality Control Plan was also awarded numerous strengths—with the only identified weakness referring to [DELETED] in the plan. *Id.*

36. Finally, for the Proposal Risk Factor, HyperNet was awarded several strengths for providing a “great overall proposal,” but the TET expressed concerns about [DELETED] and the [DELETED]. *Id.* No deficiencies were assessed under this sub-factor; in fact, the HyperNet TES advises that of the reported weaknesses, “none” were “notable” enough to “[DELETED].” *Id.* at 3-4.

37. As a result of the above technical evaluation, HyperNet received [DELETED] points out of an available eighty-four (84) points for its submitted Volume II, as follows:

<b>FACTOR No. 1</b>	<b>Sub--Factor No. 1</b>	<b>Sub-Factor No. 2</b>	<b>Sub-Factor No. 3</b>	<b>Sub-Factor No. 4</b>	<b>Sub-Factor No. 5</b>	<b>FACTOR No. 4</b>
<i>Business Approach/Strategy</i>	<i>Program Mgmt. Plan</i>	<i>Supervis. Plan</i>	<i>Recruit/Retain. Plan</i>	<i>Orientation/Transition Plan</i>	<i>Quality Control Plan</i>	<i>Proposal Risk</i>
<i>Score: [DEL.]</i>	<i>Score: [DEL.]</i>	<i>Score: [DEL.]</i>	<i>Score: [DEL.]</i>	<i>Score: [DEL.]</i>	<i>Score: [DEL.]</i>	<i>Score: [DEL.]</i>

*Id.* at 1.

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### The Evaluation of EAS Volume II

38. Under Factor No. 1, the EAS Proposal was awarded several strengths for its Business Approach and experience with the Center. The technical evaluators also reported that EAS had proposed a “[DELETED] and that EAS’ proposed “[DELETED]” plan was realistic and reasonable. *See ADD, EAS Technical Evaluation (hereinafter “EAS TES”)* at 1. At the same time, under this same factor, the evaluators also reported several weaknesses, claiming that [DELETED] and that [DELETED]. *Id.* The technical evaluators also reported—as weaknesses—that [DELETED] and was “[DELETED].” *Id.* Finally, the evaluators reported a weakness for EAS’ [DELETED]. *Id.*

39. Under the Program Management Plan Sub-Factor (No. 1), EAS’ “bold move to suggest [DELETED] was reported as a significant strength because of the potential “cost savings to the government.” *Id.* at 2. The TET also assessed strengths under this sub-factor for EAS’ [DELETED] its “[DELETED]” its “[g]ood description of [DELETED] and the fact that EAS’ Volume II had “[DELETED].” *Id.* Notwithstanding these evaluated strengths, the EAS TES cites several weaknesses in its proposed Plan including [DELETED] *Id.* The evaluators also reported that EAS’ proposed Program Management Plan “[DELETED]” and questioned whether EAS proposed “[DELETED].” *Id.* Finally, the evaluators assessed the EAS’ proposal with a deficiency because the proposal reportedly “[DELETED].” *Id.*

40. The EAS proposed Supervisory Plan—required under Sub-factor 2—was evaluated with several strengths largely because the proposed plan “covers all required years” and otherwise demonstrated “multiple years of experience” along with “[DELETED].” *Id.* At the same time, EAS’ proposed use of [DELETED] was viewed as a weakness, and the TET noted that the plan contained [DELETED]. *Id.* The EAS proposal was also downgraded because there were reportedly “[DELETED]” and because the evaluators concluded that EAS had

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proposed a “[DELETED].” *Id.* The EAS proposal was also assessed with the following deficiencies:

- [DELETED]
- [DELETED]

*Id.*

41. The evaluators reported the following strengths in the EAS proposed Recruit/Retention Plan (Sub-Factor No. 3):

- [w]ell thought out [DELETED]
- Good explanation [DELETED]
- Satisfactory [DELETED].

*Id.* at 3.

42. However, under this same Sub-Factor, the TET reported the following weaknesses:

- [DELETED]
- [DELETED]
- [DELETED]

*Id.*

43. The EAS proposed Recruit/Retention Plan was also assessed with two proposal deficiencies as follows:

- [DELETED]
- [DELETED]

*Id.*

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44. EAS received several strengths for its proposed Orientation/Transition Plan required under Sub-Factor 4, as follows:

- Detailed [DELETED]
- Good definition [DELETED]
- Proposed [DELETED]

*Id.*

However, under this Sub-Factor, EAS' proposed structure for [DELETED] was [DELETED] identified as a proposal weakness. *Id.* The EAS proposed transition plan was also criticized because the evaluators concluded that EAS [DELETED] and because the "[DELETED]" Exhibit in the EAS proposal did not "[DELETED]." *Id.* The EAS Plan was also assessed with a deficiency because it [DELETED]. *Id.*

45. Under Sub-Factor No. 5, which required a "Quality Control Plan," the EAS proposal was highly praised for its proposed use of the [DELETED] as well as for its proposed "[DELETED]." *Id.* EAS also was awarded strengths for its "Quality Control Charts," as well as for its proposed "[DELETED]." *Id.* Despite these strengths, the evaluators noted several "weaknesses" in the Plan because [DELETED]. *Id.* EAS also received two deficiencies for its Quality Control Plan because the evaluators concluded that the EAS stated goal of "[DELETED]." *Id.* Second, the evaluators criticized EAS' failure to [DELETED]. *Id.*

46. For Factor No. 4, the last evaluation criterion applicable to Volume No. II—EAS received a strength for its "[o]verall low risk of [DELETED]." However, the evaluators also assessed this portion of the EAS proposal with the following weaknesses:

- [DELETED]
- [DELETED]

*Id.* at 4.

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EAS was also assessed with [DELETED] under this Sub-Factor because its proposal had [DELETED].” *Id.*

47. Overall, EAS received a Technical Score of [DELETED] out of an available eighty-four (84) points for its proposed Volume II, as follows:

<b>FACTOR No. 1</b>	<b>Sub-Factor No. 1</b>	<b>Sub-Factor No. 2</b>	<b>Sub-Factor No. 3</b>	<b>Sub-Factor No. 4</b>	<b>Sub-Factor No. 5</b>	<b>FACTOR No. 4</b>
<i>Business Approach/Strategy</i>	<i>Program Mgmt. Plan</i>	<i>Supervis. Plan</i>	<i>Recruit/Retain. Plan</i>	<i>Orientation/Transition Plan</i>	<i>Quality Control Plan</i>	<i>Proposal Risk</i>
<i>Score: [DEL.]</i>	<i>Score [DEL.]</i>	<i>Score: [DEL.]</i>	<i>Score: [DEL.]</i>	<i>Score: [DEL.]</i>	<i>Score: [DEL.]</i>	<i>Score: [DEL.]</i>

*Id.* at 1.

**Summary of Technical Scores for CNI, HyperNet and EAS**

48. A summary and comparison of the technical scores awarded to CNI, HyperNet and EAS for Volume No. II, Business Approach/Strategy and Risk, is set forth in the following table:

<b>Offeror</b>	<b>Factor No. 1</b>	<b>Sub-Factor No. 1</b>	<b>Sub-Factor No. 2</b>	<b>Sub-Factor No. 3</b>	<b>Sub-Factor No. 4</b>	<b>Sub-Factor No. 5</b>	<b>Factor No.4</b>
<i>Factor &amp; Sub-Factor Description</i>	<i>Business Appr./Strategy</i>	<i>Prog. Mgmt. Plan</i>	<i>Supervis. Plan</i>	<i>Recruit/Retain. Plan</i>	<i>Trans. Plan</i>	<i>Quality Control Plan</i>	<i>Proposal. Risk</i>
<b>HyperNet Score:</b>	[DEL.]	[DEL.]	[DEL.]	[DEL.]	[DEL.]	[DEL.]	[DEL.]
<b>CNI Score:</b>	[DEL.]	[DEL.]	[DEL.]	[DEL.]	[DEL.]	[DEL.]	[DEL.]
<b>EAS Score:</b>	[DEL.]	[DEL.]	[DEL.]	[DEL.]	[DEL.]	[DEL.]	[DEL.]

*See ADD at 3.*

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### C. The Solicitation's Past Performance Requirements

49. The Solicitation specified that the purpose of the past performance evaluation was to “assess the degree of confidence the Government has in [the] offeror” to perform the contract. *Evaluation Factors*, ¶ M002(d), “*Past Performance Factor 2*” at 79.

50. To that end, the Solicitation required each offeror to submit a Past Performance Volume (Volume IV) which was to be evaluated under Evaluation Factor No. 2 of the Solicitation. Factor No. 2 was comprised of the following two Sub-Factors:

Sub-Factor No. 1: Contractor Experience

Sub-Factor No. 2 Key Personnel Qualifications

*Id.* at 76.

51. The Solicitation required each offeror's Past Performance Volume to “contain information” that was required by the Solicitation's “Attachment 8 Past Performance Questionnaires” (*hereinafter* “*Attachment No. 8 Questionnaires*”). *See ITO*, ¶ 5.2, “*Relevant Contracts*” at 64.

52. Attachment No. 8 set forth both a “Fact Sheet” which offerors were required to complete and submit to the Contracting Officer; as well as a past performance questionnaire form which was to be completed by each offeror's identified contracting references. *Id.*

53. The Solicitation and the Attachment No. 8 Questionnaire instructed each offeror to include past performance information “on a minimum of three (3) but no more than five (5) recent contracts . . . most relevant in demonstrating” the offeror's “ability to perform” the Center-wide administrative services “effort.” *See ITO*, ¶ 5.2, “*Relevant Contracts*” at 64.

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54. Offerors were further instructed to provide “information on up to three (3) recent contracts performed by your teaming partners and significant subcontractors.” *Id.* To that end, the Solicitation specified that each offeror was responsible for choosing contracts performed by its proposed teaming partner or subcontractor(s) that were “most relevant in demonstrating their ability to perform the proposed effort.” *Id.* Offerors were also directed to include a “rationale” in their Past Performance Volumes “supporting” the “relevance” of each cited contract. *Id.*

55. The Solicitation specified that the “Evaluation Process” for each Past Performance Volume would begin with a “Recency Assessment”—which required a pass/fail evaluation as to whether or not the offeror’s submitted contract efforts were “on-going” or performed during the past three (3) years. *See Evaluation Factors*, ¶ M002(d)(2)(i) at 80.

56. Next, the Solicitation’s Past Performance “Evaluation Process” required an “in-depth evaluation of all recent [past] performance information—the “Relevancy Assessment” Sub-Factor—to determine how closely the services performed under those contracts” relate to requirement specified in this Solicitation. *Id.*, ¶ M002(d)(2)(ii) at 80. For this assessment, the Solicitation specified that “[c]onsideration would be given to service similarity, complexity and contract scope and type.” *Id.*

57. In addition, the Relevancy Assessment Sub-Factor specified that “[a] relevancy determination of the offeror’s — including joint venture partner(s) and major and critical subcontractor(s) past performance [*sic*]—will be made based upon” the same considerations applied to the prime contractor. *Id.* This Sub-Factor further provided that:

[i]n determining relevancy for individual contracts, consideration will be given to the effort, or portion of the effort being proposed by the offeror, teaming partner, or subcontractor whose contract is being reviewed and evaluated.

*Id.*

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58. The Solicitation also specified that for the Relevancy Assessment, “past performance information forms . . . and information obtained from other sources” would be “used to establish the degree of relevancy of past performance.” *Id.* at 81. To that end, the Solicitation specified that “recent relevant contracts” would be assessed according to the guidelines set forth in the following table:

Degree	Description
<b>3.0 Highly Relevant</b>	<b>Past/present performance effort involved essentially the same magnitude of effort and complexities this solicitation requires.</b>
<b>2.0 Relevant</b>	<b>Past/present performance effort involved much of the magnitude of effort and complexities this solicitation requires.</b>
<b>1.0 Somewhat Relevant</b>	<b>Past/present performance effort involved some of the magnitude of effort and complexities this solicitation requires.</b>
<b>0.0 Not Relevant</b>	<b>Past/present performance effort involved little or none of the magnitude of effort and complexities that this solicitation requires.</b>

*Id.*

59. In addition to the Recency and Relevancy Assessments, the Solicitation required the Center to perform a third assessment under which the “performance quality of recent relevant efforts” would be evaluated. *Id.*, ¶ M002¶(d)(2)(iii) at 81. The Solicitation explained that this “Quality Performance Assessment” would consist of:

an in-depth evaluation of the past performance questionnaire responses, CPS information, Contractor Performance Systems Reports (CPSR), interviews with Government customers and fee determining officials and, if applicable, commercial clients.

*Id.*

60. The Solicitation also advised that the Quality Performance Assessment would require the Center to assess, rate and score “the quality levels” of each offeror’s recent, relevant performance efforts as follows:

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Quality Assessment	Description
<b>4.0 Exceptional</b>	Performance meets contractual requirements and exceeds many (requirements) [ <i>sic</i> ] to the Government[s] benefit. The contractual performance of the element being assessed was accomplished with few minor problems for which corrective actions taken by the contractor were highly effective.
<b>3.0 Very Good</b>	Performance meets contractual requirements and exceeds many (requirements) [ <i>sic</i> ] to the Government[s] benefit. The contractual performance of the element being assessed was accomplished with some minor problems for which corrective actions taken by the contractor were effective.
<b>2.0 Satisfactory</b>	Performance meets contractual requirements. The contractual performance of the element being assessed contains some minor problems for which corrective taken by the contractor appear, or were, satisfactory.
<b>1.0 Marginal</b>	Performance does not meet some contractual requirements. The contractual performance of the element being assessed reflects a serious problem for which the contractor has not yet identified corrective actions or the contractors proposed actions appear only marginally effective or were not fully implemented.
<b>0.0 Unsatisfactory</b>	Performance does not meet most contractual requirements and recovery is not likely in a timely manner. The contractual performance of the element being assessed contains serious problem(s) for which the contractor's corrective actions appear, or were, ineffective.

*Id.* at 81-82.

61. The Solicitation explained that based on the ratings assigned to each proposal under the Relevancy Assessment and Quality Assessment sub-factors, offerors would “receive an integrated performance confidence rating.” *Id.*, ¶ M002(d)(3) at 82, which would be made at the “factor level and represents an overall evaluation of contractor performance.” *Id.* The Solicitation also provided that the overall confidence assessment would “consider things such as the Offeror’s

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history of forecasting and controlling costs, adhering to schedules” and “reasonable and cooperative behavior and commitment to client satisfaction.” *Id.* To that end, the Solicitation set forth the following “Performance Confidence Assessment Ratings” table that would be used for this portion of the Past Performance evaluation:

<b>Performance Confidence and Assessments Ratings</b>	
<b>Rating</b>	<b>Description</b>
<b>5.0 High Confidence</b>	<b>Based on the offeror’s performance record, the Government has high confidence the offeror will successfully perform the required effort.</b>
<b>4.0 Significant Confidence</b>	<b>Based on the offeror’s performance record, the Government has significant confidence that the offeror will successfully perform the required effort.</b>
<b>3.0 Satisfactory Confidence</b>	<b>Based on the offeror’s performance record, the Government has confidence that the offeror will successfully perform the required effort. Normal contractor emphasis should preclude any problems.</b>
<b>2.0 Unknown Confidence</b>	<b>No performance record is identifiable.</b>
<b>1.0 Little Confidence</b>	<b>Based on the offeror’s performance record, substantial doubt exists that the offeror will successfully perform the required effort.</b>
<b>0.0 No Confidence</b>	<b>Based on the offeror’s performance record, extreme doubt exists that the offeror will successfully perform the required effort.</b>

*Id.* at 80.

62. Notably, for “[o]fferors without a record of relevant past performance or for whom information on past performance is not available,” the Solicitation specified that these offerors “will not be evaluated favorable or unfavorably on

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past performance and, as a result, will receive an “Unknown Confidence” rating for the Past Performance factor.” *Id.*

63. The Solicitation further emphasized that for those “[o]fferors with no relevant past performance record, the Government may consider relevant performance information regarding key personnel.” *Id.*

64. In addition, while the Solicitation clearly specified that “Key Personnel” constituted Sub-factor 2 of the Past Performance evaluation, *see Solicitation, Key Evaluation Clause*, no instructions or evaluation criteria for this portion of the Past Performance evaluation were specified or otherwise published in the Solicitation.

### **D. The Center’s Evaluation of Past Performance**

65. The Past Performance Evaluation Team (“PPET”) was comprised of the Contracting Officer and a Contract Specialist. *See TEP* at 1. In that capacity, these two individuals had sole responsibility for and prepared the past performance evaluation report. *See H-CR and E-CR*, Exh. No. 10, *ADD, PPET Evaluation (hereinafter “PPET Report”)*.

66. The PPET Report—which is the sole evaluation record for this factor—is comprised of: the two PPET members’ scoring sheets, each offeror’s “Past Performance Questionnaire Results,” and assessments of each offeror’s “Performance Confidence,” “Performance Quality/Contractor Experience,” “Key Personnel,” and “Relevancy” of prior contract performance. *Id.* Notably, the scoring sheets prepared by each PPET member are identical—except that the Contracting Officer’s is handwritten, while the Contract Specialist’s sheet is typed. *Id.*

67. Although not specified in the Solicitation, the record shows that the PPET used the following scale, set forth in a table called “Individual Contractor

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Evaluations”, to assign relevancy ratings to each submitted contract for past performance review:

Individual Contractor Evaluations	
Rating	Reported Contract
3.0	Contract value is greater than \$ 1 Million, and involved more than 80 employees
2.0	Contract value is greater than \$ 1Million, but involved between 50 and 80 employees
1.0	Contract value is between \$ 500,000 and \$ 1 Million but involves less than 40 employees.
0.0	Contract value is greater than \$500,000, but involves less than 25 employees.

*See PPET Report at 4.*

68. In addition, the PPET Report advises that the above criteria were to be “utilized in assigning relevancy ratings to each submitted contract for performance review” and might “fluctuat[e] based on the type of skills provided.” *Id.* To that end, in applying the above-referenced past performance evaluation criteria:

Administrative and Technical skill levels received the next higher rating if dollar value was greater and number of employees was less but skills provided were in line with the current effort.

*Id.*

69. According to the PPET, “[a]ll submitted contracts were determined recent.”

*Id.*

### **The CNI Past Performance Evaluation**

70. The record shows that [DELETED] contracting efforts were proffered by CNI for its past performance evaluation and the PPET considered [DELETED] of

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these contracts. *See PPET Report* at 8. In accordance with its Past Contract Relevancy Assessment Scale, CNI was assessed with [DELETED] relevancy ratings for the [DELETED] contracts that were over [DELETED] but involved [DELETED] and [DELETED] relevancy ratings for [DELETED] contracts “totaling over [DELETED] employees with a dollar value of [DELETED].” *Id.*

71. Because CNI “received a greater number of [DELETED] ratings from the [submitted] questionnaires” the PPET Report shows that CNI received a “quality rating of [DELETED].” *Id.*

72. Finally, based on CNI’s proposed personnel—the PM and the APM—the PPET assessed CNI with a Key Personnel score of [DELETED] because the PM had received “[DELETED],” “the APM works on another [Center] contract with [DELETED]” and because both of these managers “were determined [DELETED].” *Id.*

### **The HyperNet Past Performance Evaluation**

73. As noted above, offerors were required to provide past performance references for between three and five recent or on-going prime contracts. *See FF No. 53.* According to the record, the Center received [DELETED] completed Attachment No. 8 Questionnaires reflecting [DELETED] separate contracts on which HyperNet had served as the prime contractor. *See H-CR, Legal Brief* at 18. The Center also received [DELETED] past performance questionnaires for [DELETED] contract performed by HyperNet’s subcontractor—[DELETED]. *Id.*

74. The past performance evaluation prepared by the PPET shows that it evaluated [DELETED] of the [DELETED] contracting references submitted by HyperNet. *PPET Report* at 15-16. One of these contracts was awarded a “[DELETED]” rating ([DELETED] points) because it involved “[DELETED]” with [DELETED]—but for a contract amount valued at over [DELETED]. *H-CR, Ex. No. 26, Contracting Officer’s Statement of Facts (hereinafter “CO’s*

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*HyperNet facts*”) at 10. The [DELETED] evaluated contract each received a [DELETED] point “[DELETED]” rating because the PPET determined that the [DELETED] contracts each involved [DELETED] and few administrative positions. *Id.*

75. According to the PPET Report, because HyperNet “received an equal amount of [DELETED] and [DELETED]” its proposal received a [DELETED] point past performance “[DELETED]” quality rating. *Id.*

76. In addition, based on its proposed PM’s “experience with a [DELETED] and the experience of its proposed APM with “[DELETED]” the PPET awarded HyperNet’s proposal a [DELETED] point “[DELETED]” rating under the [DELETED] Sub-Factor. *Id.*

77. The PPET evaluated [DELETED] of [DELETED] past performance questionnaires—which each involved separate contracts performed at the Center. *See H-CR, Legal Brief* at 8. [DELETED] of these contracts was awarded a [DELETED] point “[DELETED]” rating while the other [DELETED] contracts were each awarded a [DELETED] point “[DELETED]” rating. *See PPET Report, HyperNet Evaluation.* The quality of [DELETED] past performance was assigned a [DELETED] point “[DELETED]” rating—which the PPET believed best represented the “[DELETED] and [DELETED]” provided by [DELETED] references. *Id.*

### **The EAS Past Performance Evaluation**

78. As reported in its submitted Past Performance Volume (Volume IV), EAS “is a Joint Venture between A Plus Communications (“APCI”) and [LCI]”, that was “formed in 2007 for the management of the proposed contract” at issue in this Protest. *See EAS Proposal, Volume IV, Past Performance*, at IV-37. According to EAS, APCI is the “Managing Venture,” and “has assembled a strong management team, a complete set of documented processes encompassing every

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aspect of day-to-day contract management for a contract of this size.” *Id.* at IV-1. EAS’ proposed PM is an [DELETED]. *Id.* EAS reports that the other Joint Venture partner—LCI—“brings a complete understanding of all [the Solicitation’s] PWS requirements and the organizations and services provided.” *Id.* While EAS does not [DELETED] as it is a newly created Joint Venture, EAS reports that through its two “Joint Venture Members” EAS “brings over [DELETED] years of experience supporting the [Center] with superior services.”<sup>3</sup> *Id.*

79. The PPET Report advises that since “[n]o contracts were provided for performance evaluation a neutral [Relevancy] rating was given” to EAS, *see PPET Report*. Notwithstanding the [DELETED] contract experience as a prime, the PPET awarded EAS a [DELETED] for its [DELETED] because the “[DELETED].” *Id.* at 15.

80. The PPET next evaluated LCI’s past performance and awarded [DELETED] point “[DELETED]” ratings for its performance of [DELETED] Center contracts that were valued at over [DELETED] and involved the performance of administrative and accounting services by [DELETED]. *Id.* A [DELETED] LCI contract received a [DELETED] point “[DELETED]” rating; according to the PPET Report, [DELETED] Performance Quality Assessment was made because “[DELETED] were provided for performance evaluation.” *Id.* at 12. The PPET also evaluated [DELETED] APCI contracts: [DELETED] received a “[DELETED]”—or “[DELETED]” score—as the cited contract involved “[DELETED],” while the other cited contract earned a [DELETED] rating. *See Id.*

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<sup>3</sup> According to EAS’ proposal, APCI is an SBA-certified 8(a) minority-woman owned-small business concern that has been in operation since 1997, and was incorporated in 2001. *Id.* APCI. *Id.* The Past Performance Volume further reports that LCI is a small disadvantaged, service-disabled veteran-owned, SBA certified 8(a) IT and management services firm that has been in business since 1999.

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### The Final Past Performance Ratings

81. According to the PPET Report, the final past performance ratings for the CNI, HyperNet and EAS proposals were:

Performance Confidence Assessment			
Offeror	Rating	Score	Reported Rationale
CNI	[DELETED]	[DEL.]	Based on the offeror's performance record, the Government has [DELETED] the offeror will successfully perform the required effort. [DELETED].
HyperNet	[DELETED]	[DEL.]	Based on the offeror's performance record, the Government has [DELETED] the offeror will successfully perform the required effort. (Based on LCI who is the current subcontractor providing support.)
EAS	[DELETED]	[DEL.]	Based on the offeror's performance record, the Government has [DELETED] the offeror will successfully perform the required effort. (Based on LCI who is the current subcontractor providing support.)

*See ADD, PPET Report, Evaluations of CNI, HyperNet and EAS.*

Performance Quality Contractor Experience Evaluation			
Offeror	Rating	Score	Reported Rationale
CNI	[DELETED]	[DEL.]	Performance meets contractual requirements and exceeds many (requirements) to the Government['s] benefit. The contractual performance of the element being assessed was accomplished with few minor problems for which corrective actions taken by the contractor were highly effective.
HyperNet	[DELETED]	[DEL.]	Performance meets contractual requirements and exceeds many (requirements) to the Government['s] benefit. The contractual performance of the element being assessed was accomplished with few minor problems for which corrective actions taken by the contractor were highly effective.
EAS	[DELETED]	[DEL.]	Performance meets contractual requirements and exceeds many (requirements) to the Government[s] benefit. The contractual performance of the element being assessed was accomplished with few minor problems for which corrective actions taken by the contractor were highly effective.

*Id.*

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<b>Key Personnel Evaluation</b>			
<b>Offeror</b>	<b>Key Personnel Rating</b>	<b>Score</b>	<b>Reported Rationale</b>
<b>CNI</b>	<b>[DELETED]</b>	<b>[DEL.]</b>	<b>Key personnel qualifications would meet requirements and exceed some (requirements) to the Government[’s] benefit.</b>
<b>HyperNet</b>	<b>[DELETED]</b>	<b>[DEL.]</b>	<b>Key personnel qualifications would meet requirements and exceed some (requirements) to the Government[’s] benefit.</b>
<b>EAS</b>	<b>[DELETED]</b>	<b>[DEL.]</b>	<b>Key personnel qualifications would meet requirements and exceed some (requirements) to the Government[’s] benefit.</b>

*Id.*

82. The final point tally for each offeror’s evaluated past performance was:

<b>Offeror</b>	<b>CNI</b>	<b>HyperNet</b>	<b>EAS</b>
<b>Past Performance Score</b>	<b>[DEL.]</b>	<b>[DEL.]</b>	<b>[DEL.]</b>

*See ADD at 2.*

**E. The Cumulative Scores of the Volume II and Past Performance Evaluations**

83. When the above Past Performance scores, *see* FF No. 82 are combined with each offeror’s Volume II scores, *see* FF No. 48, the cumulative—or “composite”—points and rankings for the three offerors under the Solicitation’s non-price factors are as follows:

<b>Offeror</b>	<b>CNI</b>	<b>HyperNet</b>	<b>EAS</b>
<b>Technical Score</b>	<b>[DEL.]</b>	<b>[DEL.]</b>	<b>[DEL.]</b>
<b>Past Performance Score</b>	<b>[DEL.]</b>	<b>[DEL.]</b>	<b>[DEL.]</b>
<b>Total Score</b>	<b>[DEL.]</b>	<b>[DEL.]</b>	<b>[DEL.]</b>

*Id.*

**F. The Solicitation’s Pricing Requirements**

84. Along with the required Cost/Price proposal—Volume V—the Solicitation required offerors to complete and submit three pricing schedules—set forth in

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Section B of the Solicitation—that corresponded to separate contract line item numbers (“CLIN Nos.”). *See Section B Pricing Schedules* at 6-18. Each schedule required offerors to propose labor rates for each identified labor category or position; in addition, Section B permitted offerors to specify an “[Estimated Total Amount Not to Exceed] ceiling price for each of the Section B pricing schedules. *Id.*

85. The Solicitation’s instructions for the Section B Pricing Schedules provided that:

All pricing information shall be addressed in [Section] B of the [Solicitation]. Information shall be limited to [CLIN]-level pricing, including unit and extended pricing as specified in the pricing section of the [Solicitation].

*See ITO, “Volume V—Contract Documentation,” ¶ 7.1.2, “Section B—SIR Supplies or Services and Costs/Prices” at 68.*

86. The Section B Pricing Schedule—identified as “Labor” (*hereinafter* “Labor Pricing Schedule”)—required offerors to propose a “unit [per] hour” price, “labor hour rate,” “total estimated amount,” and an “overtime” percentage for twenty-six labor positions<sup>4</sup>—which corresponded to those listed and described in the PWS Attachments. *See Section B Pricing Schedules* at 6-18; *see also PWS Attachment Nos. 2 and 3*. The instructions for the Labor Pricing Schedule further directed each offeror “to propose fixed price labor rates for all labor categories listed.” *See Labor Pricing Schedules* at 2, 5, 8, 11 and 14.

87. The Solicitation also required offerors to complete two additional pricing schedules (*hereinafter* “First Supervision Pricing Schedule” and “Second Supervision Pricing Schedule”) which required offerors to propose labor hour pricing:

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<sup>4</sup> The identified positions were: Key Entry Operator I and II; General Clerk I, II, III and IV; Training Program Assistant I, II, III and IV; Technical Writer I, II and III; Administrative Assistant I, II, III and IV; Administrative Analysts I and II; Inspector I, II, III and IV; and Word Processor I, II, III. *See Labor Pricing Schedules* at 3,6, 9, 11-12 and 14-15.

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<b>Labor Category</b>	<b>Estimated Annual Requirements</b>	<b>Unit Per HR</b>	<b>Labor Hour Rate \$</b>	<b>Overtime %</b>
<b>Task Supervisor I</b>	<b>3760</b>			
<b>Task Supervisor II</b>	<b>3760</b>			
<b>Task Lead</b>	<b>Dependent upon Labor Category</b>			
<b>Functional Lead</b>	<b>Dependent upon Labor Category</b>			

*See First Supervision Pricing Schedules at 3, 6, 9, 12 and 15.*

88. The Second Supervision Pricing Schedule required offerors to provide pricing information for one “Task Lead” position—designated with an estimated annual requirement of four (4) hours per week, and a separate “Functional Lead” position—designated with an estimated annual requirement of twelve (12) hours per week. *See Second Supervision Pricing Schedules at 4, 7, 10, 13 and 16.*

89. The instructions for the Labor Pricing Schedule and the First Supervision Pricing Schedule specified that each was to be prepared “In Accordance With (IAW)” the Solicitation. *See Labor Pricing Schedules at 2, 5, 8, 11 and 14; see First Supervision Pricing Schedules at 3, 6, 9, 12 and 15.* The instructions for the Second Supervisory Pricing Schedule permitted offerors to “fill-in [*sic*] the estimated number of hours based on their own supervisory plan” but cautioned that [p]lans that do not provide realistic and adequate supervision may be determined unacceptable.” *See Second Supervision Pricing Schedules at 4, 7, 10, 13 and 16.*

90. The Solicitation also set forth additional “Price Proposal Requirements” which required each offeror to submit—as part of Volume V—“in spreadsheet format with the costs properly totaled and extended,” the following “minimum” details:

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1. Direct Labor Rate and Hours by Labor Category
2. Labor Burden and Overhead Rates/Costs
3. Direct Materials-Costs-Kinds, Quantities
4. Material Overhead/Handling Charges
5. Other Direct Costs by Kinds and Quantities
6. Corporate Overhead (General and Administrative Costs)
7. Facilities Capital Cost of Money (If applicable)
8. Profit/Fee

See *ITO*, ¶ CLA.0110(a), “*Price Proposal Requirements*” at 73.

91. The Solicitation further specified that where an offeror’s chosen subcontractor “effort is significant—*e.g.*, in excess of \$500,000 for each subcontractor and more than 10% of the prime contractor’s proposed price,”—the offeror’s price/cost submission must “address how the subcontractor’s cost[s]/prices were determined [to be] fair and reasonable by the offeror.” *Id.*, ¶ CLA.0110(b)(2) at 73.

92. Finally, the Solicitation’s “Cost Information” clause directed offerors to:

submit with their offer, in support of their price, man-hours, material costs, and any other recurring or nonrecurring costs that will significantly affect price, together with supporting information . . . .

*Id.*, ¶ CLA.0169 at 73-74.

93. The Solicitation’s Volume V instructions emphasized that offerors were “to meet all solicitation requirements,” and that “[f]ailure to meet a requirement may result in an offer being ineligible for award.” *ITO*, ¶ 7.2, “*Exceptions to Solicitation Requirements*” at 68.<sup>5</sup>

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<sup>5</sup> At the same time, the Solicitation also provided that an exception to a requirement might be permitted if the offeror provided the “rationale in support of the exception” in its proposal, and “fully explain[ed] its impact, if any, on the performance, schedule, cost, and specific requirements of the solicitation.” See *ITO*, ¶ 7.2, *supra*.

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94. The Solicitation also specified that each offeror's price would be evaluated according to the information provided in the three Section B pricing schedules—taking each “applicable hourly rate” and “multiply[ing]” that rate by:

the corresponding number of estimated labor hours per skill category per CLIN specified in Section B of the solicitation for evaluation purposes. The total price for basic requirements (base year) and all options will be evaluated. The government may determine that an offer is unacceptable if the base period and option prices are significantly unbalanced or unrealistic (cost realism). Reasonableness will be based on the total evaluated price . . . .

*Id.*, ¶7.1.2, “Section B—[Solicitation] Supplies or Services and Costs/Prices” at 68; Evaluation Factors ¶ M002(e)(1), Cost/Price Factor at 82.

### **G. The Evaluation Of The Offerors' Proposed Pricing**

95. The Contracting Officer and a Cost/Price Analyst from the Center comprised [DELETED] Cost/Price Evaluation Team—but the record indicates that the Cost/Price Analyst led this portion of the evaluation. *See ADD, Pricing Memo (hereinafter “Pricing Memo”)* dated June 19, 2007 at 1. Each offeror's price was to be determined according to the prices proposed in its Section B pricing schedules.

96. In his Pricing Memo to the Contracting Officer, the Cost/Price Analyst advised that “a review and analysis of th[e] proposals was conducted in order to determine if they are in compliance with Section L.6—Preparation of Price/Cost and Section M.3—Price Cost Evaluation.” *See Pricing Memo* at 2. Notably, the cited “Section L.6” and the cited “M.3—Price Cost Evaluation” in the Pricing Memo do not exist. Instead, the Solicitation's “Cost Price Volume Instructions” are set forth in Section L (the ITO) at pages 66 through 68—but there is no “Section L.6” provision; in fact, none of these provisions are classified with an “L.” *See ITO* at 68. Similarly, there is no “M.3—Price Cost Evaluation” section in the Solicitation. While the Solicitation's Evaluation Factors (Section M) do set

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forth three pages of evaluation instructions for the “Cost/Price Factor,” *see* ¶ M002(e) at 82-84, the only possible Solicitation paragraph which the Pricing Memo’s “M.3” could possibly be referring to is Evaluation Factors ¶ M003. However, that paragraph does not contain any pricing evaluation instructions; instead, ¶ M003, “Solicitation Requirements, Terms and Conditions” simply reiterates the requirement for offerors to “meet all solicitation requirements” in order to avoid being found “ineligible for award.” *See* Evaluation Factors, ¶ M003 at 84.

97. In the Pricing Memo, the Cost/Price Analyst also advised the Contracting Officer that “all items identified in Section B” of the Solicitation “were reviewed for completeness, reasonableness, and realism.” *Id.*

100. Although the Solicitation requested that offerors provide cost and pricing data pertaining to any proposed subcontractors, *see* FF Nos. 9 and 86, the Cost/Price Analyst advised the Contracting Officer that only [DELETED] of the [DELETED] offerors—none of which were CNI, HyperNet or EAS—“showed adequate spreadsheets showing the subcontractors’ individual cost breakdowns.” *See Pricing Memo* at 2-3.

101. As a result, “[w]here there were no subcontractor cost breakdowns,” the Cost/Price Analyst advised the Contracting Officer that he had “developed separate spreadsheets using an estimated cost model.” *Id.*

102. All three offerors—HyperNet, EAS and CNI—submitted the Section B Pricing Schedules along with the required Cost/Price proposals (Volume III). *See H-CR* Exh. No. 5, *HyperNet Proposal* (hereinafter “*HyperNet Proposal*”); *id.*, Exh. No. 6, *CNI Proposal* (hereinafter “*CNI Proposal*”); *E-CR*, Exh. No. 5, *EAS Proposal* (hereinafter, “*EAS Proposal*”).

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### The Evaluation of CNI's Proposed Pricing

103. The Cost/Price Analyst reported “[n]o problems” with CNI’s cost/price proposal, *Pricing Memo* at 3, and advised that CNI’s proposed price was ranked [DELETED] out of the eight evaluated proposals. *Id.* at 4.

104. Notwithstanding the above, the record shows that the [DELETED] annual hourly estimates proposed in CNI’s submitted Second Supervision Pricing Schedule significantly deviated from the schedule requirements set forth in Solicitation. Specifically, whereas the Solicitation’s Second Supervision Pricing Schedule required price estimates for an Estimated Annual Requiremen[t] of 3,760 labor hours per year for Task Supervisor I and 3,760 labor hours per year for the identified Task Supervisor II, CNI [DELETED] labor hours for the [DELETED]. *See CNI Proposal, Volume VI: Contract Documentation, Section B Pricing Schedules* at 7, 10, 12, 15 and 17. Moreover, each of CNI’s proposed prices for the [DELETED] position was based on a [DELETED]. Instead, CNI proposed the following for the [DELETED] category: the Base Year: [DELETED] labor hours; Option Year No. 1: [DELETED] labor hours; Option Year No. 2: [DELETED] labor hours; Option Year No. 3: [DELETED] labor hours; and Option Year No. 4: [DELETED] labor hours. *Id.*

### The Evaluation of HyperNet's Proposed Pricing

105. The Cost/Price Analyst reported the following “Findings” with respect to HyperNet’s proposed cost/pricing. First, the Cost/Price Analyst advised that HyperNet’s cost/price proposal did not contain any “detailed breakout of [DELETED] costs except as a percentage on the last page” of its Price/Cost proposal. *See Pricing Memo*, ¶ 3(b), “*HyperNet Solutions*” at 2. The Cost/Price Analyst also reported that there were “[DELETED]” HyperNet’s submitted Section B pricing schedules, and that HyperNet had failed to provide the spreadsheets required by the Solicitation. *Id.* In addition, the Price/Analyst noted that were “[DELETED] proposed” in HyperNet’s submission, and also reported

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that while HyperNet “had been asked for a breakdown of [contractor and subcontractor] costs by year,” HyperNet had only “submitted” this information “[DELETED]” which the Price/Cost Analyst advised “contained [DELETED].” *Id.*

106. As required by the Solicitation, *see Part II—Section I—Contract Clauses*, ¶ 3.6.1.7, HyperNet’s Proposal included a “Limitations on Subcontracting Plan” (*hereinafter*, “*Subcontracting Plan*”) showing that its subcontractor would perform no more than forty-five (45%) of the work—and that HyperNet would perform the remaining fifty-five (55%) of the requirement. *See HyperNet Proposal*, “*Limi[ta]tions in Subcontracting*” sheet dated May 18, 2007. Notwithstanding HyperNet’s reported failure to submit certain subcontractor price details in its proposal, the record shows that subsequently, the Cost/Price Analyst was able to use the percentages provided in HyperNet’s Subcontracting Plan to “creat[e] a model spreadsheet” and perform the requisite cost/price analysis of HyperNet’s proposal. *See Cost/Price Analyst’s Undated Note* attached to HyperNet’s Subcontracting Plan.

107. On June 19, 2007, in response to the Contracting Officer’s request, HyperNet submitted a “spreadsheet” with the omitted details. *See HyperNet Explanation of Document Submissions*, dated October 23, 2007 at Attachment (*hereinafter* “*ATT*”) E.

### **The Evaluation of the EAS Pricing**

108. With respect to the EAS pricing submission, the Cost/Price Analyst advised the Contracting Officer that there was “No Schedule B breakdown of proposed costs,” and further advised that the spreadsheets submitted by EAS “show only two labor categories for each year.” *See Pricing Memo* at 3. As a result, the Cost/Price Analyst concluded that EAS’ “proposal was entirely inadequate for cost/price purposes,” and as a result, performed no further pricing analysis. *Id.*

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### The Offerors' Price Rankings

109. Ultimately, following the pricing evaluation, the record shows the following price rankings for HyperNet, CNI and EAS:

Offeror's Ranking	Base Year	Base Year & All Four Option Years
HyperNet (Ranked [DELETED]).	[DELETED]	[DELETED]
CNI (Ranked [DELETED]).	[DELETED]	[DELETED]
EAS (Ranked [DELETED]).	[DELETED]	[DELETED]

See ADD at 2.

110. Based on each proposal's composite technical score and price, the evaluated results for the CNI, HyperNet and EAS proposals were as follows:

Offeror	Composite Score	Base Year Estimated Cost/Price	Total Estimated Price/Cost (Base Yr. + 4 Option year)
CNI	[DELETED]	[DELETED]	[DELETED]
HyperNet	[DELETED]	[DELETED]	[DELETED]
EAS	[DELETED]	[DELETED]	[DELETED]

*Id.*

111. Based on a "Best Value" analysis, the Contracting Officer determined that CNI presented the best—and highest ranked—offer. See *CO's HyperNet Facts* at 2-3.

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### H. Post-Award Events

112. By June 16, 2007, the price evaluation and Pricing Report were completed. *See H-CR and E-CR, Legal Briefs* at 2. The PPET Report was completed on June 19, 2007—followed by the issuance of the TER on June 25, 2007. *Id.*

113. The Contracting Officer completed the ADD on July 9, 2007. *H-CR and E-CR, Legal Briefs* at 3. In justifying the selection of CNI for award, the ADD reports:

CNI's proposal is an estimated [DELETED] or [DELETED] higher than HyperNet. However, it is the consensus of the technical team, past performance team, cost analyst, and Contracting Officer that [in accordance with] Section M [of the Solicitation's] evaluation factors that the additional cost [of CNI's proposal] in consideration with increased potential for successful performance with a highly rated technical proposal validates the selection [of CNI] and increase in potential cost [*sic*].

*See ADD* at 5.

114. By letter dated July 25, 2007—and received by HyperNet on July 26, 2007—the Contracting Officer advised HyperNet that CNI had been selected for contract award based on a “best value” analysis. *H-CR, Exh. No. 17, Contract Award Notice (hereinafter “Notification Letter”)* at 2. The Notification Letter advised HyperNet that its “proposal received the highest overall technical evaluation (81 out of 84 possible points” and that its “total evaluated price . . . was the lowest” price received. *Id.*

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115. Notwithstanding that HyperNet's proposal was rated highest technically and lowest in price, the Notification Letter advised that CNI had been selected for award. *Id.* Specifically, the Contracting Officer reported that:

[a]lthough it was not the lowest priced offer, the extra value derived from the offer's **superior technical merit** (demonstrated by [CNI's] superior technical proposal) is considered to warrant the relatively modest evaluated price premium required to award to CNI.

*Id.* (*Emphasis added*).

116. By e-mail issued to the Contracting Officer on July 27, 2007, EAS requested a "minimum" debriefing of: (1) the source selection official's decision; (2) EAS' evaluated ranking; and (3) a summary of the Center's evaluation findings. *See EAS Protest, Attachment E, EAS E-mail* dated July 27, 2007.

117. In a response e-mail issued that same day, the Contracting Officer advised EAS that "[d]ebriefs would be scheduled for the week of August 13-17," and that she "would contact [EAS] with a date and time." *Id.*, *Attachment F, Contracting Officer's E-mail* dated July 27, 2007.

118. On August 8, EAS sent a second e-mail to the Contracting Officer asking whether the firm's request for a debriefing had been received. *Id.* That same day, the Contracting Officer advised that she had received EAS' earlier request, and after reiterating that debriefings would be "scheduled for the week of August 13-17," the Contracting Officer asked whether EAS preferred to receive its debriefing by "letter, in-person" or via teleconference. *Id.* EAS responded that it "would like an in-person debrief." *Id.*

119. On Friday, August 10, 2007, the Contracting Officer advised EAS that the Center had issued a debriefing letter ("EAS Debriefing Letter") to EAS. *Id.* On Tuesday August 14, 2007, EAS responded that notwithstanding the written debriefing, EAS still expected the Center to provide an in-person debriefing. *Id.*

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120. In a letter dated August 13, 2007, the Contracting Officer provided a written debriefing to HyperNet (“*HyperNet Debriefing Letter*”). See *H-CR*, Exh. No. 23. In addition to apprising the firm of its technical, price and overall evaluation scores, HyperNet was advised that it was ranked second overall. *Id.* The HyperNet Debriefing Letter also provided an analysis of the strengths, weaknesses and deficiencies which had been evaluated in HyperNet’s proposal. *Id.*

121. On August 16, 2007 EAS received the EAS Debriefing Letter from the Contracting Officer which advised EAS that in contrast to the first-ranked offeror—which had a “composite score” of [DELETED]—the EAS proposal was ranked [DELETED]. See *EAS Protest, Attachment H, EAS Debriefing Letter* at 2-5. The EAS Debriefing Letter also reported the evaluated strengths, weaknesses and deficiencies in the EAS proposal. *Id.*

122. According to the EAS Debriefing Letter:

[t]he pricing team felt that the information provided in your cost/price proposal was inadequate to determine the realism, reasonableness, and completeness of the proposed prices. [EAS] failed to provide a cost breakdown in accordance with Sections L&M of the [Solicitation]. No schedule B breakdown of proposed costs was submitted and submitted spreadsheets show only two labor categories for each year.

*Id.* at 4.

123. On August 17, 2007, HyperNet filed this Protest at the ODRA, contending that it should have been selected for award instead of CNI based on its proposal’s superior technical merit and lower price. See *HyperNet Protest* at 2. HyperNet also contends that the Center waived a material personnel requirement for CNI in contravention of the Solicitation and the Acquisition Management System (“AMS”). *Id.*

124. On August 23, 2007, the Contracting Officer issued an e-mail to EAS which advised that she had attempted to contact EAS “for the past two days” but was

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unsuccessful because the firm’s “answering machine [would] not record a voice mail.” See *E-CR, Ex. No. 26, Contracting Officer’s Statement of Facts (hereinafter “CO’s EAS Facts”)* at 2. The Contracting Officer’s e-mail further advised that once EAS submitted its questions about the procurement, the Contracting Officer would schedule either a debriefing meeting or teleconference. *Id.*, see also *EAS-CR, Legal Brief, Exh. No. A-3*.

125. On August 25, 2007, EAS filed this Protest at the ODRA, which challenges the Contracting Officer’s failure to provide an in-person debriefing, and also alleges that the technical and pricing evaluation of its proposal was improper and otherwise flawed. See *EAS Protest* at 1-5.

### III. THE PARTIES’ POSITIONS

#### A. The HyperNet Protest Allegations

HyperNet does not challenge the evaluation of its own Volume II, but instead contends that the Center’s selection of CNI lacked a rational basis because the Center failed to follow the Solicitation’s evaluation criteria. See *HyperNet Protest* at 2; *HyperNet Comments* at 1-11. HyperNet bases this conclusion largely on the reportedly varying and inconsistent explanations of the CNI selection decision that have been provided by the Contracting Officer. *Id.* According to HyperNet, each proffered explanation has been factually erroneous and constitutes evidence that the selection of CNI lacks a rational basis. *Id.*

The Contracting Officer’s first explanation of the CNI selection appears in the ADD—which the Center reports was executed on July 9, 2007. See FF No. 113. In that document, the Contracting Officer justifies the CNI award on the basis that CNI’s proposal provided the greatest benefit “with less risk.” See *HyperNet Protest* at 2; *HyperNet Comments* at 4. However, because the record shows that CNI and HyperNet received the same score for the Factor 4 Proposal Risk evaluation—[DELETED]—the Protester maintains that both offerors’ proposals presented equal contract performance

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risks. *Id.* As a result, HyperNet contends that the justification set forth in the ADD lacks a rational basis because there is no basis to conclude that HyperNet offered less risk than CNI. *Id.*

The second explanation of the CNI award appears in the Contracting Officer's July 26, 2007 Award Notification Letter—which, in part, advised that CNI had been selected for contract award because of its “superior technical merit.” *See* FF No. 123. HyperNet challenges this explanation as baseless because the record shows that the HyperNet's score for Volume II—[DELETED]—was actually higher than CNI's Volume II score of [DELETED] points. Since Volume II was the only proposal section evaluated for “technical merit,” HyperNet contends that the Contracting Officer had no rational basis to conclude that CNI “offered” extra value derived from “superior technical merit.” *See HyperNet Comments* at 5.

As further evidence that the selection of CNI lacks a rational basis, HyperNet points to the Contracting Officer's August 13, 2007 Debriefing Letter that was issued to HyperNet. *See* FF No. 120. In that letter, the Contracting Officer reported that “[b]ecause [the] overall technical competency of the highest rated offers was relatively close, *the evaluated past performance and cost/price became more important.*” *Id.* (emphasis in original). Since the Solicitation evaluation criteria specified that past performance would be equal to technical merit and risk (the Volume II evaluation)—and that these factors would be more important than each offeror's evaluated price, HyperNet maintains that the best value analysis underlying the selection of CNI for award lacks a rational basis because the Contracting Officer's explanation indicates that past performance was combined and weighted in the pricing score—instead of being combined and incorporated as an equal part of the Volume II (technical and risk) score. *HyperNet Comments* at 5-8. As a result, HyperNet maintains that CNI's past performance score was improperly “assign[ed] . . . more weight,” thereby resulting in an irrational “departure from the [Solicitation's] stated evaluation and award criteria.” *Id.*

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HyperNet also challenges the selection of CNI based on the rationale for the award set forth in the Center’s Response to its Protest. *Id.*, at 8-9. First, the Protester contends that the Contracting Officer’s submitted “Statement of Facts” characterizing the “[DELETED] difference in the parties’ technical scores” as minimal, is unreasonable because there is no accompanying explanation for this conclusion. *Id.* at 8. HyperNet also challenges the basis for the selection decision because the Contracting Officer’s statement only refers to making the selection of CNI based on an “integrated assessment” that treated price and non-price factors equally. *Id.* As pointed out by HyperNet, this approach wholly ignores the more specific Evaluation Factors’ instruction to base the required “integrated assessment” on the “equally weighted Business Approach/Strategy and Proposal Risk” and Past Performance Factors—which “are significantly more important than cost/price.” *Id.* (citing to: *Evaluation Factors*, ¶ M002(a), *Evaluation Factors and Sub-factors and Order of Importance* at 76.)

Since HyperNet’s technical merit was evaluated more highly than CNI’s technical merit, the Protester contends that price should be the basis for award. *HyperNet Protest* at 2; *HyperNet Comments* at 5. Alternatively, HyperNet argues that even assuming the differences in the cumulative scores of each offeror are “minimal” with respect to their [DELETED] difference, the Solicitation’s evaluation criteria nevertheless mandate that award be based on the lowest price—which establishes HyperNet as the obvious awardee. *HyperNet Comments* at 11. Finally, to the extent the Contracting Officer contends that CNI’s [DELETED] point lead warrants the higher premium, the Protester first points out the amount of this premium is not [DELETED] instead amounts to a price delta closer to [DELETED].<sup>6</sup> *HyperNet Comments* at 7. To that end, despite the Contracting Officer’s characterization of CNI’s proposal as presenting an advantage, HyperNet emphasizes that there is no elaboration or discussion of the basis for this conclusion in the record. *Id.*, at 8-11.

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<sup>6</sup> CNI’s evaluated price was [DELETED]. See FF No. 110. HyperNet’s evaluated price was [DELETED]. *Id.* This means that HyperNet’s evaluated price is [DELETED] less than that proposed by CNI. As a result, CNI’s evaluated price is [DELETED] than HyperNet’s evaluated price. See *HyperNet Comments* at 7, note 8.

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### B. The Center's Response to HyperNet's Protest

The Center maintains that its technical evaluation of CNI's proposal and subsequent selection of CNI for award adhered to the Solicitation's evaluation criteria. *See CO's HyperNet Facts* at 1-2. Notwithstanding the Contracting Officer's varying explanations of the award decision, the Center contends that, consistent with the Solicitation's "Evaluation Factors," it treated the non-price evaluation factors as "equal in importance and significantly more important than cost/price." *H-CR, Legal Brief* at 9. In explaining how the Business Strategy/Approach, Risk and Past Performance factors were treated equally, the Center reports that offerors were given a "composite score" which combined each offeror's Volume II evaluated point score (Business Approach/Strategy and Risk) with each offeror's evaluated Volume IV score (Past Performance). *Id.*, at 9-10. Following this calculation, the Center contends that it properly weighed whether or not each offeror's composite score warranted its proposed price. *Id.* Specifically, the Center advises that:

armed with recognition and knowledge, after their review, analysis, and consideration of each proposal's technical factor and sub-factor scores and each proposal[']s cost pricing, the technical team, the past performance team, the cost analyst and the [Contracting Officer] concluded that the additional [DELETED] cost of the CNI proposal, when balanced with the high potential for successful contract performance . . . was proper and provided the FAA the best value.

*Id.* at 12.

### C. The EAS Protest Allegations

EAS challenges the technical evaluation of its proposal contending that the technical "strengths and weaknesses identified by the evaluators are conflicting and do not logically correlate to" the awarded point "scoring" or proposal "ranking" of its submitted Volume II. *EAS Protest* at 3. According to EAS, numerous evaluator "comments reflect the same items" and a "bias[ed] summary." *Id.* As an example, EAS contends that the weaknesses reported in its proposed Program Management Plan blatantly conflict with the reported strengths evaluated in that plan. *Id.* According to EAS, there is no rational basis to award strengths for the contractor's "bold" and "great cost savings" while at the

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same time evaluating its Proposed Program Management Plan with a weakness due to “[DELETED].” *See EAS Protest* at 3. For similar reasons, EAS also challenges the evaluation of its proposed Supervisory Plan, Recruitment/Retention Plan and Orientation/Transition Plan. *See EAS Protest* at 3-4. EAS further contends that the Center’s determination that several of its proposed Plans were incomplete is unreasonable because the Center reportedly overlooked information that was evident in other Volumes and sections of EAS’ proposal. *Id.*

### D. The Center’s Response to The EAS Protest Allegations

The Center reports that EAS’ proposal contained several notable flaws which demonstrate that the evaluation of EAS’ Volume II was rationally based. *E-CR, Legal Brief* at 6. As a preliminary matter, while EAS contends that its submitted Volume III addressing each of the Volume II Sub-factors was overlooked, the Center emphasizes that the Solicitation expressly provided that “[c]ross-referencing within a proposal is not permitted.” *Id.* at 7 (citing *Solicitation* ¶ 2.2.3, “*Cross Referencing*” at 60.) Notwithstanding this alleged prohibition, the Center nevertheless reports that “[e]ach Sub-Factor Plan within Volume III was individually evaluated and scored by the Team,” but that the “Team did not cross-reference between those plans to evaluate and score each individual plan.” *Id.* at 7. To that end the Center advises that “[i] EAS believed an element of one plan it submitted was pertinent to a second plan, it had the option to restate that element in the second plan.” *Id.*

The Center also maintains that despite the Protester’s allegations, EAS has “fail[ed] to discuss or demonstrate how, within a particular plan, these strengths and weaknesses conflict,” and that “[c]ontrary to EAS’ apparent belief,” the “examples” cited in its Protest “do not speak for themselves.” *Id.* In support of its evaluation of the EAS proposal, the Center contends that EAS “has failed to carry its burden of proof to demonstrate that the Agency evaluated [EAS’ Volume II] in an arbitrary, capricious or prejudicial manner” because “[m]ere disagreement with the outcome of an evaluation will not in and of itself satisfy the protester’s burden.” *Id.*

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### IV. DISCUSSION

#### A. The Standard of Review

In accordance with the ODRA Procedural Regulations, 14 C.F.R. Part 17, and the FAA's 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, each must demonstrate a reasonable possibility of prejudice; specifically, both HyperNet and EAS must show that but for the Center's evaluation and source selection errors that are alleged here, either would have had a substantial chance of receiving the award. *See Protest of Optical Scientific Incorporated*, 06-ODRA-00365.

#### B. The Selection of CNI over HyperNet Lacks A Rational Basis

As a preliminary matter, the ODRA concludes that the record in this case shows that the Center complied with the Solicitation's evaluation criteria with respect to the treatment of the Business Approach/Strategy and Proposal Risk and Past Performance Factors as equally important. Despite the inconsistent selection explanations proffered by the Contracting Officer, both Center Responses and the accompanying exhibits clearly show that the non-price factors (embodied in Volume II and Volume IV of each offeror's proposal) were separately evaluated, scored, and combined into an accurate composite score for each offeror. While HyperNet has advanced a plausible objection to the Center's chosen evaluation approach, the ODRA finds the Center's interpretation of the

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evaluation criteria and treatment of the non-price factors to have been rationally based. The Center's action of combining each offeror's non-price scores into a composite is a reasonable implementation of the Solicitation's instructions to treat past performance as an equal component of the non-price evaluation.

That being said, however, the ODRA concludes that the selection of CNI nevertheless lacks a rational basis. As noted above, every procurement decision requires a well-documented rationale. In this case, as pointed out by HyperNet, the record shows that following the calculation of CNI's and HyperNet's composite scores, the difference between these competitors was a mere [DELETED]. FF No. 110.

Thus, CNI and HyperNet are essentially technically equivalent—and under the evaluation criteria set forth in the Solicitation, price should have become the determining factor and mandated that HyperNet be declared the winner of the competition, based on its significantly lower price. This record is devoid of any credible explanation, let alone substantial evidence, supporting why the Center concluded that CNI's proposal was worth a [DELETED] price premium. Nor is there any explanation beyond unsupported conclusory statements for why CNI's proposal was deemed to be "technically superior." Moreover, as noted above, HyperNet's proposal actually received the higher technical merit score. *See* FF No. 37.

As noted above, the ODRA will not overturn the Agency's technical expertise where the record shows a supported rational basis for its technical judgment. Unfortunately, in this case, beyond alluding to an unexplained technical benefit that is not consistent with the Center's own technical scoring, there is no evidence, documentary of a proper costs-technical tradeoff of analysis. The ODRA is at a loss to explain the basis for the Center's best value analysis underlying its selection of CNI.

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### C. The Center's Past Performance Evaluation Was Defective

The crux of HyperNet's challenge against the Center's evaluation of its past performance arises from its inability to "understand how [CNI] could have received a past performance rating of "[DELETED]" because "[DELETED] performance [CNI] submitted" to the Center "[DELETED]" those relied on by HyperNet.<sup>7</sup> *HyperNet Protest* at 2. In contrast to CNI's "[DELETED]" HyperNet received a "[DELETED]" rating. *See* FF No. 81. In addition, HyperNet protests that its Key Personnel rating should have been higher than [DELETED]—the same rating CNI received—because HyperNet's proposed "[DELETED]" *HyperNet Protest* at 2. In raising this challenge, HyperNet appears to suggest that its rating reflects the Center's refusal to give it credit for its subcontractor's past performance experience and qualifications.

In its Response, the Center first "asserts that all procurements are not equal in the past performance context." *See H-CR, Legal Brief* at 15. The Center next agrees that considering a subcontractor's past performance and key personnel "appears to be in conformity" with the Solicitation, and that both HyperNet and its subcontractor submitted the requisite Attachment No. 8 Questionnaires which enabled the Center to assess HyperNet's past performance. *Id.* The Center further admits that:

Review and analysis disclosed that the evaluation scores awarded to the subcontractor may have resulted in a higher evaluation score being awarded to Protester's proposal.

*Id.* at 18.

Notwithstanding these admissions, the Center maintains that the award of equal past performance ratings to CNI and HyperNet is rationally based because like HyperNet, CNI also submitted relevant past performance experience questionnaires, and both offerors received similar PPET comments. *Id.*, at 19. As a result, the Center reports that "it appears that the evaluation and awarded scores . . . for both the Protester and [CNI]

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<sup>7</sup> HyperNet reports that its teaming partner has "sterling" past performance with the FAA—and that this partner's past work is comparable in size and scope to the contracts for which CNI received a higher past performance rating. *See HyperNet Protest* at 2-3.

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were accurate, appropriate, and in consonance” with the Solicitation evaluation criteria. *Id.*

In this case, the record provides no rationale whatsoever for the Center’s Past Performance evaluation. First, as admitted by the Center, a closer review of the questionnaires submitted by HyperNet and CNI in response to the Solicitation’s instructions “may have resulted in a higher [past performance] evaluation score being awarded to [HyperNet’s] proposal.” *Id.* at 18.

This is likely because the prime contract experience synopsis prepared by the PPET, *see H-CR*, Exh. No. 10, *PPET Report*—which is also repeated in the Center Response, *see H-CR*, *Legal Brief* at 18—does not match up with the information provided by the references for HyperNet and its subcontractor in their submitted Attachment No. 8 Questionnaires. *Id.*, *Past Performance Package of Submitted HyperNet and Aero Tech Attachment No. 8 Questionnaires (hereinafter “HyperNet Questionnaires”)*. As reported by the PPET, the following constitutes the basis on which HyperNet’s past performance was assessed:

<b>PPET’s Synopsis of HyperNet’s Past Performance</b>		
<b>Dollar Value</b>	<b>Skill Category</b>	<b>Description</b>
[DELETED]	[DELETED]	[DELETED]
[DELETED]	[DELETED]	[DELETED]
[DELETED]	[DELETED]	[DELETED]
[DELETED]	[DELETED]	[DELETED]
[DELETED]	[DELETED]	[DELETED]

*See H-CR*, Exh. No. 10; *H-CR*, *Legal Brief* at 18.

However, the PPET synopsis set forth above is misleading and inaccurate. As indicated below, the actual information submitted in the HyperNet Questionnaire Package attesting to HyperNet and its subcontractor’s past performance experience reveals that the following details and past performance descriptions were provided:

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<b>HyperNet’s Actual Prime Contractor Experience (as shown in questionnaires submitted to the Center)</b>		
<b>Dollar Value</b>	<b>Skill Category</b>	<b>Description</b>
[DELETED]	[DELETED]	[DELETED]
[DELETED]	[DELETED]	[DELETED]
[DELETED]	[DELETED]	[DELETED]
[DELETED]	[DELETED]	[DELETED]

*See HyperNet Questionnaires.*

Comparing the PPET Report to the actual information set forth in the Past Performance Questionnaires that were submitted by HyperNet’s references, it is apparent that neither Center Counsel nor this Office were presented with an accurate depiction of HyperNet’s or its subcontractor’s past experience as prime contractors for similar efforts. First, contrary to the PPET’s representations, the second Tinker AFB contract—and the relevant information—is clearly identified in the corresponding questionnaire. In addition, as evidenced by comparing the “Skill” categories prepared by the PPET with the actual descriptions identified above, it is equally obvious that the actual nature of the work performed by HyperNet has been underrepresented and even mischaracterized. Finally, while the impact or purpose of identifying the Logan County customer as “Payne County” is not clear, this change in the reference’s identity constitutes a fatal inaccuracy preventing any follow-up by a reviewer.

Recognizing that the inconsistencies noted above could reflect inadvertent errors by the PPET, the ODRA reexamined the exhibits provided by the Center to support its past performance evaluation. Instead of locating any rational justification for the past performance evaluation, the ODRA’s review discovered more inexplicable inaccuracies in this part of the evaluation.

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As noted above, the past performance evaluation was comprised of a Relevancy Assessment, a Quality Performance Assessment, and a Risk Assessment. *See* FF Nos. 54-60. The ODRA’s review of these evaluations confirm the irrationality of the past performance evaluation. Most notably, while the offerors were assigned varying scores, *see* FF No. 83, the corresponding “Reported Rationale” for each assessment fails to offer any reasonable insight for the rating and score. *Id.* For example, the “[DELETED]” Score of [DELETED] points assigned to HyperNet is described with the identical rating used for EAS—including the reference to EAS’ subcontractor LCI.<sup>8</sup> *Id.* Moreover, while the rationale for HyperNet (and EAS) refers to the “offeror’s performance record” as resulting in the Center having “[DELETED] [that] the offeror will successfully perform,” the CNI reported rationale for its “[DELETED] rating omits the use of this term, instead advising that the Center “[DELETED] that CNI will successfully perform. *Id.*

The reported rationales for the Performance Quality portion of the Past Performance evaluation are equally perplexing. While CNI received a higher “[DELETED] point rating than the other two offerors—HyperNet and EAS, who each received a “[DELETED]—the “Reported Rationale” for each offeror is *identical*. *See* FF No. 81 Absolutely no explanation is given for why CNI was afforded a higher ranking than HyperNet.

Under these circumstances, there is no substantial evidence and thus no rational basis to support the [DELETED] point advantage CNI received in its past performance score. As a result the distinction between CNI’s [DELETED] past performance score and that of HyperNet’s (and EAS’) [DELETED] score is not justified on this record.

### **D. The Center’s Price Evaluation of CNI Was Defective**

As noted above, offerors were required to submit prices for every item identified in the Labor and Supervision Pricing Schedules. In its Protest, based on the pricing proposed by CNI in the First Supervision Schedule, HyperNet contends that the Center improperly waived two of the Solicitation’s supervisory personnel requirements for CNI. *See*

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<sup>8</sup> “[B]ased on LCI who is the current subcontractor providing support”. *See* FF No. 81.

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*HyperNet Protest* at 2-3. In this regard, the record shows in the First Supervision Pricing Schedule, CNI's entries for the Task Supervisor I and the Task Supervisor II position [DELETED]. *See* FF No. 104. Whereas the Solicitation's First Supervision Pricing Schedule had specified an annual estimate of 3,760 hours for each of these Supervisor positions, the record shows that CNI proposed "[DELETED]" hours for the Task Supervisor I position, and [DELETED] hours for the Task Supervisor II position. *Id.*

As a result HyperNet argues that CNI should have been eliminated from competition for failing to comply with the personnel pricing requirements, [DELETED]. *See HyperNet Protest* at 2. "Because they were allowed [DELETED], [t]his allowed for an unfair competitive advantage of approximately [DELETED]. *Id.*

The Center disagrees with HyperNet's characterization of the Task Supervisor I and Task Supervisor II pricing requirements, and instead contends that the 3760 number set forth in the First Supervision Pricing Schedule for each position "was only an example or estimate, as noted at the top of the [schedule] column." *See H-CR, Legal Brief* at 13. Since the 3760 figure was an "estimate" of annual hours for each position, the Center avers that "[n]o offeror was required or expected to provide that specific number of labor hours in its proposal without regard to its own proposed supervisory plan." *Id.* In making this argument, the Center emphasizes the language preceding the Second Supervision Pricing Schedule which stated that "[c]ontractors shall fill-in [sic] the estimated number of supervisory hours based on their own supervisory plan." *Id.* at 14. Based on this instruction, the Center argues that "[e]ach offeror was given the flexibility to respond to [these CLINs] with [a] tailored supervisory plan, [DELETED]." *Id.*

### **CNI's Pricing Schedule Failed To Comply With A Material Solicitation Requirement**

Here, the Solicitation required adherence to all requirements—and the Pricing Schedule in particular instructed offerors to make sure they proposed a price for every Schedule item. FF No. 4. Even if the ODRA were to agree that the instruction inviting offerors to propose an alternative annual hour estimate applied to the First Supervision Pricing Schedule, this did not give an offeror license to waive or eliminate a material personnel

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requirement. To that end, the Solicitation specifically required that a Task I Supervisor and Task II Supervisor be provided to perform full-time positions, for at least forty hours per week. *Id. at 4; see also* Part I – Section C – Description/Specs/Work Statement, Scope of Work, Definitions, ¶ C.1(d) Task Supervisor I, II (full-time) at 10 (*emphasis in original*).

Because it proposed “[DELETED]” hours for the Task Supervisor I position, CNI rendered itself ineligible for this award because its offer was non-responsive and altered the bargain with the government. Requirements-type contracts such as the one contemplated here are intended to provide purchasing flexibility to the government for “requirements that it cannot accurately anticipate.” *See Travel Centre v. Barram*, 236 F.3d 1316, 1318 (Fed.Cir. 2001). This flexibility is accomplished by the government providing good faith estimates of its needs and agreeing to fill all actual requirements for the estimated supplies or services for the duration of the contract from one designated awardee. *Id.* However, just as a requirements contract without estimates is unenforceable, *see J. Cooper & Associates, Inc. v. United States*, 53 Fed.Cl. 8 (2002), CNI’s reduction of the Center’s 3760 estimate to “[DELETED]” nullified the contractor’s obligation to fill the Center’s entire Supervisor I needs during the period of the contract—and the “[DELETED]” similarly prohibited the Center from ordering any Task Supervisor I services from CNI. *See International Data Corp. v. U.S.*, 64 Fed. Cl. 642 (2005). Under such circumstances, the award to CNI cannot stand—especially since the Center did not notify the other offerors that the Task Supervisor I requirement [DELETED]. *Protest of Informatica of America, Inc.*, 99-ODRA-00144. At a minimum, if the Center was inclined to [DELETED] the Task I Supervisor position, it was obligated under the AMS to advise the other offerors of this material change to the Solicitation’s specifications and provide them an opportunity to alter their bids accordingly. *Protest of Danka Office Imaging Company*, 98-ODRA-00099. Its failure to do so here constituted an impermissible “departure” from the Solicitation. *See AMS* § 3.1.2.2.3.1.2.3; *Informatica, supra*.

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### E. The EAS Technical Evaluation Lacked A Rational Basis

This record is devoid of a rational basis supporting the severely low score and ranking of EAS' Volume II. In support of the evaluation, the record contains only the evaluation summary that was transcribed from the TET's handwritten score sheets. This summary list contains only short conclusory comments on the "strengths" and "weaknesses" in EAS' Volume II. *See ADD, EAS Evaluation Summary.* Moreover, as noted by EAS in its Protest, many of these reported evaluation comments are patently contradictory—and in no way reasonably reflect or even suggest that a fair evaluation of the EAS proposal was performed. *Id.* For example, in addition to the contradictions challenged in EAS' Protest, there are several other inconsistent and/or unsupported evaluations listed in the summary. Under Factor 1, EAS is awarded strengths for its "Business Approach" and "Experienc[e] with [the Center]," as well as its "[v]ery clear [DELETED]" as "strengths." *Id.* At the same time, the summary identifies a "[DELETED] of [DELETED] under this same factor. *Id.* Without more, it is impossible for the ODRA to determine how the above-referenced strengths reconcile with the identified weaknesses; [DELETED]. Under this Factor, EAS received a rating of [DELETED] of a possible [DELETED]. *Id.* Given the clearly reported strengths for this Factor it is not at all clear how the otherwise unexplained weaknesses could have so negatively impacted this score to the extent they apparently did.

Other examples of patently contradictory and unexplained evaluations include the rating and scoring of EAS' proposed Recruitment/Retainment Plan. While, the Plan was awarded with strengths for being "well thought out with good coverage," having a "good explanation of transition" and offering a "satisfactory plan," the Plan was also assessed with a "[DELETED]"—reportedly because it "[DELETED]." *Id.* at 3. The record provides no rational basis for how this plan could be rated both "well thought out with good coverage" but at the same time not "solid." *Id.*

The evaluation of the EAS proposed Quality Control Plan presents another representative example of a patently contradictory and unsupported evaluation rating. The record shows that the EAS proposed Quality Control Plan was praised for its [DELETED]." *Id.* The

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Plan was also assessed [DELETED]. *Id.* No reasonable explanation was given for how [DELETED] can be heralded and derided at the same time.<sup>9</sup> Moreover, [DELETED] especially those that have been rated a “strength”, generally constitute a reliable form of measuring and evaluating a contractor’s [DELETED].

The Proposal Risk Rating—Factor No. 4—is similarly problematic. According to the evaluation summary, EAS was assessed with a strength for “[o]verall low risk of performance failure” [DELETED]. *Id.* at 4. Absent further explanation, there is no rational basis to justify what otherwise appear to be irreconcilable ratings.

Finally, to the extent the Center contends that “cross-referencing” between the Volume II and Volume III proposals was prohibited, the ODRA rejects this interpretation. As noted above, the evaluation criteria clearly contemplated that the Sub-factor Volume III would supplement and be considered in the context of the Volume II evaluation. *See ITO*, at 61.<sup>10</sup>

The Center is required to conduct an evaluation reflecting a consistent, equal, and rational application of its technical evaluation process. *See Protest of Optical Scientific, Incorporated*, 06-ODRA-00365. To that end, it is imperative that every acquisition decision—including technical evaluations—be reasonably based and well-documented. *Id.* In this case, the brief summaries—which haphazardly list fragments and vagaries transcribed verbatim from three evaluators’ score sheets—are the only support offered in this record to justify the evaluation of each offeror’s Volume II. While the ODRA will not substitute its technical judgment for that of the Agency, the sparse record in this case provides no reasonable justification for the largely inconsistent ratings and equally perplexing low point scores. On this record, the ODRA concludes that the evaluation of EAS’ proposal lacked a rational basis and that the awarded points under the Factors and

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<sup>9</sup> The evaluation simply states that the quality control goal of [DELETED]. *Id.*

<sup>10</sup> The plain terms of the Cross Referencing Clause establish that this provision is not the strict prohibition asserted by the Center. Instead, the clause instructs offerors that “[t]o the greatest extent possible, each volume shall be written on a stand-alone basis.” *Id.*, § 2.2.3, “*Cross-Referencing*” at 60. The only obvious prohibition in the clause is an express prohibition against cross-referencing within the *same* volume.” *Id.* (*emphasis added*).

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sub-factors were arbitrary and are not supported by substantial evidence. *See Protest of Royalea'L Aviation Consultants*, 04-ODRA-00304 at 16.

### F. The EAS Pricing Proposal Was Inadequate

In the Debriefing Letter furnished by the Contracting Officer, EAS learned that the Center's "price team felt the information provided in [the EAS] cost/price proposal was inadequate to determine the realism, reasonableness, and completeness of EAS' proposed prices." *See* FF No. 122. Specifically, the Center criticized EAS because it had "failed to provide" a [DELETED] with the Solicitation's instructions, and because [DELETED]" *Id.*

EAS disagrees with the Center's position—and reports that it actually "provided the exact information requested by the solicitation" and that the "Schedule B breakdown of proposed costs were submitted." EAS also contends that the Solicitation only sought one "model" spreadsheet outlining all cost and pricing details—and that in fact, it provided the Center with [DELETED] such models.

The Center defends its pricing evaluation of EAS by advising that the submitted proposal was "non-responsive." *E-CR, Legal Brief* at 7-9. According to the Center, EAS' proposed price could not be ascertained because "[c]omplete cost or price data properly totaled and extended in spreadsheet format was not included as required by the Solicitation. *Id.* To that end, the record confirms that Solicitation "requested" that each offeror provide certain additional "cost and pricing data for each . . . CLIN . . . in spreadsheet format with the costs properly totaled and extended. *See* FF No. 87 (*emphasis in original*). As an example of one of the EAS' pricing proposal defects, the Center emphasizes that EAS failed to "submit Cost/price data" for [DELETED]. *See E-CR, Legal Brief* at 9.

To the extent the Center asserts that the Solicitation required detailed cost/price information for every proposed schedule price, the ODRA concurs. *See* FF Nos. 87-92. In light of these Solicitation provisions and the cost/pricing detail they requested, the

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decision by EAS to submit just two cost/pricing spreadsheets was unfortunate. As we have previously held, in the final analysis it is the offeror's responsibility to ensure that its proposal is fully responsive to all of the Solicitation's requirements. *See Protest of Northrop Grumman Systems Corp.*, 06-ODRA-00384. Here, by failing to fully and clearly provide its pricing information in conformity with the Solicitation's express requirements, EAS assumed the risk that its pricing might not be viewed as competitive.

Moreover, the record does not support a conclusion that EAS likely would have won the competition. The EAS Proposal objectively was inferior to that of HyperNet on the non-price and price factors. Thus, EAS cannot demonstrate that, but for the Center's evaluation errors, it stood a reasonable chance of winning the competition. *See Protest of Royalea'L Aviation Consultants, supra*. Rather, the record here overwhelmingly demonstrates that a proper application of the award criteria and the scoring required that the Contract be awarded to HyperNet rather than to CNI.

### V. The Remedy

The record in this case evidences fatal deficiencies in the conduct of this competition. Moreover, the award decision does not have a consistently supported rationale and lacks proper documentation in support of the award decision.<sup>11</sup> Inexplicably, the Center selected CNI—whose offered price was close to [DELETED] higher than that of

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<sup>11</sup> The ODRA Procedural Regulations require that in responding to a bid protest the involved agency acquisition personnel must produce "all relevant documents, which shall be chronologically indexed and tabbed." *See* 14 C.F.R. § 17.17(f). In this case, the Center failed to provide the ODRA and the opposing parties with significant portions of the critical evaluation documents utilized in making the evaluation and award decisions that were the subject of these Protests. Moreover, the documents that were produced were out of order, mis-numbered and in some cases illegible. The ODRA, in order to insure that it had a complete record, twice asked the Center to produce—as required by regulation—certain spreadsheets and other documents that were missing from the HyperNet Protest record. *See ODRA Request for Cost/Price Evaluation Documents* and *ODRA Request for Documents*, both dated October 1, 2007. Notwithstanding the good faith and diligent efforts of Center Counsel, the Contracting Officer insisted that the missing or incomplete documents had in fact been produced—but later admitted that she had erred. *See Center Counsel's Letter to the ODRA* dated October 2, 2007. At one point the ODRA was compelled to remind the Center that it ran the risk of an adverse inference being drawn if it continued not to produce required documents. *See ODRA Letter to the parties* dated October 3, 2007. In this regard, the ODRA notes that to date, portions of some of the evaluation documents have not been provided. The Center—with the exception of Center Counsel who made multiple attempts to obtain and produce the documents—is hereby admonished to ensure that in all future matters it fully complies with the Procedural Regulations governing the production of documents.

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HyperNet, whose technical merit had been evaluated lower than HyperNet, and whose past performance rating was essentially equivalent to that of HyperNet.

It is well established that the ODRA has broad discretion to recommend remedies for a successful protest—and that in determining the appropriate recommendation, the ODRA may choose to construct a remedy appropriate to the Agency’s needs and which takes into account the likely impact on the parties. *See* 14 C.F.R. § 17.21; *see also Consolidated Protests of Camber Corporation and Information Systems & Networks*, 98-ODRA-00079 and 98-ODRA-00080. In this case, a directed award of the Contract to HyperNet is fully justified by the record.

The ODRA therefore recommends that: (1) the existing Contract with CNI be terminated and award made to HyperNet of a contract for the balance of the current fiscal year and options for future years; (2) the transition of the work from CNI to HyperNet begin immediately and be completed within 45 calendar days, or as soon as is consistent with ensuring that the contracted services to the Center are maintained; and (3) the Center report back to the Administrator through the ODRA on the status of its implementation of the mandated corrective action periodically and upon completion.

## VI. CONCLUSION

For the foregoing reasons, the ODRA recommends that the HyperNet Protest be sustained and that the Center be ordered to take the corrective actions outlined herein. The ODRA further recommends that the EAS Protest be denied.

\_\_\_\_\_/S/  
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