

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

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Consolidated Protests of	)	Docket Nos. 08-ODRA-00430
Diversified Management Solutions, Inc.;	)	08-ODRA-00431
Alaska Weather Operations Services, Inc.;	)	
	)	
<u>Under Solicitation No. DTFAWA-07-R-00006)</u>		

**DECISION ON REQUESTS FOR RECONSIDERATION**

**I. INTRODUCTION**

This matter currently is before the Federal Aviation Administration (“FAA”) Office of Dispute Resolution for Acquisition (“ODRA”) on Requests for Reconsideration (“Reconsideration Requests”) filed jointly by the Protesters, Diversified Management Solutions, Inc. (“DMS”) and Alaska Weather Operations Services, Inc. (“Alaska Weather”), as well as individually by awardees (“Awardees”) IBEX Weather (“IBEX”), Pacific Weather, Inc. (“Pacific Weather”), and RNR Technologies, Inc. (“RNR”). The Reconsideration Requests arise from a final agency order (“Final Order”) issued on May 23, 2008 in these Protests. The Final Order, which adopted and incorporated the ODRA’s Findings and Recommendations (“F&R”), sustained the Protests and directed the Program Office to re-compete three awards for contract weather operation (“CWO”) services required at three groups of FAA sites (“Groups”) located in Alaska. The Final Order further directed that each of the existing contract awards (“Contracts”) for each Group remain in place pending the results of the mandated re-competition.

In its F&R, the ODRA had determined that: the CWO Program Office’s (“Program Office”) evaluation plan and technical evaluation of proposals had deviated from the underlying Solicitation’s stated criteria; the offerors for the Groups were treated disparately; and the resulting three contract awards therefore lacked a rational basis. *See Consolidated Protests of Alaska Weather Operations Services, Inc. and Diversified*

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*Management Solutions, Inc.*, 08-ODRA-00430 and -00431 (*hereinafter the “F&R”*). For the reasons discussed herein, the ODRA denies each of the Reconsideration Requests and will not recommend reconsideration of the Final Order.<sup>1</sup>

### **II. THE FOUR RECONSIDERATION REQUESTS**

#### **A. Background**

Detailed findings relevant to the four Reconsideration Requests at issue here are fully set forth in the F&R, and are incorporated herein. *See F&R, Finding of Fact Numbers (“FF Nos.”) 1 through 57 at 1-22.* The parties’ positions in the underlying Protests and the ODRA’s analysis are set forth in Parts III through IV of the F&R. *Id.* at 23-38.

#### **B. The Joint Reconsideration Request of Alaska Weather and DMS**

On June 4, 2008, Alaska Weather and DMS filed their Joint Reconsideration Request (“*Joint Recon.*”) in which both challenge the re-competition remedy ordered in their respective sustained Protests. Alaska Weather and DMS contend that the ordered re-competition is not a viable remedy because Pacific Weather (the Group No. [DELETED] Awardee and RNR (the Group No. [DELETED] Awardee) allegedly are ineligible to perform the existing contracts or participate in the re-competition. According to the Joint Reconsideration both Pacific Weather’s and RNR’s principals have an affiliation with [DELETED] which the United States Department of Labor (“DOL”) debarred from federal contracting from May 13, 2005 until May 12, 2008, due to [DELETED] reported violations of the Service Contract Act. *See Joint Recon.* at 2-3 and *Appendix C, attached thereto.*

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<sup>1</sup> Because each of the three Awardees were Intervenor in the earlier DMS Protest, and inasmuch as DMS has now joined with Alaska Weather in pursuing the above-referenced Joint Request for Reconsideration, all four Reconsideration Requests were consolidated for decision, consistent with the ODRA’s mission to provide timely, efficient resolution. *See generally ODRA Procedural Regulations*, 14 C.F.R. Part 17. The Program Office has not joined in any of the Reconsideration Requests.

**C. The Pacific Weather Reconsideration Request**

Pacific Weather is the Awardee currently performing the Group No. [DELETED] Contract. Its May 30, 2008 Reconsideration Request (“*Pacific Weather Recon.*”) also challenges the ordered re-competition remedy, contending that, because the Program Office’s “blunder” in evaluating the technical proposals was the sole cause of any award impropriety, Pacific Weather should not be penalized by having to risk losing its Contract in a re-competition. *Pacific Weather Recon.* at 1-2. Pacific Weather further suggests that it may be disadvantaged in a re-competition because its competitors have knowledge of its prior proposal. *Id.* at 2. As a result, Pacific Weather maintains that equity requires the Program Office to give Pacific Weather a directed award for one of the other non-Alaska CWO Groups procured under the Solicitation.<sup>2</sup> *Id.*

**D. The RNR Reconsideration Request**

RNR is the Awardee currently performing the Alaska Group No. [DELETED] Contract. In its Request for Reconsideration (“*RNR Recon.*”) filed at the ODRA on June 5, 2008, RNR complains that a re-competition of the Alaska groups will be “grossly unfair to RNR” because its “competitors know RNR’s exact price and cost methodology.” *See RNR Recon.* at 1. Instead of a re-competition, RNR requests that an “alternate means to satisfy those firms that successfully protested this award” be found. *Id.* In the event that another offeror prevails over RNR for the re-competed Group No. [DELETED] contract, RNR further requests that it receive a remedy that compensates it for the “economic damage caused by” such a loss. *Id.*

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<sup>2</sup> The Solicitation contemplated separate contract awards for twenty-two Groups of FAA sites located in Alaska and throughout the United States. *See Program Office Response, Solicitation (hereinafter the “Solicitation”), Part 1—The Schedule, Section B—Supplies or Services and Prices/Costs* at B-1 through B-67.

**E. The IBEX Reconsideration Request**

IBEX is the Awardee currently performing the Group No. [DELETED] Contract. Its Request for Reconsideration (“*IBEX Recon.*”) filed June 12, 2008, challenges the outcome of the DMS Protest (“*DMS Protest*”) and the remedy imposed. IBEX claims that the F&R, on which the Final Order and re-competition remedy is based, was decided “upon grounds that DMS had not even raised” and which neither “IBEX or the FAA had the opportunity to address.” *IBEX Recon* at 2. According to IBEX, the ODRA failed “to provide the Agency and IBEX [with] a chance to be heard on the dispositive protest grounds [which] constitutes a failure of procedural due process” thereby rendering the ODRA’s issued F&R “invalid.” *Id.* IBEX also contends that the F&R warrants reconsideration because it “is based on factual errors” and because the ODRA’s stated findings are “entirely inconsistent” with precedent regarding the legal standard of review applicable to agency technical evaluations and actions. *Id.*

**III. DISCUSSION**

**A. The Standard of Review**

The standard of review employed by the ODRA where parties seek reconsideration is well established. *See Protest of Maximus, Inc.*, 04-TSA-009, *Decision Denying Maximus Inc.’s Motion for Reconsideration* dated November 29, 2004 (*hereinafter “Maximus Recon.”*); *Protest of Raytheon Technical Services Company*, ODRA Docket No. 02-ODRA-00210, *Findings and Recommendations on Motion on Protester’s Request for Reconsideration of Remedy* dated April 10, 2002 (*hereinafter “Raytheon Recon. No. 1”*); *Protest of Consecutive Weather*, 99-ODRA-00112, *Recommendation Regarding Reconsideration Request* dated July 13, 1999 (*hereinafter “Consecutive Weather Recon.”*); *Consolidated Protests of Camber Corporation and Information Systems and Networks Corporation*, 98-ODRA-00079 and 98-ODRA-00080, *Motion for Reconsideration* dated July 23, 1999 (*hereinafter “Camber Recon.”*). Specifically, to prevail on reconsideration, the requesting

party must demonstrate: (1) clear errors of fact or law in the underlying F&R; or (2) previously unavailable information that would warrant reversal or modification. *See Maximus Recon., supra.* To that end—consistent with its charge to implement an efficient dispute resolution process—the ODRA “will not entertain [reconsideration] requests as a routine matter,” and will not “consider [reconsideration] requests that demonstrate mere disagreement with a decision or simply restat[e] a previous argument” raised during the prior protest litigation. *Id.* Consequently, attempts to either re-litigate previously adjudicated issues, or to introduce new legal arguments based on the original administrative record do not provide a basis for reconsideration. *See Protest of Raytheon Technical Services Company, 02-ODRA-00210, Findings and Recommendations on Request for Consideration of the Merits and for Clarification* dated April 22, 2002 (*hereinafter* “*Raytheon Recon. No. 2*”).

#### **B. The Protesters’ Joint Reconsideration Request**

The DMS and Alaska Weather joint challenge presented on reconsideration against Pacific Weather’s and RNR’s eligibility to perform and compete for the three Group Contracts at issue in this case is recycled from the Alaska Weather Protest. The issue first was raised by Alaska Weather in its March 14, 2008 response (“Alaska Weather Opposition”) to the Program Office’s February 21, 2008 Motion to Dismiss the Alaska Weather Protest (*hereinafter*, “*Program Office Motion to Dismiss*”). In that Opposition, Alaska Weather recounted “[s]everal facts [which] seem to implicate” the principals of Pacific Weather and RNR “in the activities” of [DELETED], which, as noted above, had been debarred for a 3-year period by the DOL. *See Alaska Weather Opposition* at 10. In its Protest, Alaska Weather had contended that “further investigation” by the FAA was required to determine whether Pacific Weather and/or RNR “should have been” similarly debarred as a result of their alleged affiliation with [DELETED]. *Id.* at 10.<sup>3</sup>

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<sup>3</sup> By decision dated March 27, 2008, the ODRA dismissed several of Alaska Weather’s protest grounds as untimely, but held that Alaska Weather’s remaining challenges against the technical and price evaluation of its own proposal and that of Awardee RNR presented timely and justiciable issues. *See Protest of Alaska Weather Operations Services, Inc., 08-ODRA-000431, Decision on Motion to Dismiss* dated March 27, 2008.

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In the Program Office Response (“*Program Office Response*”) to the Alaska Weather Protest the Contracting Officer advised that she found no basis for Alaska Weather’s allegations that Pacific Weather and RNR were ineligible for contract award due to an alleged affiliation with the debarred [DELETED] contractor. *See Program Office Response, Volume I, Exhibit No. 1, “Contracting Officer’s Declaration.”* ¶¶ 32-34 at 5. The Contracting Officer reported that as a result of the allegations made by Alaska Weather in its Protest, the Contracting Officer had “again . . . researched the matter” but “found no evidence” that either Pacific Weather, RNR or either contractor’s principals were “on a suspended or debarred list” or were identified as “a part of” the [DELETED] debarment by the DOL.<sup>4</sup> *Id.* In contrast, the Contracting Officer confirmed that [DELETED] principal had been specifically debarred by the DOL as an individual—and listed as such on the DOL “exclusion list.” *Id.* However, neither Pacific Weather nor RNR nor their principals, had been listed or identified by the DOL for any affiliated or individual debarment. *Id.* The Contracting Officer also noted that unlike the debarred [DELETED] principal, her investigation confirmed that the DOL had not initiated debarment proceedings against either the Pacific Weather or RNR principals. *Id.*

Alaska Weather’s April 24, 2008 Comments on the Program Office Response (“*Alaska Weather Comments*”) continued to question the eligibility of Pacific Weather and RNR alleging that each had ties to the debarred [DELETED] Company. *See Alaska Weather Comments* at 16. Alaska Weather did not, however, present any new evidence to bolster its contention of an improper affiliation. Instead, Alaska Weather recycled the exhibits that had been submitted in its earlier “Opposition” to the Program Office Motion to Dismiss, which included copies of: the DOL notice of [DELETED] debarment; the Delaware Certificate of Incorporation that was executed by the Pacific Weather principal and changed [DELETED] name to [DELETED]; and a 1-page “sales history” for a “single wide” mobile home that had at one point been owned by Pacific Weather’s principal. *Id. and Attachments.* The ODRA’s F&R did not specifically address this allegation, which the

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<sup>4</sup> The Solicitation required each offeror to certify that neither it nor its principals were subject to any debarment, or any declaration of ineligibility for federal contract awards. *See Solicitation*, § K.9 at K-5.

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ODRA viewed as not adequately supported, inasmuch as both Protests were sustained on other grounds. *See Protest of Transgroup Express*, 00-ODRA-00157; *Protest of Raytheon Technical Services Company*, 02-ODRA-00210, *note* 13 at 38.

On reconsideration, DMS now joins in Alaska Weather’s re-allegation that Pacific Weather and RNR should be disqualified from their current Contract performance as Awardees and from the re-competition as a result of their alleged connection to [DELETED]. However, to support their contention of an improper affiliation between Pacific Weather, RNR and [DELETED], the Protesters rely on the same evidence that was proffered by Alaska Weather in its earlier Comments on the Program Office Response. *See Joint Recon.* at 2-6.

Debarment is a sanction that excludes an entity and/or individual from doing business with the federal government for a defined period of time. The sanction is generally imposed on contractors who have engaged in fraudulent, criminal or other seriously improper conduct or who have otherwise violated one or more requirements of a federal public contract. *See e.g. FAA Acquisition Management System (“AMS”) Procurement Guidance*, § 3.a(9), “*Scope of Debarment/Suspension*” and § 3.b, “*Debarment.*”<sup>5</sup> In some cases, a debarment action may apply where the record establishes that entities who are “affiliates” of the debarred contractor were sufficiently connected with the identified misconduct as to make dealing with them detrimental to the interests of the government. *Id.*, § 3.a(4), “*Effect on Division/Affiliates.*” The rationale for disbarring an “affiliate” is that if the affiliate or its principal was complicit in the act of the debarred prime contractor or principal, the affiliate company and/or principal should be similarly sanctioned. *Id.*; *see also Robinson v. Cheney*, 876 F.2d 152 (D.C. Cir. 1989).

Under the AMS, federal labor laws and regulations such as the SCA and the Fair Labor Standards Act—which are administered by the DOL—are applicable to the FAA’s acquisitions for products, services and construction. *See AMS* § 3.6.2.1. Similar to the

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<sup>5</sup> The AMS is accessible through the ODRA’s Internet website published at: <http://odra.faa.gov>.

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Federal Acquisition Regulation which governs other executive branch procurements, the AMS authorizes the FAA to debar a contractor “for cause,” *see AMS* § 3.2.2.7.4, “*Suspension and Debarment*,” and provides that such debarment may also extend to “affiliates” which the AMS defines as a business concern, organization or individual where “[o]ne controls or has the power to control the other” or where “a third party controls or has the power to control both” the debarred contractor and its affiliate. *See AMS Procurement Guidance, Part D, Appendix 1, “Definitions.”*

Notwithstanding the authority of FAA procurement officials to execute debarments, the AMS cautions that a debarment is a “discretionary action” that “should be undertaken only to protect the interests of the FAA.” *See AMS* § 3.2.2.7.4, “*Suspension and Debarment*.” As a result, the AMS requires the FAA to honor debarment decisions of other agencies “*unless* the FAA has a compelling need to obtain [a] requirement from that contractor.” *See AMS* § 3.2.2.7.4, *supra*, (emphasis added). Consistent with the above-referenced AMS provisions, the ODRA long has recognized that the adjudication of alleged federal labor law violations is more properly the subject of a DOL proceeding than a protest adjudication at the ODRA. *See Consolidated Protests of Midwest Weather, Inc.*, 98-ODRA-00087 and -00088. Moreover, whether or not an entity is affiliated with a debarred company is part of the contracting officer’s affirmative responsibility determination—a process over which the contracting officer has broad discretion. *Id.* To that end, although a contracting officer should make reasonable inquiry into debarment issues such as those raised here, the AMS does not require such inquiry as a matter of legal obligation. *Id.*

Moreover, a finding of past misconduct, standing alone, is not necessarily dispositive of a contractor’s or affiliate’s present responsibility. *See Robinson v. Cheney, supra.* A contractor or affiliate can meet the test of present responsibility by demonstrating that it has taken steps to ensure that the past wrongful act(s) underlying the debarment will not recur. *Id.* This is consistent with the purpose of a debarment action—which is to be imposed only to protect the government’s proprietary interests and not for the purpose of punishment. *Id.* As a result, even if proven true, an affiliation between either (or both)

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Pacific Weather and RNR with [DELETED] is not dispositive of either Awardee's responsibility or procurement integrity. *Id.*

In any event, as noted above, the record shows that the Contracting officer took reasonable steps to research the relevant DOL databases and records and found no evidence to support the alleged improper affiliations between either Pacific Weather or RNR with [DELETED]. Moreover, the 3-year debarment period for [DELETED] and its principal expired on May 13, 2008. *See Alaska Weather Opposition, Attachment C.* The Joint Reconsideration Request fails to demonstrate any errors of fact or law in the F&R, or new information that would provide any recognizable basis for reconsidering the F&R or the Final Order regarding RNR, Pacific Weather, and their principals' eligibility to perform or compete for the Group contracts. *See Maximus Recon., supra.*<sup>6</sup>

### **C. The Pacific Weather and RNR Reconsideration Requests**

As noted above, the individual Reconsideration Requests filed by Pacific Weather and RNR each challenge the re-competition remedy of the Final Order. Neither of these Reconsideration Requests provides a factual or legal basis for reconsidering the re-competition remedy.

With respect to the mandated remedy, it is well established that the ODRA has broad discretion to recommend appropriate remedies for a successful protest—and may choose to recommend a remedy appropriate to the situation, including recommending a re-competition. *See* 14 C.F.R. § 17.21; *Protest of HyperNet Solutions, Inc.*, 07-ODRA-00416, *Decision on Request for Reconsideration (hereinafter "HyperNet Recon.")*. As was noted in the F&R, because of the Program Office's deviation from the Solicitation's stated evaluation criteria and its disparate treatment of the offerors who competed for the three CWO Groups, each of the protested Contract awards lacked a rational basis. To permit the

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<sup>6</sup> In their Joint Request for Reconsideration, both Protesters continue to question RNR's capability to perform based on their observations of RNR's performance of the Group No. [DELETED] contract. As noted in the ODRA's *Decision on the Program Office's Motion to Dismiss, supra*, wherein Alaska Weather first lodged this allegation, such a contention purports to challenge a matter of post-award contract administration which is not justiciable in the context of a bid protest. *Id.* at 9.

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current Awardees—including Pacific Weather and RNR—to retain their Contracts in the face of a clearly irrational technical evaluation and award selection process would undermine the competition principles underlying the FAA’s AMS, and ultimately dissuade contractors from pursuing FAA contracting opportunities. *See AMS § 3.9.4 (expressly incorporating the ODRA’s Procedural Regulations, including 14 C.F.R. § 17.21, “Protest Remedies”); see also HyperNet Recon, supra.*

In this case, because the current Awardees will retain and continue to perform the awarded Contracts pending the completion and outcome of the re-competition, the record clearly shows that a full remedy can be implemented for the Protesters without any disruption or prejudice to the FAA’s CWO mission. While Pacific Weather and RNR disagree with this particular outcome—specifically objecting to the inclusion of the sixth original offeror who filed and then withdrew a Protest challenging the same Contract awards—as noted above, mere disagreement with the result of a decision does not warrant its reconsideration. *See Raytheon Recon. Nos. 1 and 2, supra.*

To that end, both Pacific Weather and RNR initially contended in their respective Requests for Reconsideration that proprietary information in their proposals had been divulged to other competitors.<sup>7</sup> Both contractors have since recanted these allegations. Specifically, in response to the ODRA’s direct inquiry, *see ODRA’s separate Letters to each party issued June 6, 2008*, both Pacific Weather and RNR have clarified in separate letters to the ODRA that neither Awardee currently believes that any proprietary or otherwise protected proposal information was divulged to any party. *See separate Pacific Weather and RNR Letters to the ODRA dated June 9, 2008.* The Pacific Weather and RNR Reconsideration Requests therefore are denied. *See Maximus Recon., supra.*

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<sup>7</sup> Pacific Weather reported that “aspects” of its “technical proposal [were] disclosed during the course of” the original adjudication of the DMS and Alaska Weather Protests, *see Pacific Weather Recon.* at 1, while RNR similarly contended that “two rival companies were given unfettered access” to its “technical and cost proposal.” *See RNR Recon.* at 1.

**D. The IBEX Reconsideration Request**

The gravamen of IBEX’s Reconsideration Request (“*IBEX Recon.*”) is that in recommending that the Group No. [DELETED] Contract award be overturned, the ODRA’s adjudication of the DMS Protest failed to provide IBEX and the Program Office with “fair notice” and “due process.” See *IBEX Recon.* at 2-3. According to IBEX, the DMS Protest—the only Protest<sup>8</sup> that challenged the Group No. [DELETED] award—presented “no cognizable protest grounds [DELETED].” *Id.* at 5. IBEX also maintains that, during the adjudication, there was no allegation that [DELETED]” *Id.* Based on these contentions, IBEX accuses the ODRA of a “*sua sponte* creation and adjudication of protest grounds.” *Id.* (emphasis in original). The record does not support IBEX’s contention. Nor does the record provide a basis for IBEX’s conclusion that its proposal should have been exempted from the ODRA’s review in the context of the Protest challenge earlier levied by DMS against the Group No. [DELETED] technical evaluation and contract award.

The DMS Protest squarely challenged the Program Office’s technical evaluation and specifically emphasized [DELETED]. See *DMS Protest* at 1, 9, 11 and 13. The DMS Protest further maintained that, but for the Program Office’s improper technical evaluation and [DELETED] DMS was clearly “in line for award of groups [DELETED] and [DELETED].” *Id.* at 1. The DMS Protest, which was submitted and litigated by DMS on a *pro se* basis, also generally contended that its submitted proposal had been irrationally and overly “scrutinized” simply because [DELETED]. *Id.* at 11.

During the adjudication of the DMS Protest, the Program Office defended its technical evaluation by submitting a comparative analysis rebuttal to DMS’ Protest argument. Specifically, the Program Office emphasized the [DELETED] of the DMS technical proposal by comparing the submission to the technical proposals of IBEX and the other

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<sup>8</sup> Alaska Weather did not challenge the Group [DELETED] award. The ODRA therefore treats the Joint Alaska Weather and DMS Opposition to the IBEX Reconsideration Request as the Opposition of DMS alone.

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offerors. For example, in contending that DMS had failed to [DELETED]. *See Program Office Response* at 20. The Program Office even went so far as to classify [DELETED]. In explaining why the DMS proposal's [DELETED]" *Id.* at 25. Moreover, in contrast to [DELETED]." *See Program Office Response, Volume I, Legal Brief No. 1* at 22; *see also Program Office Supplemental Response, Legal Brief No. 2* at 23 and 33.

In its Comments on the Program Office Response ("*DMS Comments*"), DMS also employed a comparative analysis [DELETED]. *See DMS Comments* at 1, 4 and 6. In fact, as a result of [DELETED]. *Id.* at 1. For example, although the Program Office had reported that [DELETED]. *Id.* at 6. DMS' Comments also emphasized [DELETED]. *Id.* at 8. In sum, DMS' Comments accused the Program Office of conducting a proposal evaluation that was not "consistent with the stated evaluation factors, sub-factors, and criteria stated" in the Solicitation. *Id.* at 1.

Remarkably, while IBEX's Reconsideration Request asserts that DMS failed to raise "any cognizable" grounds of protest challenging the compliance of IBEX's proposal with the Solicitation's technical criteria and similarly maintains that DMS failed to allege that the IBEX proposal [DELETED]," *see IBEX Recon.* at 5, the record clearly establishes that [DELETED], IBEX's own Comments on that Response dated March 28, 2008 ("*IBEX Comments*") unequivocally demonstrate that IBEX was aware of and addressed the [DELETED] issues involved by adopting the [DELETED] analysis used by DMS in its Protest and [DELETED]. For example, in defending [DELETED], *see IBEX Comments* at 12, IBEX emphasized [DELETED]." *Id.* at 13.

In response to DMS' allegation that the Program Office's technical team had evaluated the DMS proposal [DELETED]. *See IBEX Comments* at 13. IBEX's Comments further explained that [DELETED] *Id.* Continuing with its [DELETED] rationale, IBEX's Comments justified [DELETED]." *Id.* at 16.

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With regard to the adjudication of a protest's merits, the ODRA Procedural Regulations generally contemplate the development of the administrative record according to a 2-step sequence of filings: (1) the submission of an Agency Response; and (2) the submission of Comments by the Protester and any Intervenor on that Response. *See* 14 C.F.R. § 17.17(f). Following these two filings, the administrative record generally is closed unless: (1) the ODRA requests further information from one of the parties; (2) the ODRA grants a party's request for a hearing; or (3) the ODRA grants a party's request to supplement the administrative record.<sup>9</sup> *Id.*

Notably, in this case, following the submission of the Program Office's Response and each Intervenor's filing of Comments, the ODRA directed the Program Office to file a Supplemental Response ("*Program Office Supp. Response*") explaining [DELETED]. *See ODRA Letter to the Program Office dated April 16, 2008.* The ODRA further advised the interested parties, including the Protester and IBEX, that each could file "Supplemental Comments" (*Supp. Commentss*) on the Program Office's Supplemental Response within two days of their receipt of that filing. *Id.*

Following the Program Office's submission of its Supplemental Response, IBEX filed Supplemental Comments on April 28, 2008 in which it confirmed that [DELETED]." *See IBEX Supp. Comments* at 1-2. IBEX's Supplemental Comments further asserted that:

[t]herefore, there was [DELETED].

*Id.* at 2.

In addition, IBEX's Supplemental Comments argued, based on the answers provided in the Program Office's Supplemental Response, that "DMS [DELETED]." *Id.*

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<sup>9</sup> To the extent IBEX's Reconsideration Request suggests that it was denied the opportunity to rebut the Protester's Comments, the record shows that IBEX did not request such an opportunity. Generally, in the normal course, the ODRA Procedural Regulations do not contemplate providing an additional comment period except in the case of a dispositive motion, *e.g.*, a party's request to suspend contract performance. *See* 14 C.F.R. § 17.17(a).

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Notwithstanding IBEX's disingenuous complaint that the adjudication of the DMS Protest failed to accord IBEX "due process," *see IBEX Recon.* at 2, as evidenced by the above events, the record in this case unequivocally shows otherwise. As discussed above, DMS' Protest squarely contended that it had not been evaluated fairly. In addition, as previously noted, the Program Office, IBEX and DMS each employed a [DELETED] for the Group No. [DELETED] Contract award. This in turn required a detailed review by the ODRA of the Program Office's evaluation of the DMS and the IBEX proposals as well as the rationale underlying the Program Office's entire technical evaluation process. In sum, the record shows that IBEX: (1) clearly was aware that part of the DMS challenge against the Program Office's evaluation of its proposal evaluation [DELETED]; and (2) had ample opportunity to address the issue in its role as the Intervenor in this case. IBEX has failed to demonstrate any factual or legal error by the ODRA that would support reconsideration of this issue. *See Maximus Recon., supra.*

IBEX's Reconsideration Request also attempts to take issue with the substance of some of the ODRA's factual findings set forth in the F&R. In particular, IBEX maintains that [DELETED], *see IBEX Recon.* at 12, and otherwise challenges the ODRA's finding that the Program Office's evaluation errors and disparate treatment prejudiced DMS. *Id.* at 15-16.

Specifically, IBEX's Reconsideration Request contends that there was "NO EVIDENCE" to support two of the factual findings set forth in the F&R in which the ODRA summarized conclusions that were identified in the technical team's evaluation report. *See Program Office Response, Volume II, Exhibit No. 15, Technical Evaluation Report (hereinafter "the TER").* *See F&R* at 21-22. In the F&R's Finding of Fact Number (*FF No.*) 43, the ODRA repeated, *verbatim*, the TER's [DELETED] in the IBEX proposal as reported therein by the technical evaluation team. *See TER* at [DELETED]. In *FF No.* 44, the ODRA identified the specific technical criteria under which the technical evaluation team reported [DELETED]. *See FF No.* 44. Notwithstanding that both of these factual findings directly quote from and expressly cite to the TER source document on which they are based,

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IBEX's Reconsideration Request repeatedly contends that the technical evaluation team [DELETED] identified in FF Nos. 43 and 44. *IBEX Recon.* at 10-11.

As a preliminary matter, and as indicated above, the [DELETED] reported by the ODRA in FF No. 43 is a direct quotation from—and exact replication of—the TER's [DELETED] that were evaluated in IBEX's proposal by the technical team. *Compare FF No. 43 at 21* with *TER* [DELETED]. As such, IBEX has presented no basis to question this finding.

IBEX's disagreement with FF No. 44 is essentially a challenge against the phrasing that the ODRA used to report [DELETED]. *See TER* at [DELETED]. To that end, in FF No. 44, the ODRA reported that [DELETED]. *See FF No. 44* (emphasis added).

On Reconsideration, IBEX maintains that FF No. 44 "contain[s] numerous errors of fact." *Id.* For example, although this finding explained that the IBEX proposal was found to be [DELETED] IBEX maintains that there was no such determination by the technical evaluation team. *See IBEX Recon.* at 10. The record shows, however, that in describing the [DELETED]. Moreover, the TER's accompanying description of the IBEX proposal's [DELETED] revealed that based on its review of the IBEX proposal, the technical evaluation team determined that [DELETED]. Clearly, these [DELETED].

IBEX's contention that the [DELETED] identified in the TER—and subsequently discussed in the F&R—do not reflect [DELETED] has no bearing on the accuracy of FF No. 44, and is squarely [DELETED]. Specifically, FF No. 44 accurately reflected the TER's finding that IBEX:

[DELETED]

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As noted above, in this finding, the ODRA reported—consistent with the [DELETED] this contention has no bearing on the accuracy of FF No. 44. As noted above, in this finding, the ODRA reported—consistent with the [DELETED]. *Compare FF No. 44* with [DELETED]. In sum, a simple comparison between the content of FF No. 44 with that set forth in the TER establishes that there is no reasonable basis for this argument, and consequently IBEX’s challenge against FF No. 44 provides no basis for reconsideration.

In the F&R, the ODRA also cited IBEX’s [DELETED] as an example of the Program Office’s unreasonable evaluation and disparate treatment of offerors because the reported [DELETED].” *See F&R* at 34-35. On reconsideration, IBEX reports that the ODRA mistakenly concluded that the TER’s reference to [DELETED] in IBEX’s proposed [DELETED]“. *See IBEX Recon., note 2* at 11. While this portion of the TER was included in the Program Office Response addressing the DMS Protest allegations, IBEX explains that [DELETED]. *Id.*

In this portion of the TER, the technical evaluators did in fact reference the [DELETED]. *See Program Office Response, Volume I, Exhibit No. 7, (hereinafter “Solicitation”), “Part 1—The Schedule, Section B—Supplies or Services and Prices Costs,” “Group # 21 Small Business,”* at B-64.<sup>10</sup> However, despite IBEX’s contention to the contrary, the scheduling [DELETED] identified in the TER did [DELETED]” *See TER* at [DELETED]. By its express terms, [DELETED].<sup>11</sup>

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<sup>10</sup> Under the Solicitation, 22 separate contracts were contemplated for various clusters of FAA sites. *See Solicitation, “Part 1—The Schedule, Section B—Supplies or Services and Prices Costs,”* at B-1 through B-67. While offerors were not limited on the number of Groups they could bid on, the Solicitation limited the number of contracts that could be awarded to each offeror to three. *See Solicitation, “Part IV—Section M, Evaluation Factors for Award,”* § M.1.3, “Number of Potential Contract Awards” at M-2.

<sup>11</sup> Entitled the “Technical Proposal Evaluation Report for the Contract Weather Observation (CWO) Services Program,” the TER “present[ed] the results of the evaluation” of all the “Technical proposals [that were] submitted by Offerors in response to four [Solicitations]” including the small business set-aside Solicitation discussed herein pursuant to which the Alaska Group Nos. [DELETED] Contracts were awarded. *See Program Response, Volume II, Exh. No. 15, TER* at 1 and 5.

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However, despite IBEX's contention to the contrary, [DELETED], In any event, even assuming that the referenced [DELETED], this does not alter the outcome or the mandated re-competition remedy.

As the ODRA repeatedly emphasized and explained throughout the F&R, the record in this case was replete with evidence of disparate treatment. *See F&R* at 32-38. For example, while the Program Office disregarded the evaluated [DELETED]. In short, the administrative record provided for this adjudication clearly showed that the Program Office's technical evaluation was not uniform and therefore lacked a rational basis. *Id.*

It is well established that, as noted above, mere disagreement with the outcome of a protest is insufficient to warrant reconsideration. *See Raytheon Recon.*, 02-ODRA-00210, *supra*; *see also Protest of Frequentis*, 02-ODRA-00321.<sup>12</sup> Here, notwithstanding IBEX's quibbles with certain of the ODRA's findings, the fact remains that the Solicitation's stated evaluation criteria were otherwise not consistent with the Evaluation Plan utilized by the Program Office. In such a situation, a re-competition based on revised evaluation terms and documents, as was mandated by the Final Order here, is the most appropriate remedy to ensure fairness to all offerors. *See Protest of Optical Scientific Inc.*, 03-ODRA-00365. Thus, even if the challenges presented by IBEX on reconsideration against FF Nos. 43 and 44 were found to be meritorious, the Program Office's failure to adhere to the Solicitation's stated evaluation factors would nevertheless mandate sustaining DMS' protest and directing a re-competition. *Id.*

To that end, despite IBEX's contentions to the contrary, it was squarely within the ODRA's authority, as the Agency-based adjudicative tribunal acting on behalf of the FAA Administrator, to recommend the re-competition remedy, and for the FAA Administrator to direct FAA contracting personnel to correct the results of a flawed evaluation and provide an opportunity for the affected offerors to re-compete the requirement. *See* 49 U.S.C. § 40110(d)(4), which mandates that "that "acquisition related disputes and protests"

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<sup>12</sup> Notably, IBEX's current complaint against the ODRA's F&R is premised on an outcome that has not yet occurred. That is, while IBEX appears to pre-suppose that it will lose the Group No. [DELETED] Contract, there is not yet any basis for concluding that IBEX will be prejudiced by the re-competition remedy.

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and the “adjudication of such matters be done by the Administrator through the ODRA.” *See also ODRA Procedural Regulation* 14 C.F.R. § 17.21(a), which explains that the “the ODRA “has broad discretion to recommend remedies for a successful protest that are consistent with the AMS and applicable statutes.” These statutory and regulatory authorities expressly incorporated and implemented in the AMS. For example, AMS § 3.1.4, “*Contracting Authority*,” confirms that as a result of Title 49 of the United States Code, “[t]he Administrator has broad authority “to enter into and perform such contracts, leases, cooperative agreements, or other transactions as may be necessary to carry out the functions of the Administrator and the Administration”; similarly, AMS § 4.2.2.1, “*Contracting Authority*,” emphasizes that federal law vests the Administrator with “final authority” over acquisitions involving property and equipment. In addition, in the context of outlining the ODRA’s dispute resolution authority that has been delegated by the FAA Administrator, AMS § 3.9.4 expressly references the Administrator’s broad statutory authority over all FAA acquisition matters. Each of the above-referenced AMS provisions also make clear that the Administrator is fully authorized to “redelegate” the above-referenced acquisition authority to other FAA officials, *e.g.*, the Administrator’s Delegee. To that end, by means of a “*Delegation of Authority to the ODRA*” dated March 10, 2004, the FAA Administrator has vested the ODRA with “authority to execute and issue on behalf of the Administrator, orders and final decisions for the FAA in all matters within the ODRA’s jurisdiction” for disputes involving acquisitions valued at not more than five million dollars.<sup>13</sup> *See AMS §§ 3.1.4 and 4.2.2.1, supra; see also Protest of CNI Aviation, LLC, 07-ODRA-00428.*

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<sup>13</sup> This Delegation is published on the ODRA website at <http://odra.faa.gov>.

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**IV. CONCLUSION**

For the reasons stated herein, the ODRA denies the Reconsideration Requests and will not recommend reconsideration of the Final Order in this case.

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*/s/*  
Behn M. Kelly, Esq.  
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