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Solicitations, asserting that the procurements at issue were required to be set aside for small business. *Protests* at 1.

For the reasons set forth below, the ODRA recommends that the Protests be denied, as there was no requirement under the FAA Acquisition Management System (“AMS”) for the Program Office to set aside the Solicitations for small business. The ODRA finds that the Program Office complied with the applicable statute and AMS policy by conducting a market survey which resulted in a well supported determination by the cognizant program officials that adequate competition was not available to support set asides of the Solicitations. Consistent with the FAA policy of providing reasonable opportunities to small businesses to participate in FAA contracting opportunities, the Program Office also set aside a third solicitation not subject to the Protests and included specific subcontracting requirements in the protested Solicitations.

II. Findings of Fact

A. Market Survey

1. On January 2, 2008, the FAA issued a market survey (“Market Survey”) for the purpose of conducting market research and to determine the capabilities and interests of vendors to fulfill ATO-T support service requirements. Agency Response (“AR”), Tab 4, page 1. The ATO-T organization is comprised of 35,000 controllers, technicians, engineers and support personnel and is spread over six service groups: Safety Operations Support, Finance, Program Operations, Tactical Operations and Mission support, Administration, and Planning. ATO-T is responsible for moving air traffic safely and efficiently through the National Aerospace System (“NAS”), and serves commercial airlines, general aviation, and the United States military. ATO-T also is responsible for the delivery of terminal services and implementing new technology to support terminal operations. AR, Tab 7, page 1.

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2. The Market Survey encouraged vendors to comment on a draft Statement of Work (“SOW”) and proposed labor categories, which were provided with the Market Survey. The Market Survey provided notice that the FAA was considering making multiple awards, “but the specifics of the competition” had not yet been determined. The Market Survey also stated: “The FAA may decide to do a full and open competition or set aside all or part of the procurement” for various types of small businesses and that responses from the survey would be used to determine whether to set aside part or all of the effort. AR, Tab 4, page 1.

3. The Market Survey stated: “The principle [sic] North American Industry Classification System (NAICS) code for this effort is 541330 Engineering Services, with a size standard of \$4.5 million of annual revenues. Applicable secondary NAICS codes are provided below for the purposes of encouraging small business participation as well as subcontracting and teaming arrangements.”
Id.

4. The secondary NAICS codes identified by the Market Survey were as follows:
 - 541611
Administrative Management and General Management Consulting Services (\$6.5 M)

 - 541990
All Other Professional, Scientific, and Technical Services (\$6.5 M)

 - 541690
Other Scientific and Technical Consulting Services (\$6.5 M)

 - 541620
Environment Consulting Services (\$6.5 M)

 - 541712
Research and Development in the Physical, Engineering, and Life Sciences (500 employees)

 - 541430
Graphic Design Services (\$6.5 M)

 - 541511

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Custom Computer Programming Services (\$23 M)

5. The Market Survey explained that the requirements were “concentrated in the areas of technical, managerial, and financial services” and were needed to support life cycle activities identified within the FAA Capital Investment Plan. *Id.* The Market Survey also estimated “for planning purposes only” a fiscal year budgetary amount of \$50-55 Million. *Id.* at page 2.² Additionally, the Market Survey requested respondents to provide information as to their small business status and capabilities and resources to provide the services enumerated in the SOW.

6. The draft SOW describes the scope of the requirement as follows:

The contractor shall provide quality technical, engineering, analytical, financial, and administrative support to the ATO-T organization. The contractor shall furnish and make available all personnel, supplies, equipment, materials, data, facilities, and services necessary to assist the ATO-T organization in accomplishing its mission. As directed by the FAA, the contractor may also be required to interface with system integration contractors, equipment manufacturers, airport personnel, and various FAA and U.S. Government organizations.

This contract will be broad in scope and will provide critical technical and other planning assistance to Washington, DC ATO-T organizations. The support services include, but are not limited to: engineering, programmatic, technical, information security, budgetary, financial and administrative. ... Specific Task Orders will be issued to support specific FAA ATO-T organizations.

Id., Tab 4, page 1.

7. The requirement encompasses Technical Support Tasks, Managerial Support Tasks, Administrative Support, and Cost and Financial Support. *Id.*, pages 2-18.

² The requirement is estimated to cover in excess of 435 Full-Time-Equivalents (“FTEs”) per year and the total estimated cost of the procurement is \$360 Million. *Id.*, Tab 6, pages 1, 3.

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8. The Technical Support Tasks include the following: Operational Concepts and Requirements Analysis, Engineering Support, Environmental Support, System Engineering Studies and Assessments, Logistics Engineering, System Development/Integration, System Production, System Implementation, System Installation & Checkout, Information Systems Security (ISS) Support, Human Factors Support, Modeling and Performance Analyses, Test Support, Air Traffic Support, Safety Program Support, Automated CM Tools, Help Desk Support, and Technical Writing/Editing. *Id.*, pages 2-9.
9. The Managerial Support Tasks include: Program Management, Acquisition Support, Scheduling Support, Baseline Management Support, Earned Value Management, Risk Management, Investment Analysis/Operations Research, Organizational and Performance Metrics, Configuration Management, Government and Industry Standards, Knowledge Management Support, Technology Assessments, Alternative Analysis, Investment Analysis, Strategic Planning, Business Process Modeling, Modeling and Performance Analyses, Modeling to Support Operational Assessments, and Maintenance and Operations Support. *Id.*, pages 9-14.
10. The Administrative Support Tasks include: Development of briefing packages and other information materials in various mediums, preparation of displays and exhibits for technical conferences, arrangement and facilitation of meetings, including preparing and distributing meeting minutes, and performance of routine office administration tasks. *Id.*, pages 14-15.
11. The Cost and Financial Support Tasks include: Program Level Financial Management Support, Financial Baseline Maintenance, Budget Formulation, Budget Presentation, Budget Execution, Procurement Planning, Business Management and Financial Support, Financial Reporting Support, Cost and Benefit Analysis, and Cost and Schedule Risk Assessments. *Id.*, pages 15-17.

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12. On January 22, 2008, The FAA issued an amendment to the Market Survey (“Amendment”) responding to requests for clarification to the Market Survey. In part, the purpose of the Amendment was to remove the designation of a principal NAICS code and change the first paragraph of the Market Survey to read:

The North American Industry Classification System (NAICS) codes for this effort are: 541330 Engineering Services, 541611 Administrative management and General Management consulting Services, 541620 Environmental Consulting Services, 54990 All Other Professional, Scientific, and Technical Services, 541690 Other Scientific and Technical consulting Services, 541620 Environment Consulting Services, 541712 Research and Development in the Physical, Engineering, and Life Sciences, 541430 Graphic Design Services, and 541511 Custom Computer Programming Services.

Id., Tab 4.

13. The Amendment clarified that the requirement set forth in the draft SOW was not the result of a consolidation of several existing support service contracts, and that the Market Survey would aid in the determination of the number of qualified vendors would be interested in providing the type of labor and contract architecture best suited for the acquisition(s). Additionally, the Amendment identifies certain companies as incumbent contractors, who were awarded prime contracts under the original Multiple Area Support Services (“MASS”) Engineering Support Services Area (“ESSA”) procurement vehicle in support of ATO-T. The identified incumbent contractors are not considered to be small business concerns, *i.e.*, Apptis, BAE, Northrop Grumman, and SAIC. *Id.*; Comments, dated December 17, 2008 (“Comments”), Exhibits A and B. The record further indicates the existence of other MASS/ESSA contractors which received awards set aside for small business. AR, Tab 6; Comments, Exhibits A and B.

B. Predecessor Contracts

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14. Solicitation DTFACT-03-R-00005 for the MASS/ESSA contracts was issued by the FAA William J. Hughes Technical Center on December 13, 2002 and closed on January 21, 2003 (“MASS/ESSA Solicitation”). *See* MASS/ESSA Solicitation at <http://essa.tc.faa.gov/sir>. Under the MASS/ESS solicitation, multiple contracts were awarded on an Indefinite Delivery, Indefinite Quantity (“IDIQ”) basis for a period of performance of ten years to provide engineering support services to support the NAS (“MASS/ESSA Contracts”). MASS/ESSA Contracts were awarded in four independent competitive categories: SEDB 8(a) certified, moderately small business, small business, and unrestricted. The MASS/ESSA Solicitation used NAICS code 541330 to identify the appropriate competitive category for potential offerors. The MASS/ESSA Solicitation provided that its goal was to award 25% of all prime contract work to small businesses. *Id.* at page 2.
15. The MASS/ESSA Contracts are expiring and will be replaced by the current ATO-T procurement. *See Finding of Fact No. (“FF”) 40, infra.* The record indicates that the MASS/ESSA Contracts were transferred from the William J. Hughes Technical Center to FAA Headquarters, where they are being recompleted. AR, Tab 6.

C. Market Survey Responses and Resulting FAA Determination

16. The FAA received over one-hundred responses to the Market Survey and on March 10, 2008, the FAA issued a second amendment to the Market Survey summarizing the capabilities and interest of the respondents (“Second Amendment”). AR, Tab 4.
17. Hi-Tec was one of the companies which submitted a response to the Market Survey in the form of a Business Declaration, dated February 5, 2008. In its

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response, Hi-Tec indicated that it was a minority owned, socially and economically disadvantaged small business, with gross receipts for the last three years (2005-2007) averaging over \$15.4 Million. *Id.*, Tab 5. Hi-Tec also submitted a statement of its capabilities and interest, which included experience managing large FAA contracts, and more specifically ATO-T support, by providing relevant technical, managerial, administrative and cost/financial services. *Id.* The response specified NAICS codes 541330, 541611, 541690, 541990, 541712, and 541511 as representative of the nature of its business. *Id.*

18. FAA Contracting Officers from the Program Office met with the Manager of the SBDO on December 5, 2007 and on March 12, 2008 to discuss coordinating the interests of small businesses and providing them with opportunities to participate in the subject acquisition. *Id.*, Tabs 1 and 6. The advice provided by the Small Business Development Office (“SBDO”) was incorporated into the procurement strategy for this acquisition, which was memorialized in a “Determinations & Findings for Procurement Strategy” (“Determination”). *Id.*, Tab 6. In pertinent part, this document states:

79 prospective contractors’ [sic] responded in writing. 66 capability statements were submitted and reviewed by the integrated service team, and it was determined that adequate competition exists to support a competitive acquisition. There were at least [DELETED] respondents determined capable of meeting the **entire requirement under a single procurement vehicle**, and therefore adequate competition exists to proceed with a procurement of this type. There is a possibility that the range of capable contractors could extend to [DELETED]. However, there is some question/risk of the entire performance capability for [DELETED] of the [DELETED] respondents. [DELETED] of the pool of [DELETED] ... respondents claim small business status. [DELETED] of these respondents are considered questionable to some extent (contain risk) as to the ability to perform the entire requirement, leaving only 1 small business in the mix of confidence. Therefore, it is not in the Government’s best interest to set-aside the entire requirement for small business concerns.

Id. (emphasis added).

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19. Based on the above survey information, and in “consideration of ATO-T’s need for flexibility in obtaining the required services in a timely manner,” the Program Office decided to break the requirement down into four contract line item numbers (“CLINs”) to allow more contractors to receive awards and to allow for the set-aside of one of the CLINs for small business. The CLIN that was set aside for small business was for Administrative/IT Support Services, which fell under the size standard parameters of NAIC code 541611 “Administrative and General Management Services.” *Id.*

20. The Determination found that the Market Survey data supported the set aside of the Administrative/IT Support Services for small SEDB 8(a) business concerns. Specifically, it states that of “all the small business respondents, [DELETED] claimed SEDB 8(a) status” and “[DELETED] could qualify as small businesses under at least one of the NAICS codes.” The Determination also states: “[DELETED] of the respondents claiming SEDB 8(a) status do currently qualify as small (according to size standard @ \$6.5m) for NAICS Code 541611” *Id.*; *see also* AR, Tab 2.

21. Additionally, the Determination states:

[I]n the spirit of increasing small business participation, the awards for non set-aside CLINs will be subject to more stringent small business subcontracting requirements. In lieu of just requiring prime contractors to allocate percentages of subcontracts to small business concerns, the primes will be required to subcontract a specific percent to small businesses, thereby increasing small business participation in those areas. In further spirit of increasing small business participation there will be consideration for requiring mentor-protégé arrangements from the large businesses that may receive contract award(s).

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Id.; see also AR, Tabs 9 and 10, Section M4.5.³

22. On March 19, 2008, the SBDO concurred with the above Determination's findings and the Program Office's proposed strategy of making a partial set-aside of the Administrative/IT Support Services for SEDB 8(a) concerns. *Id.*

23. On March 31, 2008, the above strategy was approved as part of the overall procurement plan for the acquisition. AR, Tab 7. Specifically, the acquisition plan envisions the award of multiple cost-plus-fixed-fee contracts. Additionally, citing the need for flexibility in satisfying specific requirements, the plan states that offerors will be encouraged to submit proposals for the entire requirement or for specific CLINs, *e.g.*, technical support services, managerial support services, administrative support services, or cost and financial support services, and that multiple awards will be made for each segment, based on best value. AR, Exhibit 7, page 3.

³ Section M4.5 of the Solicitations provides that, for large businesses, small business subcontracting plans would be evaluated and specifies:

[A]t least 50 percent of the cost of contract performance incurred for personnel shall be expended for employees of the prime contractor and the offeror shall **allocate at least twenty-five (25) percent of the contract dollar value to small businesses** over the full life of the contract. This twenty-five (25) percent of the contract dollar value to be allocated to small businesses is further broken down ... as:

- At least ten (10) percent of the contract dollar value shall be allocated to small disadvantaged businesses.
- At least five (5) percent of the contract dollar value shall be allocated to small women-owned businesses.
- At least three (3) percent of the total percent of the contract dollar value shall be allocated to disabled veteran owned businesses.

Id. (emphasis in original).

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D. Issuance of the Solicitations

24. On July 16, 2008, the Program Office issued the Solicitations to obtain Full Performance/Level of Effort based on an estimated number of labor hours for the base and option years, as well as management services, supplies, materials, data and facilities needed to accomplish the requirements in the SOW. AR, Exhibits 9 and 10, Section B.1.1. The provisions in each of the Solicitations are almost identical, except for those specifying the services and level of effort.
25. Solicitation -55501 seeks Engineering and Scientific Support Services as described in section C4.1 of the SOW. *Id.* Solicitation -55502 seeks Program Planning/Execution/Implementation Support Services and Cost and Financial Support Services, as described in SOW sections C4.2 and C4.3, respectively. AR, Exhibit 10. These services include most of the same services identified in the Market Survey under the Managerial and Cost and Financial Support Tasks. *Id.*

E. Clarifications in Response to Questions Regarding the Solicitations

26. In response to questions and requests for clarifications regarding the Solicitations, the FAA posted responses on July 25, 2008. In response to a question regarding the applicability of certain NAICS codes and standards, the FAA responded as follows: “The North American Industry Classification System (NAICS) are not identified in the full and open [competition] SIRs [Solicitations]... in that their applicability is limited to the specific effort subcontracted out by the prime to small businesses. When the prime contractor establishes its subcontracting plan, small businesses would be required to meet the size standards of the applicable NAICS for the work to be performed.” AR, Tab 11, page 1.
27. Another FAA response posted on July 25, 2008 to a question asking for a “list of incumbents, contract numbers, contract values, and contract expiration dates” states the following:

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FAA Response: The majority of the current ATO-T Support Services requirement is being accomplished under eight Multiple Area Support Services (MASS) Engineering Support Services Area (ESSA) contracts. These contract numbers, contractor names, contract ceilings, and expiration dates were previously provided in response to questions regarding the market survey and draft SIRs and are listed below ...:

Contractor	Contract Vehicle ID	Ceiling Value	Expiration
Apptis	DTFACT-0	\$14,358,061.30	09/30/09
BAE	DTFACT-0	\$44,855,120.21	12/31/08
BAE	DTFACT-0	\$74,447,250.90	12/31/08
BAE	DTFACT-0	\$17,781,927.69	09/30/08
BAE	DTFACT-0	\$22,145,091.01	09/30/08
Northrop Grumman	DTFACT-0	\$8,708,537.98	09/30/08
Northrop Grumman	DTFACT-0	\$127,240,965.24	03/15/09
SAIC	DTFACT-0	\$15,131,076.38	12/31/08

Id., page 2.

28. On August 11, 2008, the FAA issued another set of responses to questions and requests for clarifications regarding the Solicitation. In pertinent part, these state:

Question/Request: Are there any incumbent contractors performing the services contained in this SIR? Who is the incumbent contractor and how long have they held this contract? Does the procurement represent a consolidation of current contracts, and, if so, which contracts? Is DTFAWA-08-R-55503 a new requirement? If DTFAWA-08-R-55503 is not a new requirement, who is/are the incumbent(s)?

FAA Response: SIR DTFAWA-08-R-55503, this is not a new requirement. It is one of three SIRS representing the overall follow-on ATO-T support services requirement. The majority of the current ATO-T Support Services requirement is being accomplished under the eight current Multiple Area Support Services (MASS) Engineering Support Services Area (ESSA) contracts.

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Question/Request: Will DTFAWA08R55501 (Engineering and Technical) be a single or multi-award and will DTFAWA08R55502 (Program Management) be a single or multi-award?

FAA Response: Please refer to section M.2.3 of the SIR. The statement applies to, and is included in, both SIR no. DTFAWA-08-R-5501 and SIR no. DTFAWA-08-R-55502. M2.3 reads as follows:

The FAA intends to award multiple Cost-Plus-Fixed-Fee term (level of effort) contracts for the services identified in Section B depending on the technical and cost/price proposals received. The full performance/level of effort identified in Section B and prescribed in Section L for use in the Cost Proposal, represents one-third of the ATO-T total effort. Depending on the number of contracts awarded, the FAA may adjust the level of effort to reflect an equitable distribution amongst awardees.

Id., page 1-2 (emphasis in original).

29. By e-mail dated August 12, 2008, Corporate Counsel for Hi-Tec asked the Contracting Officer the following questions:

Why were none of the SIRs set aside for small business? Why was there no category established in each or any of the SIRs under which at least one of the multiple awards could be set aside for small business? Was it per chance an oversight? On its face, it seems to be a bit of an odd combination when one SIR is set aside for companies certified under the 8(A) program, two(2) are unrestricted and none are for small business. Yet even more significant is the fact that, given that there might be 6 or 9 or 10 or more awards resulting from [sic] the 3 SIRs, none of these possible awards have been set aside for small business.

AR, Tab 12.

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30. By letter dated August 22, 2008, the FAA Contracting Officer responded to the questions set forth in Hi-Tec's August 12, 2008 e-mail by pointing out that the Solicitation -55503 for the Administrative/IT requirement is 100% small business set aside and represents approximately 11 percent of the total ATO-T support Services requirement. He further explained that the decision to set aside this part of the requirement was determined to be in the FAA's best interest based on an analysis of responses received from the Market Survey, was coordinated and concurred with by the Office of Small Business Development, and did not need written justification. The August 22, 2008 letter further states that no set aside category was established for award under the other Solicitations because: "[w]hile several market survey responses from small businesses demonstrated interest and capabilities in some of the other areas of the remaining requirement, the FAA did not find likelihood of obtaining adequate competition from qualified small businesses." AR, Tab 14.

31. The FAA Contracting Officer provided a declaration ("*Declaration of the Contracting Officer*") dated October 6, 2008, in response to the Protests' allegations, explaining the basis for the FAA's Determination to set aside the requirement for Administrative/IT support services and to compete the remainder of the requirement. AR, Tab 1, *Declaration of the Contracting Officer*. Specifically, the Contracting Officer states that he agreed with the Market Survey team's analysis and conclusion that there could be adequate competition among SEDB 8(a) vendors to "support a competitive acquisition" for the Administrative/IT support services portion of the ATO-T requirement, and that the remainder of the requirement could be competed among all size businesses. AR, Tab 1, paragraph 14.

32. The Declaration of the Contracting Officer also indicates that the FAA contract bundling policy was discussed with SBDO and "it was determined that [the Agency's] procurement strategy did not constitute contract bundling" because "AMS Procurement Guidance T3.6.1A7(a)2 defines bundling in the context of

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- consolidating requirements ‘... into a SIR for a single contract...’ and our strategy was to issue multiple SIRs with each having multiple awards.” *Id.* at paragraph 21. Subsequently, the requirement was divided into three separate Solicitations, depending on the type of services required, and approval was received to establish the ATO-T requirement as a multiple award procurement program. *Id.* at paragraphs 23 – 25.
33. The Contracting Officer also states that on July 9, 2008, he met with SBDO officials for a final review of small-business-related issues prior to the release of the Solicitations. As a result of that review, he removed NAICS codes from the unrestricted Solicitation and “added joint venture and mentor-protégé provisions in SIR Section L15.1⁴ to provide further opportunities for small businesses to participate as prime contractors. He further states that the NAICS codes were removed for the unrestricted SIRs due to the fact that small business size eligibility standards were not required for the unrestricted Solicitations. AR, Tab 1, paragraph 29.
34. Another Contracting Officer participating in the protested procurement, also served as the Contracting Officer for the MASS/ESSA Contracts. AR, Tab 2, *Declaration of Contracting Officer Byrne*. He states that: “The purpose of the current Terminal Services (ATO-T) procurement is to acquire the services necessary for continued support to the Terminal Service Unit (ATO-T) that are primarily being provided by the expiring MASS/ESSA contracts.” *Id.*, paragraph

⁴ Solicitation Section L15.1, in pertinent part, states:

Joint venture entities may submit offers. Any proposal submitted as a Joint Venture must provide a copy of the Joint Venture Teaming Agreement that describes and governs the relationship between all Parties to the Joint Venture.

SBA approved Mentor-Protégé joint ventures are not acceptable. However, two firms approved by FAA to be a mentor and protégé in accordance with the FAA Mentor-Protégé Program may joint venture as a small business, provided that the protégé qualifies as small for the size standard of the applicable NAICS code and qualifies as a protégé as defined by the FAA mentor-Protégé Program. In such a Joint Venture, the Lead Company must be a small business.

AR, Tabs 9 and 10, pages 6 and 6, respectively.

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3. He explains that he was materially involved in the review and analysis of responses to the Market Survey: “Numerous responses to the ATO-T Market Survey were received by the FAA (Approximately 100 inquires including 79 responses provided in writing). The vast majority of the responses included capability statements (66), levels of interest and business declaration forms.” *Id.* at paragraph 4.
35. Contracting Officer Byrne explained that during this review, the Market Survey responses were analyzed to determine whether the respondent’s capabilities “appeared to be consistent with the requirements sought by the FAA.” *Id.* at paragraph 5. He states that the “respondents’ claims of small business classification were also noted and considered for small business set-aside recommendations.” *Id.* Based on this review, “it was determined that, on a whole, adequate competition existed to support a competitive [unrestricted] acquisition.” *Id.* He states further that “it was determined that of the 79 responses reviewed, [DELETED] demonstrated through their capability statements, the potential to provide most if not all of the requirements identified in the draft Statement of Work (SOW) included with the survey posting.” *Id.* at paragraph 6 and Attachments.
36. Contracting Officer Byrne also states in his Declaration that although there were inconsistencies between “what was being claimed by certain respondents and what the size standards dictated to qualify as small businesses,” the review team identified and considered all responses by all businesses claiming to be small. *Id.* at paragraph 9-11. The review team identified [DELETED] businesses that had “the potential to provide and perform to most if not all of the requirement” and which claimed small business status. Contracting Officer Byrne states: “Based on the information provided and judgment of the team, at least [DELETED] of the respondents who claimed small business status were considered questionable, as to their ability to perform most if not all of the requirement,” due to “missing and/or vague descriptions of certain capabilities and the ability to perform based

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on size standard requirements to qualify as a small business.” *Id.* at paragraph 11. On this basis, it was determined “that the FAA could not reasonably expect there to be adequate competition for most if not all of the requirement if it was set-aside for small business.” *Id.*

37. The deadline for proposals in response to the Solicitations to be submitted was by 1:00 p.m. Eastern Time on August 26, 2008. AR, Tabs 9 and 10, Section L.5.

F. Protest Proceedings

38. On August 25, 2008, Hi-Tec filed the subject Protests with the ODRA alleging that the procurements at issue are “required to be set aside for small business,” or alternatively, “given that multiple awards are contemplated by the Screening Information Request (“SIR”), a category of the multiple awards is required to be set aside for small business.” *Protests* at 1. The Protests state:

Hi-Tec submits the FAA does have a reasonable expectation of obtaining offers from two or more responsible small business concerns, and there is no rational basis for contracting with a single source. Accordingly, the FAA has no legitimate reason to not set aside this procurement in total or at least partially.

Protests at 2.

39. The Hi-Tec Protests further assert that the services described in the Solicitations “were previously provided by a multitude of procurements both in headquarters and in the field”, and the consolidation of these services into a single procurement constitutes improper bundling of requirements, which has the effect of limiting small business participation. *Id. citing* AMS Procurement Guidance T3.6.1.A.7. Finally, Hi-Tec argues that the statute establishing the FAA AMS, which requires small business concerns to be provided “all reasonable opportunities to be awarded contracts,” *Id.* at 2, *citing* Section 348(b)(4) of P.L. 104-50 (Nov. 15, 1995), read in combination with the AMS Procurement Guidance T3.6.1.A.3.a,

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which provides that “[a]ll procurements must first be considered for set aside before procuring ... on an unrestricted basis,” mandates that the Solicitations at issue be set aside for small business. *Id.* at 3-4.⁵

40. On October 9, 2008, the due date for filing the Agency Response to the Protests, the Program Office filed its Motion to Dismiss (“Motion”), which also constituted its Agency Response, responding to the Protests on the merits. The Motion included a binder of exhibits identified in an “Index to [the] Agency Report.” The Motion asserts that:

[The] Protester advances no arguments or facts and provides no precedents to support its contentions that portions of the ATO-T requirement contained in the two SIRs being protested should have been set aside for competition among small businesses, and the FAA respectfully contends that there are none. The protester merely states in its protest at p. 2 that: “Hi-Tec submits the FAA does have a reasonable expectation of obtaining offers from two or more responsible small concerns” Beyond this mere statement, Hi-Tec has failed to “... articulate any basis for challenging the solicitation requirements beyond its mere disagreement”

Motion to Dismiss at 5, citing Protest of Knowledge Connections, Inc., 06-TSA-024.

41. The Motion also argued that the Protests should be dismissed for failing to state a legal claim in that:

[T]he protester has not alleged any facts to demonstrate any violation of the AMS small business set-aside policy or guidance, nor is there any basis for this conclusion. Merely alleging the ATO-T requirement should be set aside for small businesses does not prove the market survey conducted and the analysis thereof (which supports the acquisition strategy and the three SIRs issued) were irrational.

Id. at 8.

⁵ Finding no compelling reasons to support suspension of acquisition activities, the ODRA denied Hi-Tech’s request for a suspension. *Protest of Hi-Tec Systems, Inc.*, 08-ODRA-00459 and -00460 (Decision on Request for Suspension, dated September 15, 2008).

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42. Hi-Tec filed a “First Supplemental Motion to Compell [sic] Discovery” with the ODRA on October 9, 2008 (“Motion to Compel”). In this filing, Hi-Tec justified its discovery requests as follows:

There are at least five (5) separate allegations which are required to be developed and analyzed which relate to the decision [not to set the procurement aside]. These allegations result from the Government’s failure to follow the specific language of the organic statute which established the ... [FAA AMS]. That language states in part that the Small Business Act (15 U.S.C. 631 et seq.) shall not apply to the AMS except that

“... **all** reasonable **opportunities** to be awarded **contracts shall** be provided to small business concerns...”
(Emphasis supplied.) P.L. 104-50, Section 348.

1. The Government failed to utilize an applicable NACIS [sic] code which if utilized would have provided to Protester a reasonable opportunity to be awarded a contract.
2. The Government failed to utilize a size standard that was developed by the Small Business Administration (“SBA”) which if utilized would have provided to Protester a reasonable opportunity to be awarded a contract.
3. The Government failed to utilize a size standard that FAA has developed which if utilized would have provided to Protester a reasonable opportunity to be awarded a contract.
4. The Government failed [sic] to follow its own policies and guidance which if followed would have provided to Protester a reasonable opportunity to be awarded a contract.
5. The Government’s acquisition policies [sic] and guidance as written, do not implement P.L. 104-50, section 348. If the acquisition policies and guidance had been properly drafted, published and implemented, Protester would have been provided with a reasonable opportunity to be awarded a contract.

Motion to Compel at 1-2.⁶

⁶ Hi-Tec’s Motion to Compel was denied in its entirety by the ODRA on October 29, 2008 in an interlocutory decision. *Protest of Hi-Tec Systems, Inc.*, 08-ODRA-00459 (Decision on Protester’s Motion to Compel).

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43. On October 21, 2008, Hi-Tec filed its Reply to the Motion to Dismiss (“Reply”). The Reply states that the Hi-Tec Protests are:

[B]ased upon the assertion that the Government has failed to follow applicable statutes, regulations, policies, procedures and guidance ... with regard to its decision not to set aside procurement(s) for small business concerns (“SBCs”) and/or not to establish with the procurement(s) which provided for multiple awards, a category in which competition would be set aside for SBCs.

Reply at 2-8.

44. The Reply goes on to elaborate on the five allegations identified in the Motion to Compel, and argues that “if the material facts are viewed in the light most favorable to Protester, it would be concluded that there has been improper conduct on the part of Government procurement officials and a violation of the AMS by the FAA.” *Id.*
45. In a letter dated October 22, 2008, the Program Office requested permission from the ODRA to respond to, what the Program Office identified as five “new protest grounds which were not in Hi-Tec’s protest as originally filed on August 25, 2008.” The Program Office letter further states: “These protest grounds are now being introduced for the first time in Hi-Tec’s October 21, 2008, response to the Agency’s Report filed on October 6, 2008.”
46. In response to the Program Office’s October 22, 2008 letter, Hi-Tec filed a letter with the ODRA disagreeing with the Program Office’s assertion that the five protest grounds were introduced for the first time in Hi-Tec’s October 21, 2008 letter. Hi-Tec explains that the Protests are “grounded upon the Government’s noncompliance with its own acquisition statute, policies and procedures with regard to its treatment of Protester as a small business concern” and notes that

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“[n]early two (2) pages of the Protest[s] are devoted to a recitation of some of those procedures.” The letter further asserts that: “The five (5) areas in question were specifically identified in Protester’s First Supplemental Motion to [C]ompel Discovery of October 9, 2008.”

47. In a letter dated October 27, 2008, the Program Office submitted “[S]upplemental Agency comments to the Protester’s Reply to the Motion to Dismiss,” arguing that five of Hi-Tec’s “new arguments must fail as a procedural matter because the arguments are untimely.” Letter of October 27, 2008 at 1. The five “new” arguments were those which Hi-Tec raised for the first time in the context of its Motion to Compel and then developed in its Reply. *Id.*
48. The Program Office also provided the Declaration of the Contracting Officer explaining that “NAICS Code 541611 Administrative Management and General Management Consulting Services was established as the qualifying NAIC code on the Administrative /IT support services set-aside SIR” [Solicitation DTFAWA-08-R-55503 which is not the subject of these Protests] because it represents the “predominant portion of the work to be performed.” *Id.*, Attachment A, *Declaration of the Contracting Officer, dated October 27, 2008, paragraph 4.* The October 27, 2008 Declaration further explains that, contrary to a recommendation made by Hi-Tec in its capability statement that NAICS code 541512 be added as a qualification to compete, the Program Office determined that the work represented by that particular code, *i.e.*, “planning and designing computer systems,” was not covered by the SOW for the protested solicitations. Moreover, the Declaration indicates that Hi-Tec did not indicate in its business declaration that NAICS code 541512 represented the nature of its business; nor is it reflected in the Central Contractor Registration or other online information sources. Letter of October 27, 2008 at 3; Attachment A, Paragraphs 5 and 6.
49. The Program Office asserts that Hi-Tec’s challenge to the NAICS code determination amounts to a mere disagreement, which is not a valid protest

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ground. *Id.* at 4. Additionally, to the extent that Hi-Tec argues that the FAA failed to use a process consistent with the Federal Acquisition Regulations (“FAR”), the Program Office argues that this allegation should be summarily dismissed, as the FAR is inapplicable to the FAA’s acquisition process, and thus does not provide a basis for protesting an AMS solicitation. *Id.*

50. On November 7, 2008, Hi-Tec filed a Supplementary Opposition to Reply to Opposition to Motion to Dismiss (“Supplementary Opposition”). In the Supplementary Opposition, Hi-Tec sets forth arguments that: (1) “The five (5) of violations [sic] set forth by Protester are not new;” (2) “[t]he allegations are not untimely;” (3) “[t]he Government never determined the ‘predominant portion of the overall requirement’ for the SIRs that are the subject of this Protest;” (4) “[r]eliance upon the Protest of PCS, 01-ODRA-000184 is misplaced;” (5) “[t]he difference between an objection and a recommendation is irrelevant;” (6) “[t]he Government Contracting Officer made an erroneous statement regarding the establishment of NAIC codes and size standards;” (7) “[t]he Protester is not untimely in its protest of FAA’s failure to issue policies and procedures which properly implement Section 348(b)(4) of P.L. 104-50 (Nov. 15, 1995);” (8) “[d]ispute over the selection of a NAIC code requires fact-finding and an improper selection may result in a statutory violation;” and (9) “[t]he FARs [sic] provide a base line which FAA must follow.” *Supplementary Opposition* at 1-5.
51. On December 1, 2008, the ODRA denied the Program Office’s Motion to dismiss the Protests as untimely, and as failing to state a claim upon which relief may be granted. The ODRA dismissed Hi-Tec’s protest ground alleging that the AMS does not properly implement the FAA’s governing acquisition statute. In doing so, the ODRA held that it lacks jurisdiction to review whether, in issuing the AMS, the Administrator complied with an alleged statutory mandate regarding contracting opportunities for small business. *Protest of Hi-Tec Systems, Inc.*, ODRA Docket No. 08-ODRA-00459 and -00460 (Decision on Motion to Dismiss, December 1, 2008).

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52. On December 17, 2008, Hi-Tec filed Comments on the Agency Response. Specifically, the Comments argue that the FAA failed to: (1) follow applicable statutes, policies and guidance; (2) use the correct NAIC code; (3) use the appropriate size standard; (4) follow FAA Bundling policies; and (5) perform a reasonable Market Survey. Comments at 1.

III. Discussion

A. Standard of Review

It is well established that, in the context of a bid protest, the ODRA will not overturn or recommend that the Administrator overturn procurement actions that comport with the AMS, have a rational basis, are neither arbitrary, capricious, nor an abuse of discretion, and are supported by substantial evidence. *Protests of Air Transport Association, et al.*, 08-ODRA-00452, -00453, -00454, -00455, -00456, -00457, -00461, and -00462. In reviewing challenged procurement actions, it also is well established that the ODRA will not substitute its judgment for properly supported judgments of contracting officials exercised consistent with the requirements of the AMS. *Id.*, citing *Protest of Northrop Grumman Systems Corporation*, 06-ODRA-0038. Moreover, a protester's mere disagreement with an Agency action or decision does not, by itself, provide a sufficient basis for sustaining a bid protest. *Protests of Air Transport Association, supra.*, citing *Protest of En Route Computer Solutions*, 02-ODRA-0220. Finally, in order to prevail, a protester bears the burden of demonstrating that the challenged action was prejudicial to it. *Protest of Emerging Engineering Excellence Joint Venture*, 08-ODRA-00467.⁷

B. Applicable Statutory and AMS Requirements Regarding Small Business

⁷ In light of the ODRA's conclusion herein, it is not necessary to reach the issue of prejudice. The ODRA notes in that regard, however, that nothing precludes the Protester from competing under the challenged Solicitations as a potential prime contractor, subcontractor, or teaming partner. AR, Tab 1, paragraph 41.

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The statute authorizing the FAA's Acquisition Management System ("AMS") specifically provides that the Agency "would not be subject to the Small Business Act (15 U.S.C. 631 *et seq.*) except that all reasonable opportunities to be awarded contracts shall be provided to small business concerns and small business concerns owned and controlled by socially and economically disadvantaged." Sec. 348 (b)(4) of P.L. 104-50 (Nov. 15, 1995) 109 STAT. 460.

In general, AMS policy, which implements the FAA Administrator's statutory acquisition authority, provides FAA contracting officials with significant discretion over the procurement planning process and the flexibility to use any method of procurement they deem appropriate, as long as it provides "reasonable access to competition" from a best value perspective, considers mission needs, complexity, dollar value, and availability of services in the marketplace. AMS § 3.2.2.2; *see also Protest of Caribe Electronics, LTD, Inc.*, 07-ODRA-00412.

Specifically, with respect to the FAA providing contracting opportunities to small business, the AMS policy is to "implement and aggressively strive to provide small businesses ... attainable and reasonable opportunities to participate as prime contractors and subcontractors for the products and services procured by the FAA." AMS § 3.6.1.2. The AMS further provides that "[w]hen appropriate, individual procurements may be set aside for competitive award among small businesses" and subcontracting opportunities encouraged. AMS §§ 3.6.1.3.2. and 3.6.1.3.7. Toward this end, the AMS assigns the FAA's Small Business Development Office ("SBDO") with responsibility for ensuring FAA-wide implementation and accomplishment of the small business program objectives. AMS § 3.6.1.2.

The AMS Procurement Guidance ("PG") provides further clarification with respect to implementing AMS policy. As for policies pertaining to small business, the Procurement Guidance states: "While the use of small business set-asides as a method of procurement is not mandatory, small businesses must be afforded reasonable opportunities to compete for all procurements" and "[a]ll procurements must first be considered for set-aside

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before procuring the product or service on an unrestricted basis.” PG T3.6.1.A.3.a. Even so, a procurement may not be set aside if “there is no reasonable expectation of obtaining offers from two or more responsible SEDB(8)(a) concerns, small business concerns, very small business concerns or service-disabled veteran owned small business concerns, that are competitive in terms of market prices, quality and delivery.” PG T3.6.1.A.3.b.8.a.

C. The Agency’s Actions were Consistent with the Statutory Mandate and AMS Policy

The record shows that the Program Office’s actions in planning the procurement, and its ultimate determination not to set aside the Solicitations exclusively for small business, were consistent with the statutory mandate and AMS policy to provide reasonable opportunities to small businesses to participate as prime contractors and subcontractors for the products and services procured by the FAA.

The record further shows that the Program Office’s actions in conducting the Market Survey were consistent with the AMS and that its conclusions regarding the lack of adequate small business competition for the Solicitations had a rational basis and were properly supported.

In accordance with FAA Procurement Guidance, the Program Office first considered the feasibility of a set aside for small business by conducting market research in the form of a Market Survey. PG T3.2.1.2.A.1. The goal of the Market Survey was to determine the capabilities of vendors that were interested in providing the broad support services required by ATO-T in the areas of Safety Operations Support, Finance, Program Operations, Tactical Operations and Mission Support, and Administration and Planning. *FF 1.*

The Market Survey advised interested vendors that the procurement strategy had not yet been determined, *FF 2*, and sought feedback regarding a draft SOW, which was comprehensive in scope. *FF 6 – 11.* The Market Survey explained that the requirements were concentrated in the areas of technical, managerial and financial services, and

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provided an estimated fiscal year budgetary amount of 50 to 55 Million Dollars. *FF 5*. The Market Survey also sought small business size status information and included NAICS codes for the purpose of encouraging small business participation in responding to the Market Survey, as well as to facilitate subcontracting and teaming arrangements. *FF 3, 4, 5 and 12*. An amendment to the Market Survey further informed interested vendors that the responses would be used to determine the contract architecture best suited for the acquisition and identified “incumbent” contractors, *FF 13*, that were responsible for providing the majority of support services under the MASS/ESSA Contracts. *FF 27*.⁸

The record shows that the Program Office received over one-hundred inquiries in response to the Market Survey and seventy-nine written responses from prospective vendors. *FF 16 and 34*. The record further shows that the Program Office used the information it received to analyze the extent and nature of potential competitors, in terms of number, business size status,⁹ and capability to satisfy the entire requirement under a single procurement vehicle. *FF 17 and 36*.

The Program Office’s determination with respect to the feasibility of an SEDB set aside for satisfying the requirement was supported by the record and rationally based. *FF 19*. The written responses to the Market Survey, including both large and small businesses, showed at least three respondents that the Program Office believed were capable of meeting the entire requirement under a single procurement vehicle. *FF 18 and 37*. As for the responses from small businesses, the Program Office identified only one respondent, claiming small business status, who the Program Office believed could perform the entire requirement. *FF 18 and 37*.¹⁰ Given the results of the Market Survey

⁸ The MASS/ESSA Solicitation provided as an Agency goal the award 25% of all prime contract work to small business awardees. *FF 14*.

⁹ Small business status under the AMS is strictly determined based on meeting NAIC code standards. PG T3 6.1.A.6.a.

¹⁰ The record reflects that the “market survey review/analysis documentation evolved in a number of ways based on data being identified, uncovered and considered” and “although not reflective of a formal down select process/plan, as that was not the intent/purpose of the market survey data gathered, the review teams’ notes and spreadsheets were considered and discussed between the team members, the Lead Contracting Officer, Contracts Manager, ATO-T Management and the Small Business Office.” AR, Tab 2, *Declaration of Contracting Officer Byrne*, paragraph 10. The evaluators’ notes were not final in nature and were part of the deliberative process. There is no support for the Protester’s suggestion that the evaluators’ notes were

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and the need by ATO-T “for flexibility in obtaining the required services in a timely manner,” the Program Office reasonably decided to divide the requirement into three solicitations, each with four separate CLINs, to allow more contractors to receive awards, and to allow for the set aside of one of the solicitations exclusively for SEDB concerns. *FF 19; see also AR, Tabs 9 and 10, Section B.*

The Program Office’s decision to set aside the Administrative/IT Services solicitation for SEDB concerns was based on Market Survey information that clearly demonstrated that such services would generate adequate competition among SEDBs to support a set aside, *i.e.*, more than two responsible small business concerns were identified that were expressly certified by the SBA for participation in the SBA’s 8(a) program. *FF 20; PG T3.6.1.A.3.b.3.* The record further shows that in accordance with AMS §3.6.1.2, the Program Office presented the information obtained from the Market Survey, its analysis thereof, and proposed procurement strategy to the SBDO for approval and to ensure compliance with small business policy objectives. *FF 18, 22 and 36; PG T3.6.1.A.2.* The SBDO endorsed the Program Office’s approach of setting aside the Administrative/IT Services solicitation for competing SEDB concerns and competing the remainder of the requirement under the unrestricted Solicitations. *FF 22.*

In light of the above, the ODRA finds that the Program Office, based on the written responses obtained through the Market Survey, had a rational basis in deciding to set aside the Administrative/IT Services portion of the requirement for small business, and to compete the remainder of the requirement under four CLINs on an unrestricted basis.

Although Hi-Tec asserts that the Program Office failed to use the appropriate NAICS code and size standard for the Market Survey, the record shows that the Program Office initially identified the primary NAICS code for the effort as 541330 Engineering Services, which incidentally was the same NAICS code identified in the predecessor MASS/ESSA Solicitation, *FF 14*, and then added seven NAICS codes by amendment.

not considered, or that the evaluators did not ultimately agree with the final determination. Comments at 13, F.N. 1.

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FF 12. The certifications of small business size submitted by respondents were based on these NAICS codes and used by the Program Office in the context of the Market Survey to analyze the potential for set aside. *FF 18.* The record shows that the Program Office considered all of the NAICS codes in its analysis of the capabilities of small business to satisfy the entire requirement in one procurement vehicle. AR, Tab 2, *Attachments*. Furthermore, the use of eight NAICS codes in the Market Survey allowed for greater participation of interested vendors and enhanced the quality of the information on which the procurement strategy ultimately was based. Moreover, even though the Program Office was not required to identify these NAICS codes in the final unrestricted Solicitations, the codes would be used by the prime contractors for purposes of identifying eligible small businesses subcontracting partners. *FF 26; Declaration of Contracting Officer, dated October 27, 2008.*

Hi-Tec has not demonstrated that the Market Survey was faulty; nor has it shown that the Program Office's determination to set aside the Administrative/IT Services requirement and to compete the remainder of the requirement on an unrestricted basis lacks a rational basis. As previously indicated, under the AMS, the Agency has broad discretion to determine its needs and how to meet them. *Protest of Caribe Electronics, LTD, Inc., supra.* More specifically, the determination as to whether a particular acquisition should be partially set aside is left to the soundly exercised discretion of the contracting officer. *Vox Optima, LLC, B-400451, 2008 CPD 212, 2008 WL 4877012 (Comp.Gen.).* Moreover, there is no obligation for a contracting officer to inquire further into a small businesses' representation of its qualifications and eligibility, provided that there is "a rational connection between the facts of the situation and the procurement official's action or decision." *Protest of Caribe Electronics, LTD, Inc., supra.* It is well established that the ODRA will not substitute its judgment for that of the procurement officials if the challenged decision complies with the AMS, has a rational basis, and is not arbitrary, capricious, or an abuse of discretion. *Id., citing Protest of L. Washington & Associates, Inc., 02-ODRA-00232.*

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Notwithstanding Hi-Tec's complaints, the ODRA concludes that the actions of the Program Office actually served to enhance the opportunities for small business to participate in this procurement. Here, the Program office took additional steps to promote small business participation by setting aside the Administrative/IT solicitation for SEDBs and including "more stringent" small business subcontracting requirements and joint venture and mentor-protégé provisions in the remaining Solicitations. *FF* 21, 33 and 34. Such actions fully complied with AMS policy to encourage reasonable contracting and subcontracting opportunities for small businesses. Hi-Tec has teamed with a larger company to bid on the Solicitations and thus has the opportunity to participate in the competition for those requirements as a subcontractor. AR, Tab 1, paragraph 41.

Under the circumstances of this case, the ODRA finds that no statutory or AMS policy required the Program Office to set aside the two Solicitations for small business. The Market Survey showed there was only one small business that the Program office believed could perform the entire requirement under a single procurement. *FF* 18. A minimum of two companies are required for a set aside competition. PG T3.6.1.A.3.b.8.a.

Finally, with respect to Hi-Tec's allegation that the Program Office violated AMS bundling policy, the record shows that the chosen procurement strategy was to satisfy ATO-T's support requirements by issuing multiple solicitations with each having multiple awards, and by breaking out a portion of the requirement for a small business set aside. *FF* 19. The Procurement Guidance defines bundling as:

[C]onsolidation of two or more requirements for supplies or services, previously provided or performed under separate smaller contracts, into a SIR for a single contract that renders a contract likely to be unsuitable for award to a small business concern

PG T.3.6.1.A.7(a)(2).

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While the current ATO-T procurement seeks to acquire services for continued support of ATO-T that are primarily being provided by the expiring MASS/ESS Contracts, *FF* 34, the procurement strategy for the current ATO-T procurement does not constitute bundling. Here, the Program Office determined that the most appropriate method to provide reasonable access to competition, considering mission needs, complexity, dollar value, and availability of services in the marketplace, required the use of three contracts, one of which was set aside for small business. Additionally, small business participation in this procurement is promoted by the fact that the two unrestricted Solicitations provide for “more stringent” small business subcontracting requirements combined with multiple awards. Moreover, the Solicitations’ subcontracting requirements, which require large businesses to subcontract at least twenty-five percent of the contract dollar value to small businesses, small disadvantaged businesses, small women-owned businesses and disabled veteran owned businesses, *FF* 21, F.N. 3, combined with the set aside of Administrative/IT support services to small business, *FF* 22, provides reasonable opportunities for small businesses to participate as prime contractors, subcontractors and teaming partners. *FF* 14.

IV. Conclusion and Recommendation

The ODRA finds that the Program Office complied with the applicable statute and AMS policy to provide obtainable and reasonable opportunities for small businesses owned and controlled by socially and economically disadvantaged individuals to participate in contracts awarded by the FAA and as subcontractors. AMS § 3.6.1.3.1. The Program Office’s actions in this regard had a rational basis, are neither arbitrary, capricious, nor an abuse of discretion, and are supported by substantial evidence. The ODRA recommends that the Protests of Hi-Tec Systems, Inc. be denied.

-S-

Marie A. Collins
Dispute Resolution Officer
FAA Office of Dispute Resolution for Acquisition

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APPROVED:

-S-

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