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

FINDINGS AND RECOMMENDATIONS

Matter: Protest of Ribeiro Construction Company, Inc.
Pursuant to Solicitation No. HST04-8-R-CT8021

Docket No.: 08-TSA-031

Appearances:

For the Protester: Ribeiro Construction Company, Inc.
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For the Agency: Transportation Security Administration
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I. INTRODUCTION

Ribeiro Construction Company, Inc. (“Ribeiro”) filed the above bid protest (“Protest”) on April 14, 2008 against the award of a contract by the Transportation Security Administration (“TSA”) Office of Acquisition pursuant to Solicitation No. HSTS04-08-R-CT8021 (“Solicitation”) to the Vic Thompson Company (“Vic Thompson,” “VTC” or “Awardee”). The Solicitation is for the design and construction of a baggage screening and test facility at the Washington Reagan National Airport.

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The Protest chiefly is grounded on the assertion that the Awardee, VTC, enjoys an especially close business relationship with the TSA as a result of other contract work performed for the TSA. Within that context, the Protest specifically asserts that: (1) the TSA waived for VTC a material requirement of the Solicitation pertaining to the bid bond; (2) VTC has a substantial organizational conflict of interest (“OCI”) which should have barred it from the award and which is beyond mitigation; (3) TSA failed to conduct discussions and negotiations fairly with Ribeiro and improperly allowed VTC to revise its proposal; (4) while VTC may have past performance experience specific to baggage handling systems, it lacks experience for the other, more substantial requirements necessary to perform the design and build out of an entire facility – all of which TSA allegedly failed to consider or evaluate in light of the Solicitation’s requirements and evaluation criteria; and (5) TSA treated VTC and Ribeiro unequally with respect to each of the issues identified above. Protest at 2-3. As a remedy, Ribeiro requests that its Protest be sustained, the contract awarded to VTC be terminated for convenience, TSA be ordered to direct the award to Ribeiro, and Ribeiro be granted its fees and costs in the matter.

Ribeiro filed a Supplemental Protest on April 24, 2008 (“Supplemental Protest”), alleging that the TSA relaxed solicitation requirements for VTC and treated offerors unequally. After receipt of the Agency Response, Ribeiro raised supplemental grounds of protest with respect to the OCI in its Comments, filed on May 19, 2008 (“Comments”), and further challenged: the TSA’s best value analysis; the evaluation of VTC’s proposal; and the issuance of a third Solicitation Amendment solely to VTC. For the reasons explained below, the ODRA recommends that both the Protest and Supplemental Protests be denied.

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II. FINDINGS OF FACT

Background

1. The TSA is charged with the mission of protecting the nation's transportation systems, to ensure freedom of movement for people and commerce. The mission of the TSA Office of Security Technology ("OST") is to implement the best security technology solutions to achieve this mission, including the TSIF. TSA Agency Response entitled "Statement of Position," dated May 12, 2008 (hereinafter "Agency Response"), Tab 1, Bate Stamp Page 00006 (hereinafter "AR 6")¹.
2. When created in 2001, the TSA faced a Congressional mandate to immediately screen all commercial airline checked baggage with certified technology by the end of 2002. TSA met this mandate but also recognized the existence of a significant gap in its screening technology lifecycle, *i.e.*, the absence of an ability to test and evaluate the integration of technologies and full systems in an operational environment without disrupting airport operations. Agency Response at 1, *citing* TSA's Statement of Opposition, filed April 21, 2008 at 1.
3. The lack of this ability to test screening technologies led to the goal of establishing a TSA Systems Integration Facility ("TSIF") program which would duplicate a "real world environment." This objective became a priority for the TSA. Declaration of [DELETED], Attachment A to Agency Response ("Attach. A"), ¶ 5; Declaration of [DELETED], Attachment B to Agency Response ("Attach. B"), ¶¶3-4, 6.

¹ For ease of reference, the ODRA adopts the TSA's pagination system for the exhibits attached to the Agency Response, and refers to the pages contained therein as AR 1 to AR 1486.

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4. A TSIF also was the subject of widespread continuing public discussion, *Id.*, ¶ 12, as well as the subject of internal Department of Homeland Security (“DHS”) debate concerning the control and location of such a facility. Attach. B, ¶ 9.
5. Prior to and during this procurement, [DELETED] was the Assistant Administrator for Operational Process and Technology (“OPT”) at the TSA and served as the Chief Technology Officer overseeing the implementation and development of security technologies across several modes of transportation, including aviation. Attach. B, ¶ 2. Upon arriving at TSA in 2006, [DELETED] began working at a high executive level within TSA to promote the idea of combining Advanced Technology and Computed Tomography (“AT + CT”) baggage screening technologies into a Baggage Handling System (“BHS”), as a cost-effective way of increasing baggage screening throughput without sacrificing security. In order to test this concept, an integrated test facility that could test the integration of security technology into a BHS in an operational setting was required. Attach. B, ¶ 5.
6. The TSA sought authorization from senior TSA officials, as well as the DHS, the Office of Management and Budget (“OMB”) and the Congress, to establish a TSIF in order to test the integration of security technology into a BHS operational setting. *Id.* ¶ 5 and 6.
7. Toward this end, the TSA reports that [DELETED] instructed Contracting Officer [DELETED] to identify a contractor familiar with BHS design and integration who could develop a slide presentation on AT + CT in an integration facility. [DELETED] planned to use the presentation for, among other reasons, briefing senior TSA and other officials to obtain approval and funding for this effort. Attach. B, ¶ 6.²

² [DELETED] served as a TSA Contracting Officer until October 29, 2007, when he left for private industry. Declaration of [DELETED], Attachment C, ¶ 2.

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8. The record shows that [DELETED] issued three competitive Task Orders to VTC via the General Services Administration (“GSA”) Professional Engineering Services (“PES”) Schedule:

- HSTS04-06-F-CTO048 was competitively awarded August 21, 2006 for systems integration work to support the TSA’s Office of Security Technology’s operational use and evaluation activities of new and emerging technology.
- HSTS04-07-f-DEP131 was competitively awarded March 21, 2007 for consultation services to support standardization of Electronic Baggage System Program (“EBSP”) system design and integration criteria.
- HSTS04-07-F-CTO062 was competitively awarded May 24, 2007, for systems integration work to support TSA’s Office of Security Technology’s operational use and evaluation of [DELETED]equipment at [DELETED].

Declaration of [DELETED], Attachment C to Agency Response (“Attach. C”), ¶¶ 2 – 5; Declaration of [DELETED], to Agency Response D (“Attach. D”), ¶ 3; AR 893-934; AR 935-954; AR 955-979.

Task Order No. HSTS04-06-F-CTO048

9. Under Task Order No. HSTS04-06-F-CTO48 VTC provided engineering, operational and analytic support and technical expertise to OST for work principally relating to operational test and evaluation of new technologies. Declaration of [DELETED], Attachment F to Agency Response (“Attach. F”), ¶ 3; AR 893-934. According to [DELETED], who was the manager of the Surface Protection Technology Program:

Work under this contract began quickly after award, initially focusing on [DELETED] systems. The first major assignment for VTC was to perform engineering analyses, site surveys, systems integration into the existing baggage system, and site management [DELETED]. This project experienced several difficulties, causing it to last much longer than planned and producing occasional significant operational disruptions. Although this and

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other systems were then undergoing a certain amount of qualification testing at the Transportation Security Laboratory (TSL)—a function that migrated to TSA when control of the TSL was transferred to DHS Science and Technology—no capability existed to emulate field installations before integrating these complex technologies into live security situations. One of the major lessons learned from the [DELETED] field test was that evaluation of prospective systems in a simulated integration facility prior to actual operational airport installation is critical to avoiding major airport disruptions, and associated potential for security vulnerabilities. VTC observed firsthand the challenge TSA faced at [DELETED] and what would be required to overcome this challenge.

Attach. F, ¶ 4; AR 893-934.

10. Other efforts by VTC under this task order are described as supporting the [DELETED] Program:

Support for the [DELETED] technology also began soon after award, and is continuing presently. VTC is tasked to fully support the testing and evaluation of all aspects of the transition of the [DELETED] technical approaches into field testing; and subsequently into production representative configurations if they meet requirements. Field testing is currently taking place at [DELETED], with additional sites under consideration. These installations, originally considered to be reasonably straightforward, became highly complex as [DELETED]. By virtue of providing this support, VTC has become very knowledgeable of the requirements for installation of such systems and the very complex requirements that each site must have to meet TSA's mandates.

Attach. F, ¶ 5; AR 921-928.

11. Another TSA program, supported by VTC under Task Order No. HSTS04-06-F-CTO48, was aimed at creating the next generation in passenger screening called "The PAX 2.0", also known as "Checkpoint Evolution." Much of the effort of VTC in this regard involved meetings, discussions and briefings between VTC and [DELETED], a San Francisco company involved in the development of the PAX 2.0 program. Declaration of [DELETED], Attachment E to Agency Response ("Attach. E"), ¶ 8.

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12. [DELETED] explains in his declaration that “[o]ne of the primary technologies considered in the design of PAX 2.0 was the Whole Body Imager and the “AT” accompanying article screening systems. He describes the scope of the task order as specifically including:

[E]ngineering and engineering evaluation support for systems and technologies being considered for PAX 2.0. This support primarily involves provision of field test reports and engineering analyses from [DELETED] test installations concerning how the [DELETED] systems are integrated into [DELETED], given TSA’s complex and strict installation guidelines. The PAX 2.0 design contractor, which has no relationship to VTC, is primarily an esthetics and process firm; and therefore requires engineering input from TSA’s current installations and field testing.

Attach. F, ¶ 7.

13. [DELETED] further explains the scope of VTC’s efforts as follows:

In December, 2007 the PAX 2.0 design team was tasked to create a prototype installation and conduct a series of executive, senior leadership, and congressional briefings and demonstrations of their design and some of the proposed technologies. OST Engineering decided that this prototype installation should be placed within the building that was leased for eventual use as the TSIF. One significant concern was the ability of the building in its then current form to accept the [DELETED] technology and [DELETED] systems considered to be critical to the PAX 2.0 design. Due to VTC’s accumulated expertise from their support of these systems’ field testing – particularly the complex requirements for a [DELETED] installation – I tasked VTC to do a short and simple site survey of the building, without providing any other or advance information about it, to only assess its ability to support technologies proposed for PAX 2.0. Specifically, no details of the prospective installation at [DELETED] were provided, as noted in the draft report. VTC did the survey and provided a draft report listing the observable, easily discoverable by sight existing physical characteristics of the building as they related to support of the proposed equipment.

Attach. F, ¶ 8; AR 1032-1040.

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14. Meanwhile, the VTC's PAX 2.0 equipment feasibility survey was assumed by [DELETED], along with all activity relative to providing full engineering support services for PAX 2.0 under a competitively awarded contract. Attach. F, ¶ 8.

Task Order No. HSTS04-07-F-DEP131

15. Task Order No. HSTS04-07-F-DEP131 "provided technical support to OPT/OST for the assessment of existing screening systems as well as new and/or future screening systems and screening technologies. VTC, as part of its responsibilities under the contract, analyzed data and developed recommendations, which were presented to OPT/OST Senior Leadership for review and consideration." Attach. E, ¶ 4. VTC's work under this Task Order covered several areas, including: TSA's Planning Guidelines and Design Standards, Integrated Test Facility Task Plan, and a BHS concept study involving computed tomography. *Id.*; AR 935-954.
16. VTC's responsibilities also included analyzing data and developing recommendations to be presented to OPT/OST Senior Leadership for review and consideration. Attach. E, ¶ 4.
17. As a deliverable under Task Order No. HSTS04-07-F-DEP131 on April 10, 2007, VTC made a slide presentation to the TSA entitled "Advanced Technology + Computed Tomography and Integrated Test Facility" which described a concept for integrating different baggage handling systems. AR at 980-1010; Attach. B, ¶ 7. The slides identify a need for an integration facility but do not provide detail about such a facility. *Id.* The purpose of this paper was to evaluate how combining the [DELETED] equipment with the [DELETED] equipment can increase checked baggage screening efficiency as well as lower equipment costs by [DELETED]. Attach. E, ¶ 7.

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18. [DELETED] used illustrations from these slides to present the concept to senior TSA and other Government officials and to explain why the facility should be located in the Washington DC area. *Id.*; Attach. B, ¶ 9.
19. Also, pursuant to this Task Order, VTC submitted a concept paper consisting of 10 pages for an ITF, dated May 9, 2007 to the CTO and OST entitled “2.3.1 Integration Test Facility Task Plan.” AR 1011 – 1023. The purpose of the paper was to illustrate how such a facility could be used as an all inclusive test site for screening equipment and processes. Declaration of [DELETED], Attachment E to Agency Response (“Attach. E”), ¶ 6. The concept paper states that VTC “is providing system design and integration consultation ... in support of TSA’s mission and standardization goals and has been tasked with ‘... integration evaluation testing in an environment which does not impact existing transportation operations or commerce.’” AR 1014. It states further that “[t]his Plan provides the means by which standardization and testing is most appropriately accomplished.” *Id.*
20. The VTC Task Plan describes the ITF technical and operational requirements and sets forth the results of market research it conducted with respect to potential sites and facilities. The Task Plan also addresses ITF implementation costs and sets forth a proposed schedule of activities that include securing the ITF facility, building out offices and test rooms, procuring and installing BHS and other equipment, and technology integration testing and evaluation. The Task Plan indicates that an implementation approach would be “drafted and submitted for TSA review and approval following execution of the contract funding modification.” AR 1023.
21. Compared to the Solicitation, VTC’s Task Plan is schematic and general in nature. It does not address in a comprehensive manner the specific functions that the TSIF facility must provide. For example, VTC’s Task Plan identifies types of activities to be accommodated by the TSIF facility, and potential sites for the facility. It also proposes a schedule outlining the implementation of the activities

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- and sets forth estimated costs. In comparison, the TSIF Solicitation provides, in Section C, the Statement of Work, as well as in numerous pages of attachments, comprehensive and detailed information as to the functional requirements for telecommunications and IT infrastructure, space requirements, test areas and screening technologies. More specifically, the attachments provide information as to TSIF space allocations, as-is floor plans, equipment lists, security checkpoint layout designs, equipment maintenance, room descriptions, construction specifications, and electrical distribution standards. AR 1171-1405.
22. This concept paper was not the only such plan that had been received by TSA with recommendations and requests for funding in connection with potential facilities and conceptual layouts “for testing of passenger and baggage screening systems.” Attach. A, ¶ 10; AR 1446-1486. The record shows that prior to and during the same timeframe as VTC’s activities in connection with the concept paper, a TSA Systems Engineering Group within the Office of Security Technology (“OST”) and its support contractor, Dynamic Security Concepts, Inc. (“DSCI”) developed a “TSA Systems Engineering Facility Proposal” dated April 5, 2007 for the purpose of seeking approval to obtain “suitable office and engineering facility space for immediate occupancy in the South Jersey area.” *Id.* at ¶ 10; AR 1447 – 1449.
23. Under Task Order No. HSTS04-07-F-DEP131, and in connection with its concept paper for an ITF, VTC was involved in an initial market survey to find a suitable location for the site. Attach. A, ¶ 15; Attach. E, ¶ 6. VTC provided to OST a list of potential sites, dated April, 23, 2007 with various descriptions of properties that were summarized in a document entitled “ITF Market Survey Scoring Summary” which identifies ten properties, the available square feet (“sf”), and scored based on a “preliminary space requirement of [DELETED] sf.” The property located at the [DELETED] achieved the highest score. AR 1163 – 1170. OST provided this list to the Office of Real Estate with a recommendation to select the facility at [DELETED]. Attach. A, ¶ 15. All further dealings by the

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TSA in connection with the facility were conducted through the broker leasing the facility. *Id.*

24. Shortly after the VTC provided the above site recommendation to the TSA, a separate effort to locate and lease a warehouse property was conducted in May 2007 by the Office of Real Estate Services, which resides within the TSA's Office of Finance and Administration, for the purpose of leasing a site for the TSIF. The Director of Real Estate Services, [DELETED], explains, "[w]orking with OST, the basic facility requirements were identified as follows: a minimum of [DELETED]usable square feet, climate control conditions (site will have offices and run large conveyor-type equipment); electrical capacity of [DELETED] AMPS for operating the planned security screening technologies; and a required availability timeframe of early Fall 2007 (i.e., within 3-4 months). OST had provided a list of possible candidate buildings and recommended leasing property located at the [DELETED]." Based on the OST request, [DELETED] began to research the identified candidate properties based on OST's requirements. Declaration of [DELETED], Attachment G to Agency Response ("Attach. G"), ¶¶ 2-3.

Task Order No. HSTS04-07-F-CTO062

25. This Task Order was awarded to VTC to provide systems integration work to support OST's operational use and evaluation of [DELETED] equipment at [DELETED] and was unrelated to any TSIF support work. AR 955-979; see also, Attach. D, ¶ 3; Attach. C, ¶¶ 2.c, 5.
26. The Task Order was modified on September 20, 2007 to add a third line item entitled "System Integrator Support for multiple operational integration division efforts." AR 976. On December 20, 2007, the Task Order was modified to change the Contracting Officer from [DELETED] to [DELETED] who works for the TSA Office of Acquisition, in direct support of OST, and who is Contracting Officer on the instant Solicitation. Attach. D, ¶ 3; AR 977.

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Baggage Screening-related Studies and Standards Development

27. In support of its objectives, TSA engaged representatives from the airline, airport and engineering/construction industries to produce a Baggage Screening Investment Study (“BSIS”). Members of the BSIS Technical Team included representatives from airport authorities, airlines, Federal government agencies and contractors, including baggage handling system designers and security equipment manufacturers. Attach. A, ¶ 7; Attach. E, ¶ 5; Attach. B, ¶ 12; AR 1051.
28. According to [DELETED], who leads the program for planning and deployment of transportation security equipment associated with screening of checked baggage for [DELETED], the BSIS was a broad-based document, including both funding and planning studies. Attach. E, ¶ 5.
29. [DELETED] explains in his Declaration that:

OPT/OST decided to make another TSA document entitled the Planning Guidelines and Design Standards (PGDS) focusing solely on design of checked baggage screening systems and associated certification testing. The PGDS development was a further refinement of the BSIS. The idea of the PGDS was to standardize baggage handling system design and provide planning guidance to the industry for checked baggage screening. VCT took the lead on developing the PGDS and engaged other support contractors that were currently under contract to the TSA. This working group included OST employees, [DELETED]. All of which contributed in their respective areas of expertise. The initial version of the PDGS is dated October 10, 2007, and has been made available to the industry. It is important to note that the PDGS is a living document and will be updated periodically based on input and recommendations from industry.

Id.

30. The October 10, 2007 PGDS version 1.0 states “[t]his document is distributed under the sponsorship of the Transportation Security Administration ... in the interest of information exchange.” Specifically identified as having participated

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- in a series of technical review workshops and contributing “valuable insights” to the PGDS were VTC, Jacobs Consultancy, Battelle, Cage, and Carter Burgess. Attach. A, ¶ 7; Attach. E, ¶ 5; Attach. B, ¶ 12; AR 1051. It further states “[t]here are recommendations and guidelines contained in this document that might be considered highly beneficial in one airport environment while being virtually impossible to implement at another airport. AR 1043. The purpose of the document is to provide as extensive a list of options, ideas, and suggestions as possible for the airport architect, designer, planner and engineer to choose from when first considering security requirements in the early planning and design of new or renovated airport facilities” and to convey TSA requirements for checked baggage inspection systems.” AR 1052.
31. The scope of the PGDS covers four screening process levels. The PGDS assumes three project phases, namely, pre-design, schematic design, and detailed design. AR 1061. The PGDS contemplates deliverables for the detailed design phase based on the following percentages of completion: 30%, 70% and 100%. AR 1063. The PGDS also sets forth detailed standards of design for screening systems, configurations and equipment. It further provides detailed descriptions of baggage screening demands, equipment requirements, and contingency planning and developing and evaluating alternative systems. AR 1044-1046. The TSA continues to seek comments from industry for future updates and changes to the PGDS document. Attach. A, ¶ 7; Attach. E, ¶ 5.

Development of the Solicitation and Acquisition Process for the TSIF

32. The TSIF acquisition was to be for a “one-of-a-kind, integration test and evaluation facility” unlike any other contract that OST has undertaken. “As reflected in the solicitation’s contract line items, the TSIF acquisition covers four primary efforts – design (of a facility and Baggage handling System (BHS)); construction (of facility and BHS); system operation and maintenance of the BHS; and reconfiguration (more design and construction of test areas.” Attach. A, ¶ 4.

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33. According to [DELETED], Manager of System Planning and Evaluation and Program Manager for the TSIF and Chair of the Technical Evaluation Team (“TET”) for the TSIF design-build acquisition, the TSIF is not a “baggage screening facility,” but rather the TSIF “provides for much greater functionality in its test and evaluation of security screening technologies and systems within a simulated operational environment. The facility will provide the means to more thoroughly assess security technologies for multiple modes of transportation including, but not limited to, aviation passenger/carry-on items, checked baggage screening, cargo, and surface transportation.” Attach. A, ¶ 5.
34. [DELETED] explains that it is his group that was responsible not only for the TSIF requirements, but also all requirements documents and specifications for security screening technology procurements that OST manages. He states that in “no way has VTC defined or refined any of these requirements ... as I would have reviewed [any requirements defined or refined by VTC] I know that TSA did not task VTC to support the TSIF solicitation development in any way.” Attach. A, ¶ 9.
35. [DELETED] also stated in his declaration that no information about the TSIF acquisition was available on the TSA’s shared IT infrastructure, except for private email, and that all meeting attendance and written documentation was controlled. Additionally, he states that most of the documentation was controlled and kept at DSCI’s corporate offices in New Jersey. TSA Supplemental Response, dated June 6, 2008 (“TSA Suppl. Response”), Supplemental Declaration of [DELETED], dated June 5, 2008 (“Suppl. Attach. A”) ¶¶ 3-4.
36. [DELETED] also states that VTC has never provided a detailed design for the TSIF, but only a high-level concept paper. Attach. A, ¶ 10. Specifically, he states the “VTC concept paper was written in very broad terms. For example, the paper provides an overview of the types of high-level functions that would be performed at the facility. It also discusses the need for a Baggage Handling System but in

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- broad terms – not at all like the requirements detail provided in the public PGDS.” Attach. A, ¶ 12. The VTC concept paper did not involve non-public information, but rather public information, such as that available in the PDGS, and it was the PGDS that was used as a reference document for requirements for the TSIF BHS. Attach. A, ¶¶ 7, 12.
37. According to [DELETED], the VTC concept paper was not a deliverable for the TSIF Solicitation. Rather, the VTC paper focused solely on the concept of having a test facility, while the TSIF Solicitation identified and defined in detail the full functionality that the facility must provide. Attach. A, ¶ 14. Except for VTC’s development of a list of potential sites and recommendation for a final site selection, all dealings by the TSA in connection with the facility were conducted through the TSA and the broker leasing the facility. Attach. A, ¶ 15.
 38. On December 21, 2007, the TSA Office of Acquisition issued a Pre-solicitation Notice of its intent to release the Solicitation. Attach. D, ¶ 3.
 39. The Solicitation was posted on FedBizOps on December 28, 2007, with a proposal due date of January 24, 2008. AR 1-84.
 40. The TSA held an “Industry Day Site Visit” on January 7, 2008 and the agenda provided opportunities for questions from offerors regarding the Solicitation, the type of contract, the CLIN structure, the proposal schedule, bonding requirements, period of performance, and the like. AR 131-144.
 41. The TSIF solicitation included a complete set of as-is drawings, as well as a detailed engineering assessment report covering every aspect of the TSIF infrastructure. Attach. A, ¶ 6. According to the TSA, this building information, combined with the Industry Day Site Visit activities, provided every potential offeror with equal and complete information about the TSIF. Attach. A, ¶ 6.

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42. The TSA posted on FedBizOps a modification to the Solicitation announcement on January 10, 2008, which included the following information: AutoCAD files for drawings — including site plan, topographic survey, surface plan, building sections, elevations, and base building drawings for both floors of the facility. Also provided with the modification was a TSIF Building Evaluation Report dated December 21, 2007 (an engineering assessment) prepared by NVE, Inc. Attach. D, ¶ 4; AR 85-130.
43. Amendment P0001 (“P0001”) was issued on January 20, 2008, revising the Solicitation and changing the proposal due date to January 31, 2008. AR 145-247. Amendment P0001 revised the bonding requirements in Clause H.9 to add a bid bond requirement.³ AR 191. Another amendment, Amendment P0002, was issued on January 29, 2008 and revised Solicitation Section B.2, Table 1.
44. According to the Contracting Officer, the changes to the Solicitation in Amendment 0001 were the result of a collaborative effort between key personnel involved in the TSIF procurement and involved in various disciplines within TSA, including the Office of Real Estate, OST and Office of Acquisitions; no contractor assisted with the development of Amendment 0001. Attach. D, ¶ 5.
45. Additional documentation provided with Amendment 0001 included: (1) “Questions and Answers” generated from the release of the Solicitation; (2) TSA Building Evaluation Report, which identified areas of work to be completed; (2) TSIF as-built drawings and (4) additional attachments to Section J, J11 (MWAA truncated design guidelines) and J12 (TSIF Building Evaluation Report, which was incorporated in Section J). Attach. D, ¶ 5; AR 145-247; 1171-1349; 1406-1410.

³ The TSIF Solicitation originally was issued without a bid guarantee requirement, but the Contracting Officer later determined that because the Miller Act applied to this acquisition and the TSA was requesting payment and performance bonds, the Government should require a bid guarantee. Hence, Amendment No. 0001 was issued to include the requirement for a bid guarantee in the form of a bond in the amount of 20% for construction of CLIN 00002. Subsequently, the Contracting Officer reviewed FAR 28.101-2(b) and the AMS and determined that \$3 million would be acceptable as a maximum bid guarantee to protect the Government’s interest. Attach. D, ¶ 12.

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46. The TSIF as-built drawings also released on January 20, 2008, included over 100 drawings in PDF file format. The drawings reflected as-built floor plans, roof framing, HVAC, sprinklers, power, exterior grading, and other aspects of the building. The Contracting Officer states that he released as much detailed information as possible on the TSIF to all offerors and this type of information could not have been obtained through a site visit. Attach. D, ¶ 5; AR 1406-1410.
47. Section B of the Solicitation identifies the Contract Line Item Numbers (“CLINS”) applicable to the base year of the contract as follows:
- Line Item 00001 Design Services
 - Line Item 00002 Construction Services (Checked Baggage Handling System and Facility Build Out)
 - Line Item 00003 Baggage handling Systems Maintenance
 - Line Item 00004 Test Area Support

AR 159-160.

48. CLIN 0001 is described as requiring the development of “a Facility Design that meets the requirements defined in Section C.6.2. The Facility Design includes but is not limited to the Telecommunication and IT Wiring Infrastructure, Office Area, Integration Test Area, Checked Baggage Testing Area to include a high-speed Baggage Handling System, a Passenger Screening System Testing Area, Multi-Purpose Test Area, and Parking Lot design Price is a firm fixed price and will include all costs, including all labor, materials, certifications and any other associated costs to complete the designs.” AR 160.
49. CLIN 0002 is described as “firm fixed [price] and includes all labor material, permits and all other associated costs to complete the Construction Services needed to build the approved Facility Design” and CLIN 00003 is described as “firm fixed [price] to provide on-going operations and maintenance of the baggage handling system.” CLIN 00004 is described as a “Time and Materials CLIN.” AR 160.

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50. Section C.3 of the Statement of Work (“SOW”) provides the following background information for the procurement as follows:

The TSA has leased a 128,000 sq. ft., two-story facility (64,000 sq. ft. each floor) at Reagan National Airport in Arlington, VA, to create a testing capability that can emulate operational environments, in order to integrate and evaluate technologies, processes, procedures, and staff. The facility will be the TSA Systems Integration Facility. The purpose of the TSIF is to support the TSA Office of Security Technology (OST) in effectively and efficiently performing system, technology, and procedural assessments and analyses. The TSIF will provide OST with an environment that supports the development and evaluation of functional and operational design standards, in order to determine how to best integrate different baggage and passenger screening technologies into efficient and economical screening systems.

The TSIF will provide the TSA with an operationally-realistic environment in which to evaluate current and new advanced screening technologies, processes, and procedures against known threats to transportation venues, particularly air transportation facilities. The TSIF environment will support the emulation of outbound passenger, baggage, and cargo movement from arrival through departure. The TSIF will be used by the TSA to develop and evaluate concepts of operation, Measures of Performance (MOPs), and Measures of Effectiveness (MOEs) of individual systems, as well as fully integrated system-of-systems configurations.

AR 163.

51. In pertinent part, Section C.2 states there “is a requirement to build-out a portion of the checked baggage test area and complete all requirement equipment installation, integration and check-out to the point where [specified] evaluations ... can be performed by the TSA on a high-speed Explosives Detection System-Baggage handling System (EDS-BHS) equipment suite by **15 August 2008.**” (Emphasis in original). AR 164. Other types of work identified to be performed in the facility include the following:

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- Generation and validation of requirements documents, using real systems installed and configured to mimic operational sites;
- Development and verification of the concepts of operations for both standalone and integrated technologies and systems;
- Evaluation and validation of concepts and equipment configurations identified in the PGDS and TSA Security Checkpoint Layout Design/Reconfiguration Guide;
- Evaluation of engineering alternatives throughout a system's lifecycle;
- Evaluation of system and technology performance, human factors, and usability;
- Qualification testing on systems being qualified against system requirements for inclusion of the TSA Qualified Products List;
- Certification and accreditation assessment;
- Regression testing;
- Training; and
- Troubleshooting.

AR 165.

52. Solicitation Section C.5 identifies thirteen documents applicable to the SOW, which include various guidelines, forms, regulations, FAA Orders, recommended practices and the like. Specifically included in section C.5 is the PGDS and Security Checkpoint Layout Design/Reconfiguration Guide, as well as Truncated MWAA Design Guidelines. AR 165. It also states that the building design and the Baseline Test Area equipment configuration design are interrelated and the initial build-out of the Checked Baggage area is critical, stating further that “[u]nlike typical TSA installations of equipment, which are not changed often, the TSIF Test Areas must be designed and equipped to be reconfigurable with minimal impact to other Test Area assets. The balance of the build-out and test equipment installation, integration and check-out shall be structured to minimize disruption to the capabilities achieved in initial build-out of the Checked Baggage Area, while achieving that balance of the Test Area capability and office area build-out.” AR 166.

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53. Section 6.1 sets forth Critical Milestones that the contractor is advised to consider as “hard-dates” from which relief is not to be expected. The Critical Milestones are as follows:

1. Final Design Documentation: Shall be finalized and delivered to the TSA on or before **3 July 2008**.
2. Limited Office Area Availability: Approximately 20 office locations shall be available for use by TSA and TSA Engineering Support Contractor Personnel on or before **1 August 2008**.
3. Initial High-Speed EDS Test Capability: Shall be available to the TSA on or before **15 August 2008**. This shall include design, procurement, installation, and functional verification of the required BHS, and integration with an OEM delivered and installed high-speed EDS. Formal acceptance of this capability will be determined through the issuance of a Letter of Acceptance signed by the TSA Contracting Officer.
4. Completion of Facility Build-Out: Completion of the Facility Build-Out and the Checked Baggage handling Screening System shall be completed on or before **30 September 2008**.

AR 166 (emphasis in original).

54. Section 6.2 specifies the specific design services required for the internal build-out of the TSIF, stating “the contractor shall ensure the most efficient use of the space, consider environmental needs to include but not be limited to heating, cooling, electrical, fire suppression, plumbing, etc., and consider the existing structure to reduce construction costs.” AR 166-171. The required services encompass the design of Telecommunication and Information Technology Wiring Infrastructure; Office Area; Test Area; and Parking Lot Design. This section also states that the design shall comply with all references, guidelines, certifications and standards, as well as all Federal, state and local codes and regulations, cited in Section 5.0, Applicable Documents. *Id.*

55. More specifically, for the design requirements of the Test Area, the Solicitation specifies compliance with FAA standards for power distribution and powering and grounding sensitive electronic equipment. AR 168. It also requires the

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design of the checked baggage test area to include a baggage handling system that complies with CDRL ITF-001a, and specifies certain equipment for a baseline configuration that supports the specifications identified in the PGDS, among other things. Likewise, the design of the Passenger Screening Test Area must support specifications identified in the TSA Security Checkpoint Layout Design/Reconfiguration Guide, among other things. AR 169-170.

56. Section 6.3 of the SOW provides for the actual construction and build-out of the facility, which may only begin upon approval of the final design and issuance of a written notice to proceed. AR 171.
57. Section H.5 of the Solicitation contains a TSA clause addressing the treatment of OCIs [TSA AMS 3.1.7-3, Organizational Conflict of Interest SIR Provision (February 2003)] that states as follows:

- (a) The policy of the TSA is to avoid contracting with contractors who have unacceptable organizational conflicts of interest. An organizational conflict of interest means that because of existing or planned activities, an offeror or contractor is unable or potentially unable to render impartial assistance to the agency, or has an unfair competitive advantage, or the offeror or contractor's objectivity is, or might be, impaired.

It is not the intention of the TSA to foreclose a vendor from a competitive acquisition due to a perceived OCI. TSA Contracting officers are fully empowered to evaluate each potential OCI scenario based upon the applicable facts and circumstances. The final determination of such action may be negotiated between the impaired vendor and the Contracting Officer. The Contracting Officer's business judgment and sound discretion in identifying, negotiating, and eliminating OCI scenarios should not adversely affect the TSA's policy for competition. The TSA is committed to working with potential vendors to eliminate or mitigate actual and perceived OCI situations, without detriment to the integrity of the competitive process, the mission of the TSA, or the legitimate business interests of the vendor community.

- (b) Mitigation plans. The successful contractor will be required to permit a Government audit of internal OCI mitigation procedures for verification purposes. The TSA reserves the right to reject a mitigation plan, if in the opinion of the contracting Officer, such a plan

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is not in the best interests of the TSA. Additionally, after award the TSA will review and audit OCI mitigation plans as needed, in the event of changes in the vendor community due to mergers, consolidations, or any unanticipated circumstances that may create an unacceptable organizational conflict of interest.

(c) Potential organizational conflict of interest. The following examples illustrate situations in which questions concerning organizational conflicts of interest may arise. They are not all inclusive.

- 1) Unequal access to information. Access to “nonpublic information” as part of the performance of a TSA contract could provide the contractor a competitive advantage in later competition for another TSA contract. Such an advantage could easily be perceived as unfair by a competing vendor who is not given similar access to the relevant information. If the requirements of the TSA procurement anticipate the successful vendor may have access to nonpublic information, the successful vendor should be required to submit and negotiate an acceptable mitigation plan.
- 2) Biased ground rules. A contractor in the course of performance of a TSA contract, has in some fashion established important “ground rules” for another TSA contract, where the same contractor may be a competitor. For example, a contractor may have drafted the statement of work, specifications, or evaluation criteria of a future TSA procurement. The primary concern of the TSA in this case is that a contractor so situated could slant key aspects of procurement in its own favor, to the unfair disadvantage of competing vendors. If the requirements of the TSA procurement indicate the successful vendor may be in a position to establish, or may have important ground rules, including but not limited to those described herein, the successful vendor should be required to submit and negotiate an acceptable mitigation plan.
- 3) Impaired objectivity. A contractor in the course of performance of a TSA contract, is placed in a situation of providing assessment and evaluation findings over itself, or another business division, or subsidiary of the same corporation, or other entity with which it has a significant financial relationship. The concern in this case is the contractor’s ability to render impartial advice to the TSA could appear to be undermined by the contractor’s financial or other business relationship to

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the entity whose work product is being assessed or evaluated. In these situations, a “walling off” of lines of communication may well be insufficient to remove the perception that the objectivity of the contractor has been tainted. If the requirements of the TSA procurement indicate that the successful vendor may be in a position to provide evaluations and assessments of itself or corporate siblings, or other entity with which it has a significant financial relationship, the affected contractor should provide a mitigation plan that includes recusal by the vendor from the affected contract work. Such recusal might include divestiture of the work to a third party vendor.

(d) Disclosure by Offerors or contractors participating in TSA acquisitions.

- 1) Offerors or contractors should provide information which concisely describes all relevant facts concerning any past, present or currently planned interest, (financial, contractual, organizational, or otherwise) relating to the work to be performed and bearing on whether the offeror or contractor has a possible OCI.
- 2) If the offeror or contractor does not disclose any relevant facts concerning an OCI, the offeror or contractor, by submitting an offer or signing the contract, warrants that to its best knowledge and belief no such facts exist relevant to possible OCI.

(e) Remedies for Nondisclosure. The following are possible remedies should an offeror or contractor refuse to disclose, or misrepresent, any information regarding a potential OCI:

- 1) Refusal to provide adequate information may result in disqualification for award.
- 2) Nondisclosure or misrepresentation of any relevant interest may also result in the disqualification of the offeror for award.
- 3) Termination of the contract, if the nondisclosure or misrepresentation is discovered after award.
- 4) Disqualification from subsequent TSA contracts.

AR 188-189.

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58. Section H.9, Bonds, required an offeror to provide with its proposal “a Bid Bond with 20% of their proposed value of CLIN 00002 construction Services as listed in Section B.2.” AR 191.
59. Section I, TSA clause 3.1.7-2, Organizational Conflicts of Interest (February 2003) provides the following:
- a) By submitting an offer or proposal the offeror or Contractor warrants that, to the best of the Contractor’s knowledge and belief, there are no relevant facts or circumstances which could give rise to an organizational conflict of interest (OCI), as defined in the TSA Acquisition Management System, “Organizational Conflicts of Interest”, or that the contractor has disclosed all such relevant information.
 - b) The offeror or Contractor agrees that if an actual or potential OCI is discovered after award, the Contractor shall make a full disclosure in writing to the contracting Officer. The disclosure shall include a mitigation plan describing actions the contractor has taken or proposes to take, to avoid, mitigate, or neutralize the actual or potential conflict. Changes in the contractor’s relationships due to mergers, consolidations or any unanticipated circumstances may create an unacceptable organizational conflict of interest might necessitate such disclosure.
 - c) The contracting Officer may terminate this contract for convenience in whole or in part, if it deems such termination necessary to avoid an OCI. If the Contractor was award of a potential OCI prior to award or discovered an actual or potential conflict after award and did not disclose or misrepresented relevant information to the Contracting Officer, the government may terminate this contract for default, debar the contractor from government contracting, or pursue such other remedies as may be permitted by law or this contract.

AR 198⁴

⁴ Section L.10, TSA AMS Clauses and Provisions, also restates in full the language of clause 3.1.7-3, Organizational Conflict of Interest SIR Provision (February 2003). AR 235.

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60. Solicitation Section J.1, Deliverables, sets forth a summary of deliverables required under the Contract, which includes as “initial submissions” the following:

Item Description	Deliverable Number	Due
TSIF Facility Design Documents 40% Design 70% Design 100% Design	ITF-001	Initial submission 10 days after contract award (see CDRL for subsequent submissions).
TSIF Checked Baggage Screening System Design Documents 40% Design 70% Design 100% Design	ITF-001a	Initial submission 10 days after contract award (see CDRL for subsequent submissions).

AR 217

61. Also, Section J.1.1.1 also requires that “all drawings developed shall be approved by the TSA prior to submission for approval by the lessor, MWAA, or state and local government construction offices.” AR 218. Section J.1.12 further instructs the contractor to refer to the PGDS and TSA Security Checkpoint Layout Design/Reconfiguration Guide for specific guidance. *Id.*

62. Solicitation Section L.3, Award Without Discussions, provides that:

The Government intends to evaluate proposals and make award without discussion. Offers should contain the Offeror’s best terms within the proposed technical approach, to include all evaluation factors. Additionally, the Government reserves the right to conduct discussion and request proposal revisions if it is determined to be in the Government’s best interest.

AR 227

63. Section L.7, Submittal of Proposals, provides that “[e]ach Offeror shall submit a proposal that clearly and concisely describes and defines the Offeror’s response to the objectives/requirements contained in the RFP The proposal shall contain all the pertinent information in sufficient detail in the area of the proposal where it contributes most critically to the discussion of the same information. When

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necessary, the Offeror shall refer to the initial discussion and identify its location within the proposal. Offerors should also identify risks inherent in their proposal, techniques used to mitigate those risks, and where such techniques were successfully employed in other contracts.” AR 228

64. Section L.8.1 provides instructions for preparing Volume I – Technical Proposal. It states:

The Offeror’s Technical Approach should be written to communicate the overall proposed approach to meeting the requirements in Section C of this RFP. The descriptions should contain enough detail for the government to understand the overall approach, how it satisfies the technical requirements, as well as key changes and timeframes associated with the Offeror’s proposal.

AR 229-230.

65. In Volume I, Technical Approach, the Solicitation instructs the offeror to provide, in part, information on its proposed Facility Design, describing “the approach used to ensure the facility design supports TSIF operations.” AR 230. As for the proposed Checked Baggage Test Area Design, the offeror was required to describe “in detail the proposed design to include ease of maintenance, flexibility for reconfiguration, utilization of Checked Baggage environment components and ability to meet the mission of the TSIF as described in Section C.” *Id.*
66. For the Past Performance section of Volume I, the Solicitation instructs the offeror to provide “an example for each of the following tasks: 1) Facility Design, 2) Facility Construction, 3) Checked Baggage Screening system Design, 4) checked Baggage Screening system Construction, 5) Baggage Handling Systems Maintenance, and 6) Test Area Support.” AR 231-232. It states further that “[e]ach example must have been performed within the past five years and be of similar size, scope, and complexity to the tasking defined in the SOW.” *Id.*

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67. In the Business Management Section of Volume I, the Solicitation requires the offeror to provide information that describes the offeror's approach to fulfilling all the SOW requirements. AR 232. It also requires the Offeror to "identify any perceived risks associated with the SOW and propose mitigation strategies. The Offeror shall provide a description of how the perceived risks will be managed to minimize technical, cost, and schedule risks. AR 232.
68. Section L.8.2 of the Solicitation addresses the submission of Proposal Volume II – Pricing, which requires the offeror to include pricing support documentation sufficient for the Government to determine that "the proposed price is reasonable and realistic for the effort." AR 232.
69. Section M.1 of the Solicitation provides that the "Government intends to award a competitive contract to the contractor whose proposal, conforming to the Solicitation, represents the best value solution to the TSA." AR 242. It also states that the Government may "(1) Reject any or all submittals if such action is in the public interest; (2) Accept other than the lowest price submittal; and, (3) Waive informalities and minor irregularities in offers received." AR 242.
70. Section M.1 also states, "[t]he Government intends to evaluate submittals and award a contract, either on initial submittals without communications, or on initial or subsequent submittals with communications. In evaluating the submittals, the Government may conduct written or oral communications with specific Offerors only, with all Offerors, or with no Offerors, as circumstances warrant. A submittal in response to an RFP must contain the Offeror's best terms from a technical and cost or price standpoint." AR 242.
71. Solicitation section M.2, Basis for Award, provides the following:

All proposals will be evaluated against the evaluation factors set forth in this section. Any award made will be based on the best overall proposal that provides the best value to the Government. To receive consideration for award, the proposal must be

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acceptable in meeting the Government's requirements in each area. Proposals will be evaluated using the criteria listed below.

Non-price factors are significantly more important than price. However, as the non-price factors between proposals become closer, price shall become more important in any trade-off decisions. Among the non-price factors, technical approach is more important than past performance. Past performance is more important than business management.

AR 242-243.

72. Sections M.3.2 Eligibility for Consideration of Award, states that the evaluation factors detailed in Section M.4 will be evaluated and rated to make a best value determination to award. Section M.4, Evaluation Factors, states "the Government will conduct a detailed evaluation of the Contractor's approach and capability to meet the Government's objectives" against the evaluation factors of Technical Approach, past Performance, Business Management, and Pricing/Cost. AR 244.
73. Section M of the Solicitation advised offerors that the Government will evaluate their "Understanding and Approach" with respect to Factor 1.0, Technical Approach, and Factor 3.0, Business Management, using the following definitions:

Understanding: The degree to which the Offeror demonstrates clear understanding, knowledge and experience in performance of the technical requirements of the Statement of work (SOW). Understanding includes the ability of the Offeror to identify potential problem areas and propose technical and management solutions that successfully fulfill the unique goals and mission of TSA and the TSIF.

Approach: The degree to which the Offeror's technical and management capabilities satisfy all the requirements in the SOW. The degree to which the Offeror's approach is logical, feasible and technically effective. Unique concepts, features and other approaches offered in a proposal will be considered in terms of the degree to which risks are identified and minimized and potential benefits to the government are identified.

AR 245.

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74. Also provided with Amendment 0001 were questions and answers addressing several items raised by offerors. With respect to the Sections H.5 and L.10 of the Solicitation that dealt with OCIs, the following question was raised:

It states “(1) Unequal access to information. Access to “nonpublic information” as part of the performance of a TSA contract could provide the contractor a competitive advantage in a later competition for another TSA contract. Such an advantage could easily be perceived as unfair by a competing vendor who is not given similar access to the relevant information. If the requirements of the TSA procurement anticipate the successful vendor may have access to nonpublic information, the successful vendor should be required to submit and negotiate an acceptable mitigation plan.” Also, Section L.10.3.1-3 states, (1) Unequal Access to Information. Access to “nonpublic information” as part of the performance of a TSA contract could provide the contractor a competitive advantage in a later competition for another TSA contract. Such an advantage could easily be perceived as unfair by a competing vendor who is not given similar access to the relevant information.” Therefore a prime contractor, or a prime contractor using a subcontractor who has not reviewed the results and the requirements of these reviews provided to the TSA. So to create an equal playing field, could the TSA provide the results of BHS/EDS system reviews performed for the TSA by a competing contractor within the time frame of the bid period so that the contractor without this knowledge will also be able to provide the most competitive BHS/EDS system designs for this project?

AR 153.

75. In response to the above question, the TSA stated as follows:

No. TSA has publicly published the BHS design guidelines as referred to within the RFP of Section C.5. TSA Planning Guidelines and Design Standards for Checked Baggage Inspection Systems, v1.0, 10 October 2007.

AR 153.

76. Another question raised by an offeror was “do current contracts between TSA and Vic Thompson Company or TSA and Cage create a situation where a team of which they are a member would be considered as having unacceptable

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organizational conflicts of interests?” The TSA responded that “[i]t has been determined that no operational conflict exists for these companies.” AR 154.

77. On January 31, 2008, the TSA received four offers. One offer was received late and was rejected. Another offer was later rejected on February 25, 2008 for failing to submit a bid bond. Only two offerors remained to be fully evaluated, Ribeiro and VTC. Attach. D, ¶ 6.

Bid Bond Concerns

78. VTC provided a bid bond with its proposal, but it raised a concern in the mind of the Contracting Officer. According to the Contracting Officer:

VTC provided a bid bond with its proposal. However, there were [DELETED] bond submission. [DELETED].

Attach. D, ¶ 12; AR 656-669.

79. The Contracting Officer explained that he sought legal review and guidance and subsequently concluded that the VTC bond submission was flawed but could be addressed if discussions were held with VTC. Subsequently, he advised VTC of the issue and sought from VTC a revised bid bond, with VTC named as principal, equaling \$3 million. Since Ribeiro already had submitted an acceptable bond, the Contracting Officer did not see the need to communicate to Ribeiro the \$3 million limitation.⁵ Attach. D, ¶¶ 13-14.

⁵ The Solicitation was issued for the TSIF without a bid guarantee requirement. Amendment 1 included the requirement for a bid guarantee, but did not take into account the fact that under the AMS and the Federal Acquisition Regulation (“FAR”), bid guarantees were generally limited to \$3 Million. Attach. D, ¶¶ 10-11. The Contracting Officer determined that, based on FAR 28.101-2(b), the \$3 Million limitation set forth therein could serve as the basis for the bid bond, rather than the proposal amount. Attach. D, ¶¶ 13-14.

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Evaluation of Proposals

80. The Source Selection Plan (“SSP”) provides that, in addition to price, award will be based on an [DELETED]. AR 695-727.
81. The SSP also provides that to receive consideration for award, the proposal must be acceptable in meeting the Government’s requirements in each area. AR 700.
82. According to the SSP, the rating of “significant weakness” is assigned to a “flaw in the proposal that appreciably increases the likelihood of unsuccessful contract performance,” while a finding of “weakness” in a proposal is based on a “flaw in the proposal that increases the likelihood of unsuccessful contract performance.” AR 712, 714.
83. The SSP also provides that a finding of “strength” in a proposal is based on “an element of the proposal which exceeds a requirement of the solicitation in a beneficial way to the Government.” AR 714 (emphasis in original).
84. The SSP provides that a finding of “deficiency” results when there is “a material failure of the proposal to meet a requirement or a combination of significant weaknesses that increase the likelihood of unsuccessful performance to an unacceptable level.” AR 712.
85. The Technical Evaluation Team (“TET”) used the above ratings defined in the SSP to develop overall adjectival ratings of “Outstanding”, “Good”, “Acceptable”, and “Unacceptable.” AR 712-713. The term “Acceptable” is defined in the SSP as “[p]roposed approach is adequately responsive with no major weaknesses Demonstrates an understanding of the requirement and has demonstrated adequate technical capability to achieve the proposed approach. Some moderate risks for which alternatives are identified and considered achievable.” The term “Unacceptable” is defined in the SSP as “[p]roposed approach is not adequately responsive, does not address the specific factor, and/or

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does not propose to accomplish the work in a manner which can meet the objectives of the program or the risk is too high. Significant risks for which alternatives are not identified or are not considered achievable.” AR 712-713.

86. Based on the initial TET findings, the proposals were evaluated as follows:

FACTOR	VIC THOMPSON	RIBEIRO
1 - Technical Approach	[DELETED]	[DELETED]
2 – Past Performance	[DELETED]	[DELETED]
3 –Business Management	[DELETED]	[DELETED]
Overall	[DELETED]	[DELETED]

AR 728-737.

VTC’s Technical Evaluation Results

87. Under Factor 1 “Technical Approach” the TET rated VTC as [DELETED] because it provided a discussion of an [DELETED]. AR 729-730; 738-739. The TET found that VTC also [DELETED]. *Id.* The TET also found that VTC’s proposal provided [DELETED]. *Id.* The TET further viewed VTC’s proposed BHS design as [DELETED], yet still addressed every key aspect of the requirements; and a [DELETED]. *Id.*
88. For Factor 2 “Past Performance” the TET rated VTC as [DELETED] because all references provided showed a wide range of experience and were applicable to the TSIF in size, scope and complexity. AR 730, 740. The TET found many of VTC’s past performance references mentioned [DELETED]. *Id.* Also, the TET viewed the past performance reference contacted for checked Baggage Screening System design/construction as very positive, stating that VTC was very responsive and did excellent work. *Id.*

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89. As for Factor 3, “Business Management” the TET gave VTC a rating of [DELETED] because it provided a [DELETED]. AR 730-731; 742-743. The TET indicated that VTC also cited several relevant risks with significant detail on mitigation steps; and proposed [DELETED] that was an effective mitigation tool for schedule risk. *Id.*

Ribeiro’s Technical Evaluation Results

90. Under Factor 1 “Technical Approach” the TET rated Ribeiro as [DELETED]. The TET found the Ribeiro proposal to contain [DELETED]. AR 734, 751. Particularly, it found that the proposed [DELETED]. *Id.* The TET considered the Ribeiro design [DELETED]. *Id.* The TET also found that the design [DELETED]. *Id.* The TET further found that Ribeiro [DELETED], which was a primary objective of the TSIF. AR 168-169; 230; 376-391;455-463;734-735; 751.
91. Also, under Factor 1, the TET found the Ribeiro proposal to contain [DELETED]. For example, it found Ribeiro [DELETED] as required by Solicitation Attachment J-5, Public Area – Section 1, Non-Public Area Secure – Section 1.1. AR 734; 750; 1210-1212; 1389-1391. Moreover, the TET viewed Ribeiro’s proposed design for [DELETED]. AR 734; 750; 455-463.
92. In addition, under Factor 1, the TET found there [DELETED]. AR 734, 751. The TET further found that [DELETED]. AR 455-463; 734; 751. Specifically, it found [DELETED]. *Id.* In addition, the TET indicated that Ribeiro [DELETED] as required by the Solicitation Section C.6.2.4, p. 16. AR 171.
93. The TET rated Ribeiro as [DELETED] under Factor 2 “Past Performance”, however, it considered the Ribeiro proposal to contain [DELETED]. AR 735, 752-753. The TET found Ribeiro’s references for facility construction [DELETED], AR 735, 753, [DELETED]. Attach. A, ¶ 19.B. Moreover, the TET considered facility construction to be one of the most important efforts under the

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- contract. *Id.* In addition, under Factor 2, the TET contacted the reference provided, [DELETED]. AR 735, 753. The TET reported that [DELETED]. AR 231; 7335; 753; Solicitation L.8.1.2 A, p. 76).
94. Under Factor 3 “Business Management” the TET rated Ribeiro as [DELETED] because it viewed the Ribeiro proposal as containing [DELETED]. AR 417-418; 451-454; 735-736; 754-755. The TET noted that the [DELETED], AR 417; 735-736; 755, [DELETED]. *Id.* The TET did not expect such work [DELETED]. AR 417-418; 451-454; 736; 755.
95. Also, under Factor 3, the TET noted that Ribeiro identifies [DELETED]. AR 451; 736; 755. In the TET’s view, Ribeiro’s proposal includes [DELETED] required by the TSIF SOW, Section J, Deliverable Tables, Table 1. AR 63; 217; 451; 736; 755. The TET found the fact that Ribeiro’s proposed approach [DELETED]. See Attach. A ¶19.D. [DELETED]; thus, the TET characterized this approach [DELETED]. AR 736, 755. The TET also notes that Ribeiro identified [DELETED]. AR 451; 736, 755. With respect to the schedule, the TET considered Ribeiro’s proposed [DELETED]. AR 63; 217; 451; 736; 755. Additionally, Ribeiro provided [DELETED]. AR 451; 736; 755. Ribeiro’s response [DELETED] for the Business Management Factor. AR 736, 755.
96. The TET assigned an overall rating of [DELETED] for the Ribeiro proposal, however, the TET viewed the [DELETED] to represent [DELETED] to the Government. AR 728, 737. Further, while Ribeiro’s “Business Management” factor was rated [DELETED], this did not result in an overall [DELETED] rating because the Business Management factor is less important than the Technical Approach and Past Performance factor. AR 728-729.

Price Evaluation of Proposals

97. The TSA conducted a price analysis of the price proposals of VTC, Ribeiro and a third offeror on all CLINS in order to determine that a competitive environment

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had been established and to determine their reasonableness in comparison to the Independent Government Cost Estimate (“IGCE”). AR 768.

98. The Solicitation and the SSP provided that the price proposals would be evaluated based on the following: (1) a complete Section B.2; (2) Breakdown of CLIN 0002; (3) pricing data for proposed new and/or refurbished TSIF systems components; (4) monthly cost breakdown for BHS Maintenance; (5) price proposal for Test Event Scenario; and (6) complete Section B.2 (Table 2). AR 766-767.
99. The Price Evaluation Team (“PET”) found that only VTC and Ribeiro were compliant and submitted competitive price proposals. AR 794. The other offeror was eliminated because it did not provide a bid bond. AR 767. Ribeiro proposed a higher price than VTC. AR 808.
100. The March 10, 2008 PET Report indicates that both VTC and Ribeiro did not understand the requirement set forth in CLIN 0003 based on their proposed pricing for this CLIN. The Contracting Officer directed the Team to prepare a Solicitation Amendment P00003 to clarify the language in Section C.6.4. AR 773, 778.

Elimination of Ribeiro’s Proposal from Further Consideration for Award

101. Based on the evaluation findings the TET believed that Ribeiro would have to [DELETED]. Attach. A, ¶20. The evaluation team recommended the removal of Ribeiro from further consideration given the [DELETED]. *Id.*
102. In this regard, the Contracting Officer viewed the [DELETED] in Ribeiro’s proposal as calling into question the likelihood that further communications with Ribeiro would substantially improve its position for award from a technical standpoint. Attach. D, ¶16; AR 794. After review of the AMS regarding communications with offerors, the Contracting Officer determined that further

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- communications with Ribeiro were unnecessary. *Id.* In particular, the Contracting Officer believed that inclusion of Ribeiro in discussions only would increase its proposal costs without providing commensurate benefit to its competitive position. *Id.* The Contracting Officer further did not believe that Ribeiro would be capable of revising its technical proposal to address TSA's concerns in an acceptable timeframe. *Id.*
103. The Contracting Officer's decision to remove Ribeiro from further consideration was made on March 12, 2008. Attach. D, ¶18. On that same day, TSA issued Solicitation Amendment P00003 "which clarified and better defined the requirements associated with CLINS 0003 and 0004 in Solicitation Section C.6.4 and C.6.5 and added a BHS Warranty and Technical Support clause as RFP Section H.17." AR 782. A negotiation session with VTC also was held on that same day, during which the TSA highlighted technical and pricing issues that had been identified in its proposal submission. *Id.* VTC subsequently submitted revised Volume I Technical and Volume II Price proposals on March 14, 2008. *Id.*
104. Ribeiro was not provided with a copy of Amendment P00003 issued on March 12, 2008, because TSA had decided to eliminate it from the competition on the same date. TSA Contracting Specialist, [DELETED], had several conversations with [DELETED] Ribeiro concerning the scheduling of discussions concerning its proposal. [DELETED] states:

For example, Ribeiro had a negotiation meeting scheduled with TSA on March 4, 2008, which was cancelled the day before. In one conversation, he [DELETED] stated that he would be sending out an agenda identifying areas of Ribeiro's proposal we were to address in our negotiations meeting. I never received such an agenda. Instead Ribeiro was notified at 3:54 pm on March 14, 2008 that its proposal would not be considered further by TSA.

Protester Supplemental Comments, dated June 13, 2008 ("Suppl. Comments"), Exhibit 1, Declaration of [DELETED].

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105. According to the Contracting Officer, prior to removing Ribeiro from further consideration:

I reviewed the AMS regarding communications with offerors. I noted that under the AMS, TSA is not required to conduct negotiations with all of the offerors (AMS 3.2.2.3.1.2.2, Communications with Offerors) and that communications may be held with individual offerors at any time during the acquisition provided that such communications do not afford any offeror an unfair competitive advantage. The AMS Guidance was also included in Solicitation Section M.1, paragraph 2.

Attach. D, ¶ 15.

106. The Contracting Officer also states that although Ribeiro's price appeared to be fairly competitive against VTC's, the technical submission was not, and VTC's prices also were very competitive on CLINS 0001, Design, and 0002, Construction. He anticipated that, with clarification of the CLIN 0003, BHS maintenance requirement, pricing for that CLIN would substantially affect VTC's price, while the [DELETED] were regarded as [DELETED]. Attach. D, ¶ 17.
107. In a letter, dated March 14, 2008, the Contracting Officer advised Ribeiro that it was removed from further consideration for award and provided an opportunity to schedule a debriefing after award. AR 795-796; Attach. D, ¶18. The letter informed Ribeiro that [DELETED] within its Volume I Technical Proposal caused the removal from further consideration. *Id.* Specifically, the letter advised of [DELETED] with Ribeiro's proposed BHS design [DELETED]. *Id.* Moreover, it stated that the design [DELETED]. *Id.* The letter also advised Ribeiro of [DELETED] with its past performance information where its reference for facility construction [DELETED]. *Id.*
108. The TSA scheduled a debriefing with Ribeiro on April 3, 2008 and Ribeiro submitted written questions by email prior to the debriefing. During the oral debriefing, the TSA reiterated the reasons for Ribeiro's elimination as cited in the March 14, 2004 letter, and identified [DELETED] found during the evaluation

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process. According to the Contracting Officer, “Ribeiro did not question the evaluation of its proposal or suggest that it could have improved its technical proposal; only lower its price.” Attach. D, ¶¶ 19-20.

Final Negotiations with VTC

- 109. The TSA conducted negotiations with VTC and received clarifications on the few [DELETED] identified in VTS’ proposal. AR 756-763. For example, VTC’s proposal schedule [DELETED], as required by the TSIF Solicitation, Section J-1, Table 1, which lists a 40% 79% and 100% submittal requirement. AR 63; 217; 731; 743; 758. During negotiations and subsequent documentation, VTC explained that [DELETED]. AR 758.

- 110. As a result of the TSA’s negotiations and receipt of clarifications from VTC, the TET revised its ratings on the VTC proposal as follows:

FACTOR	VTC
1 – Technical Approach	[DELETED]
2 – Past Performance	[DELETED]
3 – Business Management	[DELETED]
Overall	[DELETED]

AR 756-758.

- 111. Through the negotiation process with VTC, the Contracting Officer became aware that VTC had performed work on the initial site survey for potential TSIF locations in the Washington D.C., metropolitan area. AR 799-801; Attach. D, ¶ 9. In negotiations, Mr. Vic Thompson mentioned that he had visited various sites for the TSIF and performed an initial evaluation. AR 799, 801. Based on this information, the Contracting Officer sought additional information from VTC to determine whether an OCI situation existed and any mitigation efforts that would be required. *Id.*; Attach. D, ¶ 9. VTC provided its responses to the Contracting Officer. AR 797-798.

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112. The Contracting officer discussed the VTC work with the TSA Office of Real Estate and the TSIF Program Manager. AR 801. From these discussions the Contracting Officer re-confirmed that VTC had no involvement in and was not privy to the development of the TSIF contract requirements. *Id.* The Contracting Officer determined that VTC had assisted TSA in identification of potential locations for the TSIF, including the facility selected. Attach. D, ¶ 9. The Contracting Officer also determined that VTC did not obtain an unfair competitive advantage for the TSIF Solicitation as the VTC was not involved in the actual selection of the TSIF location. *Id.* The Contracting Officer concluded that either VTC did not gain access to non-public information or that the Government's release of the site engineering study, TSIF drawings, and other documentation constituted sufficient mitigation. *Id.*; AR 799-801.
113. On the afternoon of March 14, 2008, the PET contacted VTC to discuss pricing for CLIN 0003 and 0004 and to discuss additional concerns as to the requirements for these items. In addition to its revised proposal submitted on March 14, 2008, VTC provided final revisions to these cost items on March 17, 2008. *Id.* The PET amended its Report on March 18, 2008, AR 782, and concluded that VTC's price was both reasonable and realistic. AR 793.
114. The Contracting Officer prepared a Recommendation and Decision Memorandum for the Source Selection Official ("SSO"), recommending award to VTC of CLINS in the amount of [DELETED], which represents CLIN 0001 (design price of [DELETED]) and CLIN 0002 (build price of [DELETED]). AR 814. The BHS Maintenance under CLIN 003 was to be awarded in a separate contract modification upon completion of the Baggage Handling System. *Id.* The SSO concurred with the recommendation. *Id.*

Contract Award to VTC

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115. The contract was awarded to VTC on March 25, 2008 in an amount not to exceed \$28,510,189. AR 826-892.
116. As awarded to VTC, the completion schedule for the TSIF project provided for an approximate overall 30 day extension as a result of an approximate 30 day delay in award. Based on the delay, critical milestones were proportionately adjusted, including the milestone for the initial high speed EDS test, *i.e.*, the date for this milestone completion was extended 30 days from the date established in Amendment 001 of the Solicitation from August 15 to September 15, so as to be consistent with the extension of the other critical milestones. Attach. D, ¶ 22; Attach. A, ¶ 25.

Ribeiro's Debriefing

117. Following contract award, TSA provided a telephonic post-award debriefing to Ribeiro on April 3, 2008, which continued until April 7, 2008, when Ribeiro received TSA's completed written responses to questions that Ribeiro submitted on April 2, 2008. Attach. D, ¶¶ 18-20; AR 802-813. The debriefing information provided to Ribeiro reflects the evaluation findings as to its proposal's [DELETED] listed in the Technical Evaluation Report. AR 734-737; 750-755; 806-813. This information regarding the evaluation of Ribeiro's proposal restates the information already provided to Ribeiro in the Contracting officer's March 14, 2008 letter notifying Ribeiro of its removal from award consideration. AR 795-796; 734-737; 750-755.

Additional Facts Related to OCI

118. During VTC's performance of Task Order No. HSTS04-07-F-DEP131, Contracting Officer, [DELETED], observed that materials reflecting layouts for baggage handling systems might next lead to the development of specifications for an operational test facility, and he warned VTC that any work beyond the scope of its Task Order would create an OCI and preclude its involvement in any

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- future acquisition for BHS designs; however since it did not require work on BHS designs, he determined that no OCI Mitigation Plan from VTC was necessary. Attach. C, ¶ 8; AR 935-954.
119. [DELETED] was the successor to [DELETED] as the Contracting Officer on the task order contracts awarded to VTC under the GSA PES Schedule. Attach. D, ¶ 3.
120. [DELETED] was sensitive to the potential of an improper OCI with VTC and addressed concerns to counsel; however, at no time did TSA conclude that VTC should be prohibited from submitting a proposal or be disqualified from consideration from award based on an OCI. Attach. A, ¶ 17; Attach. D, ¶ 7; Attach. A ¶ 17.
121. The TSA did not consider the location of VTC's office at TSA headquarters two doors down from Assistant Administrator to pose an OCI risk since [DELETED] had no involvement in the actual development of TSIF requirements and had no involvement in the TSIF statement of work or specification. Attach. B, ¶ 8, 11; Attach. A, ¶ 16.
122. Additionally, the TSA offices responsible for the TSIF acquisition, OST or the Office of Acquisitions, are not in the same building as VTC's office and no senior leadership in OPT or OST had any involvement in developing the TSIF statement of work or specifications. Attach. A, ¶ 16.
123. According to [DELETED], any work on the TSIF solicitation at TSA Headquarters were done in the West building where OST and the Office of Acquisitions is located, while VTC's office is in the East building. Suppl. Attach. A, ¶4.
124. [DELETED] indicates that his "group and the Office of Acquisition remained sensitive to the presence of VTC, its personnel and its support on other OST

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efforts. Therefore, prior to the receipt of proposals, we identified the Source Selection Officer and team members for the TET from government personnel who did not have a working relationship with VTC.” Attach. A, ¶ 17.⁶

125. During the Question and Answer period of the acquisition, the TSA was asked whether there was an OCI problem with VTC and another company based on previous work they had done for TSA. *See* Finding of Fact No. (“FF”) 8, *supra*. TSA responded in the negative on January 20, 2008, based on information the Contracting Officer had available at the time; none of which he believed indicated that work VTC previously performed would create a conflict or an unfair advantage. He explained, “at this state of the acquisition, I believed only that VTC had referred a real estate agent to TSA for the purposes of leasing a suitable location for the TSIF. But at the time, I did not know VTC had entered the TSIF facility. I felt that VTC did not gain any non-public information that would assist in its proposal preparation. I also felt that the release of information on the facility was so detailed that it would mitigate any advantage VTC possible could have gained.” Attach. D, ¶ 8.
126. In his declaration, [DELETED] explained how he later learned of additional information that caused him some concern about a potential OCI in connection with VTC. He states:

The site survey issue arose again during negotiations with VTC when Vic Thompson stated he had access to the TSIF prior to the Solicitation release; a fact I was unaware of before that time. During negotiations, Vic Thompson indicated that he was involved in initial site survey work for the TSIF. This caused me some concern regarding OCI and I had a subsequent communication with Vic Thompson regarding his access to the TSIF soon after negotiations concluded. I asked several direct questions; including; (1) how many sites Vic Thompson visited personally, (2) how many times he had access to the USPS facility, and (3)

⁶ A member of the Office of Real Estate Services, [DELETED], served as a representative for the TSIF acquisition, assisting in any further refinement of the usable space requirements for the TSIF solicitation and serving on the technical evaluation team. [DELETED] had no involvement in the effort to lease the USPS facility, and she was informed by [DELETED] that the selection of the USPS facility was a decision made by the TSA based on its own site selection activities. Attach. G, ¶ 8.

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how much time he had spent at each facility, among others. Mr. Thompson[‘s] response indicated that he toured five sites and that he spent approximately an hour and a half to two hours at each facility, except for the USPS facility, where he made three visits lasting approximately two hours each. Upon information and belief, two of Mr. Thompson’s site visits to the USPS facility were in connection with scouting locations for the TSIF and one involved a site survey for the PAX 2.0 program. Mr. Thompson also confirmed that VTC reviewed the OCI clause in the Solicitation and firmly believed that VTC had done nothing that would present an OCI problem as it relates to the TSIF Solicitation. After a review by OA, OST and legal counsel, I determined that VTC assisted TSA in identification of potential locations for the TSIF, including the USPS facility. Upon information and belief, TSA OST recommended the USPS site to TSA Office of Real Estate. Again I concluded that either VTC did not gain access to any non-public information or that the release of as-built TSIF drawings and other documentation was sufficient mitigation. After review of the facts and consultation with legal counsel, it was determined that the involvement did not constitute an unfair advantage and the agency had adequately mitigated any OCI by providing very detailed drawings and other information to all offerors.

Attach. D, ¶ 9.

127. As for the assistance VTC provided TSA in identifying potential locations for the TSIF, [DELETED] explains in his declaration that it became apparent within the first day of his research effort that the USPS building was the obvious choice “for TSA because it existed as excess Government property immediately available for aviation-related occupancy.” Attach. G ¶¶ 4-5. This was due to the following reasons: (1) USPS had a 20-year ground lease for the building from the Metropolitan Washington Airport Authority (MWAA) which owned the land and limited lease of the building for aviation-related purposes only; (2) the USPS building complied with federal construction specifications and once served as a mail sorting/distribution facility and remained empty except for USPS equipment left in place; (3) the USPS facility was immediately available and would avoid spending the time and money that would be associated with leasing a similar building from the private sector market; and (4) TSA and USPS’ lease agreement

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would be in the form of an Inter-Agency Agreement, whereby funds would transfer between federal agencies. Attach. G, ¶¶ 4-7.

128. The Contracting Officer further explains the basis for his determination that there was no OCI with respect to VTC as follows:

In addition to reviewing the OCI concerns at various times during the acquisition process (including pre-solicitation, during the solicitation process, site visit, after negotiations and prior to making award), I believe that I have also conducted a thorough revisit of OCI after protest receipt. I have reviewed the protest and supplemental protest and the OCI allegations they contain. I reviewed all contract documents in connection with HSTS04-07-DEP131, HSTS04-07-F-CTO062 and HSTS04-07-F-CTO048, including the Statements of Works. I have reviewed the deliverables VTC has provided in connection with these documents. I reviewed the statements made by the declarants in this response. After my review of this material, I confirm that: (1) the deliverables provided by VTC related to the TSIF are high level conceptual documents used for other purposes, (2) none of the deliverables contain TSIF requirements, (3) VTC was not engaged to provide TSIF requirements, (4) VTC did not gain access to any nonpublic information from Task Order work that gave it an unfair competitive advantage in the TSIF acquisition, even visits to the USPS location, (5) any advantage VTC may have obtained from viewing the TSIF site was mitigated by release of facility information with the TSIF Solicitation, (6) VTC did not gain any access to nonpublic information because of its presence at TSA headquarters, (7) there was no more advantage for VTC, if it had any, than that an incumbent would enjoy, (8) TSA took appropriate action to include disinterested personnel in the TSIF acquisition and evaluation, and (9) all TSIF proposals were evaluated properly on their merits.

Attach. D, ¶ 23.

Procedural History

129. Ribeiro received a post award debriefing which concluded on April 7, 2008, and subsequently filed the instant Protest with the ODRA on April 14, 2008. The Protest also sought a suspension of all work under the Contract and requested a hearing.

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130. The ODRA issued a Protective Order on April 15, 2008, and the Awardee, VTC, filed a notice of intervention in the Protest on April 17, 2008.
131. The TSA filed an Opposition to Ribeiro's Suspension Request on April 21, 2008 and on April 23, 2008, Ribeiro and VTC filed replies in connection with the suspension request.
132. Ribeiro filed a Supplemental Protest on April 24, 2008.
133. The ODRA issued a Decision on April 30, 2008, denying the Protester's Request for Suspension.
134. A telephone status conference was held in this matter on Tuesday, April 29, 2008, in order to establish a briefing schedule, among other things. During the conference, Ribeiro was directed to include within its Comments, a statement concerning whether it continues to request a hearing in this case, and the issues on which the hearing is needed, the witnesses that Ribeiro proposes to call and the approximate estimated length of the hearing. The ODRA further advised that, in the event of a hearing request, an opportunity would be provided to the TSA and the Awardee/Intervenor to comment on the request.
135. The TSA responded to the Protest by filing an Agency Response on May 12, 2008, which included a "TSA Statement of Position," and pages of exhibits numbered from 1 to 1486 containing, among other things, the solicitation and revisions thereto; solicitation amendments; solicitation attachments; the solicitation announcement and other related documents posted on FedBizOps; the proposals of the offerors; the source selection plan; technical, past performance, and price evaluation materials pertaining to all offerors; memorandums, correspondence and email communications concerning various aspects of the evaluation and award process; the Source Selection Official's Memorandum;

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debriefing materials; the Contract awarded to VTC; and Task Orders awarded to VTC under other contract vehicles along with related deliverables.

136. The Protester's Comments were filed on May 19, 2008, as were those of the Intervenor. The Protester's Comments asserted four new "supplemental grounds of protest," and alleged facts and arguments in support of those grounds.
137. On May 22, 2008, the TSA responded to Ribeiro's request for documents and provided 75 pages of supplemental documentation, numbered sequentially for inclusion in the Agency Response. In its response, the TSA also represented that all documents relating to source selection, the integration facility under the TSA Task Orders awarded to VTC, and potential OCI matters, have been produced to the extent that they have been identified or known to exist. *See* TSA letter, dated May 22, 2008, pp. 3-4.
138. In light of the new protest allegations, by letter, dated May 23, 2008, the ODRA directed the TSA to file a Supplemental Agency Response solely to address the supplemental protest grounds presented in the Ribeiro Comments. Supplemental Comments on the TSA Supplemental Agency Response, by either Ribeiro or Intervenor, also would be limited strictly to addressing the supplemental grounds of Protest set forth in the Ribeiro Comments.
139. The TSA filed a Supplemental Agency Response to the Supplemental Protest on June 6, 2008, and Supplemental Comments were filed by the Protester and Intervenor on June 13, 2008.
140. On June 26, 2008, the ODRA, by letter responded to Ribeiro's complaints about the TSA's production of documents set forth in the Protester's June 13, 2008 filing, as well as its proposals for ensuring the availability of a meaningful remedy. The ODRA informed the parties that it had reviewed Ribeiro's document request and the TSA response and found the TSA response to be adequate and consistent with its obligations under the ODRA Rules, which

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contemplate limited, focused discovery in the context of protest proceedings. *See* 14 C.F.R. §17.37(f). Additionally, the letter advised Ribeiro that per the ODRA's April 29, 2008 Status Conference Memorandum, the ODRA had not received from Ribeiro a statement as to whether it continues to request a hearing in this case, and directed Ribeiro to clarify whether it was withdrawing its original request for a hearing, and if not, to provide the requested information.

141. On June 27, 2008, Ribeiro advised the ODRA that it was withdrawing its request for a hearing and requested that the record be closed. On July 1, 2008, the ODRA issued a letter to the parties advising them that the record was closed and the matter was proceeding to a decision.

III. DISCUSSION

A. The Standard of Review

In accordance with the ODRA Procedural Regulations, 14 C.F.R. Part 17, and the FAA's AMS, the ODRA will not recommend that a post-award protest be sustained where a contract award decision has a rational basis and is neither arbitrary, capricious, nor an abuse of discretion and is supported by substantial evidence. *Hypernet citing Protest of Ibex Group, Inc.*, 03-ODRA-00275. In "best value" procurements such as this one, the ODRA will not substitute its judgment for those of the designated evaluation and selection officials as long as the record demonstrates that their decisions satisfy the above test, were consistent with the AMS and the evaluation and the award criteria set forth in the underlying solicitation. *Protest of PCS*, 01-ODRA-00184. Notably, an offeror's mere disagreement with the agency's judgment concerning the adequacy of its proposal is not sufficient to establish that the Agency acted irrationally. *Protest of En Route Computer Solutions*, 02-ODRA-00220. The Protester bears the burden of proof by substantial evidence that the award decision lacked a rational basis or was otherwise improper. 14 C.F.R. §17.37(j). In addition to proof of substantial evidence, a protester such as Ribeiro must demonstrate a reasonable possibility of prejudice; specifically, Ribeiro must show that but for the TSA's improper actions that are alleged here, it would

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have had a substantial chance of receiving the award. *See Protest of Optical Scientific Incorporated*, 06-ODRA-00365.

B. TSA was Not Required to Disqualify VTC Based on an Organizational Conflict of Interest

With respect to the OCI, Ribeiro asserts that VTC should never have been allowed to compete for, much less win, the instant contract due to a “blatant” OCI resulting from other contractual relationships with the TSA and OST. Ribeiro alleges that this OCI is the result of VTC’s prior involvement with and support of OST’s TSIF program and related technologies, as a contractor under three task orders. FF 8. According to Ribeiro, through the performance of these task orders, VTS gained access to decision makers and non-public information that enabled it to bias the ground rules of the procurement, and use that access unfairly to its advantage to win the competition. The Protest states this OCI materially prejudiced the Protester and other offerors by providing the Awardee with unequal access to information and the opportunity to create a bias in the “ground rules” of this procurement in its favor. Protest, page 9 and 14; Comments at 9.

1. Applicable Law

For acquisitions commenced prior to the effective date, *i.e.*, June 23, 2008, of the Consolidated Appropriations Act of 2008, the TSA continues to be exempt from the Competition in Contracting Act, 41 U.S.C. §251 *et seq.* and regulations under the Federal Acquisition Regulations (“FAR”).⁷ All TSA acquisitions issued prior to that date are conducted under TSA’s adaptation of the FAA’s unique Acquisition Management System (“AMS”), which authorizes the ODRA to adjudicate on behalf of the TSA Administrator, challenged actions of TSA acquisition officials. 49 U.S.C. §114(o); 49 U.S.C. §40110(d). In addition to being subject to the FAA AMS policies and guidelines, the TSA also has

⁷ The Transportation Security Administration (TSA) has been exempt from the FAR by authority of section 101(a) of the Aviation and Transportation Security Act (ATSA), Pub. L. 107-71 [codified at section 114(o) of title 49], which applies the FAA AMS to TSA acquisitions. The Homeland Security Act of 2002, Pub. L. 107-296 (HSA), as amended, transferred TSA into DHS, but maintained the application of the FAA AMS to TSA acquisitions. Subsequently, on December 26, 2007, the Consolidated Appropriations Act of 2008, Pub. L. 110-161 was enacted into law; thereby striking 114(o) of Title 49 and requiring TSA to follow the FAR system beginning June 23, 2008. .

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developed its own policies and contract clauses under the TSA Acquisition Management System (TAMS).⁸ As this acquisition was initially posted on January 24, 2008, it is an acquisition under the TAMS, and is subject to the FAA's AMS policies and procurement guidance, as well as established ODRA precedent.⁹

TAMS §3.1.7 sets forth the policy with respect to issues of organizational conflicts of interest and provides contracting officials with broad authority to resolve OCI issues on a case-by-case basis, as well as discretion to waive, or mitigate, an actual or potential conflict when such action is necessary to further the interests of the agency.” *Protest of MAXIMUS, Inc.*, 04-TSA-009, ODRA Decision, dated November 10, 2004. The AMS does not mandate exclusion of contractors from procurements in every instance where there is a prior contract or current contractual relationship between the FAA and a particular firm. *Protest of Crown Consulting, Inc.*, 01-ODRA-00181, at 22, *citing Protest of Washington Consulting Group*, 97-ODRA-00059.

As established in *Protest of Washington Consulting Group, Inc.*, 97-ODRA-00059, discretion is provided to the Contracting Officer under the AMS to assess and resolve potential OCIs for a particular procurement, either as a pre-award responsibility determination or during post-award contract administration. Where the underlying solicitation does not include consideration of potential OCIs as an evaluation factor, the agency maintains the authority and discretion to waive OCIs altogether, assuming that such a decision has a rational basis. *Id.*

In this regard, TAMS 3.1.7 defines an organizational conflict of interest to mean that because of existing or planned activities, an offeror or contractor is unable or potentially unable to render impartial assistance to the agency or has an unfair competitive advantage, or the offeror or contractor's objectivity is, or might be impaired. *See* FF 59. Notably, the clause expressly states, “[i]t is not the intention of the TSA to foreclose a

⁸ *See* http://www.tsa.gov/join/business/business_tsaams.shtm.

⁹ Decisions of the GAO are considered to be persuasive authority provided such decisions are consistent with the AMS and applicable laws and regulations and ODRA caselaw. *Protest of MAXIMUS, Inc.*, 04-TSA-009, ODRA Decision, dated November 10, 2004, *citing Protest of International Services, Inc.*, 02-ODSA-00224; *Protest of Transgroup Express*, 00-ODRA-00157.

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vendor from a competitive acquisition due to a perceived OCI” and “Contracting Officers are fully empowered to evaluate each potential OCI scenario based upon the applicable facts and circumstances.”

FAA Procurement Guidance T3.1.7 A:1 instructs the Agency to identify potential OCIs as early as possible in the procurement process, and to avoid, neutralize, or mitigate significant conflicts before contract award. Moreover, the FAA’s Procurement Guidance, T3.1.7 A: 5 speaks directly to situations where contractor support activities actually address the substance of the solicitation specifications. This guidance expressly states that even where a contractor furnishes specifications to be used in a competitive acquisition, an OCI may not exist in situations “in which contractors, acting as industry representatives, help Government agencies, refine, or coordinate specifications, regardless of source, provided this assistance is supervised and controlled by Government representatives.” T3.1.7 (a)(2). Additionally, the guidance recognizes that there may be instances when contractor assistance is necessary in preparing statements of work, but that this does not automatically mean that the contractor had an unfair opportunity to establish the groundrules and favor its own products or capabilities, where more than one contractor was involved in the effort. T3.1.7(c)(3). The guidance also states:

In development work, it is normal to select firms that have done the most advanced work in the field. These firms can be expected to design and develop around their own prior knowledge. Development contractors can frequently start production earlier and more knowledgeably than firms that did not participate in the development, and this can affect the time and quality of production, both of which are important to the Government. In many instances the Government may have financed the development. Thus, while the development contractor has a competitive advantage, it is an unavoidable one that is not considered unfair, therefore no OCI mitigation would be necessary.

T3.1.7(d).

Thus, based on the above, the AMS clearly contemplates situations where Contractors can compete in an acquisition, even where they may have participated in preparing specifications or statements of work for the acquisition.

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2. The Record does not Support Ribeiro's OCI Allegation

Ribeiro alleges that the disqualifying OCI is the result of prior task orders (“Task Orders”) awarded to VTC by the TSA in connection with integrating aviation related security equipment. Under the Task Orders, VTC supplied such services as “engineering, engineering analysis,” “planning of developmental and operational testing,” “engineering advice, assistance, data collection, and evaluation;” and “planning, coordination, and supervision,” among others. Protest, page 11, *citing* TSA Task Order No. HSTS04-06-F-CT0048, Section 2.0, Scope. The Protest argues that through the Task Orders, VTC has “been able to define for TSA the very requirements which form the very core of the present Solicitation, and to obtain information about vendors in the space, their technology and other salient, nonpublic aspects of the marketplace, thereby giving the Awardee a distinct unfair competitive advantage.” Protest, page 13.

The Protest also asserts that VTC maintains an office within the OST offices and its employees have full access to OST, its decision-makers, and data, and “has provided best practices guides and other information to TSA and OST with the specific intention of both parties of influencing the government’s approach to procurements such as the one at issue here.” *Id.* As a result of the above actions, Ribeiro alleges that VTC gained significant access to TSA, and in particular, the OST; and obtained “enormous amounts of ‘nonpublic information’ relevant to this Solicitation” which allowed VTC to influence the rules in its favor and enjoy an unfair competitive advantage. Protest, page 14. The Protest also contends that this situation impaired the impartiality of the TSA in the instant acquisition, as well as of VTC with respect to the advice and analysis it provided under the TSA Task Orders. Protest, page 14.

TSA argues that the OCI allegation is untimely and presents the exception from the general rule that a protester is not required to protest that another firm has an impermissible OCI until that firm has been selected for award. The TSA reasons that Ribeiro, by its own admission, possessed knowledge regarding its claim of OCI matters prior to submitting its proposal for the TSIF due to its possession of Task Order No.

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HSTS04-06-F-CT0048 and the posting of Q&A's indicating the TSA position that no OCI existed that would prohibit VTC from submitting a proposal.¹⁰ AR at 39-40, *citing* Protest at 11, 13.

TSA argues that, even if the Protest is timely, Ribeiro cannot identify a TSIF acquisition requirement that gives a competitive advantage to VTC; nor can it present information that indicates VTC had the benefit of inside information regarding the TSIF acquisition. AR at 42. TSA further argues that, while VTC did provide support to OST under several TSA Task Orders, it neither developed TSIF requirements nor gained access to nonpublic information in connection with the TSIF acquisition, and none of the work provided VTC with an unfair competitive advantage. AR at 43.

The ODRA finds that although VTC's activities under these Task Orders in support of OST addressed directly, or indirectly, many aspects of the TSIF solicitation, VTC did not have an unfair competitive advantage and was not rendered ineligible for award. The ODRA also finds that the Contracting Officer ("CO") rationally exercised his authority and discretion to review the OCI issue, more than once during the course of the procurement and the CO's conclusion in that regard had a rational basis and was not arbitrary, capricious, or an abuse of discretion. FF 125-128. Aspects of the previous work of VTC cited by Ribeiro in support of its OCI allegations are discussed in the following sub-sections.

- a. Advanced Technology + Computed Tomography Slide Presentation

¹⁰ As a general rule, the Government Accountability Office ("GAO") has stated that a protester is not required to protest that another firm has an impermissible OCI until that firm has been selected for award. *See Maximus, citing CDR Enterprises, Inc.*, March 26, 2004, B-293,557, 2004 CPD ¶ 46; *Kimmins Thermal Corporation*, B-238,646, September 12, 1990, 90-2 CPD ¶ 198 (agency's acceptance of a proposal for evaluation does not itself amount to a determination that the offeror is eligible for award of the contract); *see also John J. McMullen Assocs., Inc., B-188703*, Oct. 5, 1977, 77-2 CPD ¶ 270 (protester not charged with knowledge that another firm was considered eligible for award simply because the protester knew that the other firm had submitted an offer). As in *Maximus*, the ODRA adopts this general rule in this case, with the exception of the OCI allegation pertaining to VTC's involvement with the PGDS, which is discussed below.

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In support of its OCI allegation, Ribeiro relies on a BHS concept study slide presentation entitled “Advanced Technology + Computed Tomography and Integrated Test Facility” that VTC prepared under Task Order No. HSTS04-07-f-DEP131. FF 15. However, the record lacks substantial evidence to support the contention that VTC’s preparation of this slide presentation involving computed tomography provided VTC with access to “nonpublic information” that provided a competitive advantage in the TSIF competition. The record shows that VTC was identified as a contractor who was familiar with BHS design and integration that could develop a slide presentation on AT + CT in an integration facility for Assistant Administrator [DELETED] to use, among other things, to brief senior TSA and other officials to obtain approval and funding for the TSIF effort. FF 7. The slide presentation identified a need for such an integration facility but does not provide detail about the facility. FF 17. Rather, the purpose of the paper was to evaluate how combining the high speed AT equipment with the medium speed CT equipment could increase checked baggage screening efficiency as well as lower equipment costs by increasing throughput and reducing the number of EDS required for a screening matrix. *Id.* The record indicates that this deliverable had nothing to do with the TSIF requirements for the design and construction of a baggage screening and test facility, but rather was a high-level, conceptual presentation.

There also is no substantial evidence that development of the AT + CT Concept Slides under Task Order No. HSTS04-07-f-DEP131 allowed VTC to establish important “ground rules” for the TSIF competition or impair the objectivity of the TSA contracting officials in connection thereto. Ribeiro asserts that the Concept Slides “included detailed text and very precise and specific aspirations for the TSIF, such as desired throughput rates” and as such are evidence of involvement in the development of the TSIF specifications that would give rise to an actual OCI. *See* Ribeiro Comments at 13. As previously discussed, the purpose of the slide presentation was to focus on a particular type of technology, and while the slide presentation identified a need for an integration facility, it did not provide details about the facility, FF 17, that would establish “ground rules” for the “ultimate TSIF requirement.” Comments at 12.

b. TSIF Task Plan and Building Survey

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Ribeiro also challenges as evidence of an OCI, work that VTC provided under Task Order No. HSTS04-07-f-DEP131, *i.e.*, the ITF Task Plan, which included an initial market survey addressing a suitable location for the site. FF 15. The record lacks substantial evidence to support the allegation that VTC's work in developing the ITF Task Plan and its performance of an initial market survey under this Task Order provided VTC with access to "nonpublic information" that could provide a competitive advantage in the TSIF competition. The record shows that pursuant to Task Order No. HSTS04-07-F-DEP131, VTC submitted a ten page concept paper to illustrate how such a facility could be used as an all inclusive test site for screening equipment and processes. FF 19. Such a facility was the subject of widespread public discussion for a long time, as well as the subject of internal DHS debate, FF 4, and VTC's Task Plan was not the only such proposal TSA received in connection with the development of the TSIF concept. FF 22.

The record shows that VTC's Task Plan generally describes the ITF technical and operational requirements, including generic BHS designs, along with other considerations for such an effort, and sets forth the results of market research it conducted with respect to potential sites and facilities. FF 20-21. In contrast to the Task Plan, which is conceptual, the actual requirements in the TSIF Solicitation are specific and reflect the precise needs of the TSA as they relate to: a facility size of 128,000 sq. ft., AR 6, 163; lease site at Reagan National Airport, AR 6, 163; specific concept drawings for both facility and BHS, with critical component list, AR 63-64, 217-218; four Critical Milestone dates, AR 9, 166; 45 areas of space with notional space allocations, AR 10, 13, 170, 1211-1212, 1399-1191; as-built drawings and engineering assessment for facility, AR 6, 85-130, 163, 1406; a detailed schedule with defined critical milestones, AR 9, 166; a multi-purpose test area for testing other critical areas, AR 12-13; and detailed office space requirements, AR 10, 13, 168, 170, 1211-1212, 1261-1322, and 1390-1391.

Ribeiro complains that VTC had substantial access to the site and information about the site for more than nine months prior to proposal submission, which gave it a substantial unfair advantage over Ribeiro and the other offerors. Comments at 3. Ribeiro also complains that VTC's access to site selection criteria or scoring methodology for the

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TSIF facility gave it a “keen understanding of the underlying goals and interests of the TSA in the TSIF.” Suppl. Comments at 19.

Even with access to and information about the site nine months before the due date for proposal submission, as argued by TSA, VTC could not have had a competitive advantage because it did not have access to the actual TSIF Solicitation and could not have prepared a responsive proposal that addressed specific TSIF requirements relating to the checked baggage test area, information technology, office area, notational space allocations, building office space, multi-purpose test area, parking lot, government furnished equipment and information and building repair and maintenance issues. FF 41-42, 45-46; TSA Suppl. Response at 16-17. As for any competitive advantage of knowing the “underlying goals and interests of the TSA in the TSIF” resulting from access to site selection criteria or scoring methodology, these goals and interests were clearly set forth in the Solicitation. FF 50. Moreover, the record shows that all competing offerors were given similar access to the relevant information, FF 41-42, 45 – 46, and no offeror requested an extension of the due date for submission of bids due to a lack of sufficient time to prepare a proposal.

The record further does not show substantial evidence in support of Ribeiro’s allegation that the VTC Task Plan was not just a “concept paper” but rather a specific Task Plan for developing a TSIF, Comments at 3, and thereby resulted in resulted in a competitive advantage by influencing the groundrules or impairing the objectivity of the TSA. As previously discussed, the record shows that this Task Plan constituted a broadly written “high level” conceptual proposal for a systems integration test facility, FF 36, and it was not a deliverable for the TSIF Solicitation.¹¹ FF 37. As explained by [DELETED], the Chair of the Technical Evaluation Team, the VTC Task Plan focused solely on the concept of having a test facility, while the TSIF solicitation identified and defined in

¹¹ Ribeiro contends that the TSA has refused to provide additional relevant documents in this regard that would show the extent of involvement of VTC in developing the requirements for the TSIF, Suppl. Comments at 2 and 3, and that the ODRA should draw an adverse inference from TSA’s failure to produce them. Suppl. Comments at 9. TSA claims that no documents have been withheld and there is no proof that such responsive documents exist. Thus, the ODRA will not on this record draw the requested adverse inference.

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detail the full functionality that the design and construction of the facility required. FF 33 and 7.

Rather, the record shows that VTC had no role in defining or refining any of the TSIF requirements; nor was it tasked to support the TSIF solicitation development in any way. FF 34. Moreover, the record indicates that the TSIF Solicitation varied significantly from the requirements set forth in the ITF task plan. The Task Plan's schematic diagrams reflect generic BHS designs similar to those contained in the PGDS document. AR 1110-1120. The PGDS schematic drawings simply reflect non-proprietary, generic layouts that any BHS design company could create. Moreover, comparison of the Concept Paper with the TSIF Solicitation demonstrates that the two differ significantly with respect to requirements for facility size, site location, BHS, project schedule, facility areas, site selection, schedule concept, multi-purpose room and office space. FF 21; TSA Suppl. Response at 10-11.

Furthermore, the record lacks substantial evidence in support of Ribeiro's speculative allegation that VTC developed its TSIF Task Plan with the location selected in its site/market survey in mind, thereby impairing its objectivity on both projects and allowing it to bias the ground rules of the procurement in its favor. Comments at 3. As discussed above, the record indicates that the TSIF Task Plan was not a deliverable for the TSIF Acquisition. Moreover, even though VTC was involved in an initial market survey for an ITF site in connection with its development of the TSIF Task Plan, Comments at 3; FF 23, the record shows that the actual selection of the USPS location was made by the TSA, FF 24 and 127, and not by VTC.

In this regard, the record shows that TSA's Office of Real Estate was responsible for the site selection decision. *Id.* As explained by [DELETED], after receiving OST's request for a warehouse facility in May 2007, he began to identify the necessary basic requirements, notwithstanding the fact that OST provided to him a list of candidate sites. His own research immediately revealed the existence of a warehouse facility at Reagan National which was excess Federal property, and subject to a 20-year building lease held by USPS, which no longer used the facility. He states that independently, he would have

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located this building as the obvious choice for the TSIF site, regardless of the recommendation of VTC, which had no role in the TSA site selection decision. *Id.* Ribeiro has not produced substantial evidence rebutting [DELETED]'s sworn statement.

The ODRA finds [DELETED]'s explanation, which provides a detailed rationale for contemporaneous conclusions of the TSA, to be credible. The ODRA, in reviewing the rationality of selection decisions, may consider post-protest explanations that provide previously unrecorded details, so long as those explanations are credible and consistent with the contemporaneous record. *Enroute Computer Solutions*, 02-ODRA-00220; *AIU North America, Inc.*, B-283743, Feb. 16, 2000, 2000 U.S. Comp. Gen. LEXIS 34; *Jason Associates Corp.*, B-278689, March 2, 1998, 1998 U.S. Comp. Gen. LEXIS 61; *Northwest Management, Inc.*, B-277503, Oct. 20, 1997, 97-2 CPD ¶ 108 at 4 n. 4.

Additionally, the ODRA finds that the fact that VTC recommended the site ultimately chosen by the TSA did not provide VTC an unfair competitive advantage over its competitors. To the extent that the VTC Task Plan recommends the USPS site and identifies general facility information in that regard, as discussed above, all relevant facility information regarding the site was contained in the TSIF Solicitation materials, which was released to all offerors, including Ribeiro.

c. PAX 2.0 Site Survey

Ribeiro also bases its OCI challenge on a deliverable that VTC provided under Task Order No. HSTS04-06-F-CTO048,¹² *i.e.*, the PAX 2.0 site survey. FF 12-14. Based on VTC's expertise supporting such systems in the field, VTC was tasked to do a "short and simple site survey of the TSIF building, because the TSA had decided to install a prototype of this technology in the TSIF building. FF 13. The purpose of the survey was to focus on determining whether the building in its current form could accept the [DELETED] and related technologies, in accordance with the scope of Task Order No.

¹² This Task Order was competitively awarded August 21, 2006 for systems integration work to support OST's operational use and evaluation activities of [DELETED] technology, [DELETED]. Generally, this work involved field testing and evaluating prospective systems in a simulated integration facility. FF 9.

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HSTS04-06-F-CTO048.¹³ No other instructions were given to VTC in this regard, except to assess the building's ability to support technologies proposed for PAX 2.0. FF 9, 13. Subsequently, all activity relative to providing full engineering support services for the PAX 2.0 program were assumed by [DELETED] under a competitively awarded contract. FF 12-14.

The PAX 2.0 site survey consists of 6 pages and states that a "preliminary and partial site survey" of the TSIF "was conducted to determine the feasibility of initial PAX 2.0 testing and staging in designated areas on the second floor of the facility." The survey addresses such topics as columns, elevators, lights, restroom, electrical and equipment access, and concludes as follows: "There is sufficient power for the proposed PAX 2.0 testing and BWI staging. Layout drawings for BWI have not been received; the area proposed for staging is indicated In the absence of BWI layout drawings, it cannot be confirmed with certainty that the area will accommodate the proposed four-lane configuration. However, there is sufficient area for the two-lane configuration for extended/concurrent testing of PAX 2.0 concepts within the TSIF" AR 1035-1040.

Ribeiro asserts that the PAX site survey provided VTC with high level detail regarding the site and was delivered to the TSA "just over two weeks prior to the issuance of the Solicitation," Comments at 18-20. There is no substantial evidence in the record showing that VTC's performance of the PAX 2.0 survey gave VTC an unfair advantage over the competition because, as required by the AMS, the TSA provided the same facility information that was contained in the survey to offerors, either in the TSIF Solicitation, or attachments posted on the FedBizOpps site. FF 41-42, 45 – 46; *See also* TSA Suppl. Response at 13-15. Moreover, as compared with the scope of TSIF site information provided with Amendment 1 of the Solicitation, the building information VTC identified in the PAX site survey is consistent with how [DELETED] described it, i.e., "short and

¹³ Task Order No. HSTS04-07-F-CTO062 was competitively awarded May 24, 2007, for systems integration work to support OST's operational use and evaluation of [DELETED] equipment at [DELETED]. FF 8. The record shows that work under this Task Order was unrelated to any TSIF support work, FF 25, and there is no indication that VTC's support under this Task Order provided VTC with access to "nonpublic information" that could provide a competitive advantage in the TSIF competition; nor any indication that this Task Order allowed VTC to establish important "ground rules" for the TSIF competition.

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simple,” and Ribeiro does not identify any building information relevant to the PAX site survey that was not released to offerors. Additionally, as discussed previously, VTC’s earlier access to the information did not create an unfair competitive advantage, since no offeror could prepare a responsive proposal until it had received the TSIF solicitation materials which encompassed broad requirements pertaining to the design and construction of BHS, facility build out, BHS maintenance and Test Area support. FF 51-56.

In sum, the record lacks substantial evidence showing that performance of this Task Order deliverable provided VTC with access to “nonpublic information” that provided a competitive advantage in the TSIF competition, particularly since competing offerors were given timely access to the relevant information; nor is there any evidence that the PAX 2.0 site survey allowed VTC to influence the conduct of the TSIF acquisition in any way.

d. Involvement in BSIS/PGDS

The ODRA finds that Ribeiro’s allegation is untimely to the extent that it alleges an OCI based on VTC’s support of the BSIS and PGDS efforts under Task Order No. HSTS04-07-f-DEP131. FF 15. The record shows that VTC was one of many representatives from the airline, airport and engineering/construction industries, as well as Federal government agencies, that the TSA engaged to produce a Baggage Screening Investment Study (“BSIS”), which was later refined into the PGDS, which is a public document. FF 27-30. Here, the involvement of VTC in developing the PGDS, the PGDS’ incorporation into the Solicitation specifications, and the TSA’s position with respect to the possibility of an OCI resulting from the participation of VTC, as well as another company, in the PGDS effort, were unambiguously set forth in the Solicitation, Amendment 1, and the attachments.¹⁴ FFs 52, 74. These Solicitation documents clearly notified Ribeiro of the

¹⁴ In this regard, the ODRA notes that even when a contractor participates in the development of the specifications for an acquisition, it does not necessarily result in a disqualifying OCI where the contractor’s participation as an industry representative, is not exclusive, and is supervised and controlled by Government representatives. AMS Procurement Guidance T3.1.7A.

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basis for this protest allegation, and it was incumbent on Ribeiro to file such a challenge prior to the closing date for receipt of initial proposals.

Pursuant to the ODRA Procedural Regulations, apparent solicitation improprieties, at a minimum, must be protested prior to the closing date for proposals. *See* 14 C.F.R. § 17.15(a). Under the ODRA Procedural Regulation, 14 C.F.R. Part 17, the ODRA does not have discretion to extend the stated time limits for protest filings, and such time limits are strictly enforced. *Protest of Boca Systems, Inc.* 00-ODRA-00158; *Protest of Bel-Air Electric Construction, Inc.* 98-ODRA-00084; *Protest of Raisbeck Commercial Air Group, Inc.* 99-ODRA-00123; *Protest of Aviation Research Group/US, Inc.* 99-ODRA-00141.

Since Ribeiro failed to timely raise this issue prior to the closing date for receipt of initial proposals, it cannot now challenge it in the context of this post-award bid protest. *See Protest of Bel-Air Electric Construction, Inc.*, 98-ODRA-00084; *see also Women's Energy, Inc.; San Franciscans for Public Power; City and County of San Francisco*, B258785 (February 15, 1995); *MIL Corporation*, B-297508 (January 26, 2006).

3. Access to TSA Officials and Facilities

The record also is lacking in substantial evidence to support Ribeiro's allegation that as a result of its task order activities, VTC had an OCI that arose from having physical access to TSA, its files, IT systems, and personnel by virtue of its office located within TSA headquarters. Comments at 3. The record reflects that the TSA offices responsible for the TSIF acquisition were sensitive to the presence of VTC, its personnel and its support on other OST efforts. FF 124. For that reason, the Source Selection Official and members of the TET were chosen from government personnel who did not have a working relationship with VTC. FF 124. Additionally, the record shows that VTC and the individuals participating in the TSIF acquisition effort were physically separated. The TSA offices responsible for the TSIF acquisition, OST and the Office of Acquisition are in the West building, while VTC's office is in the East building. FF 122, 123. The record also shows that, with the exception of private email, no information about the

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TSIF acquisition was available on the TSA's IT shared IT infrastructure and that all meeting attendance and written documentation was controlled and kept in another support contractor's corporate offices in New Jersey.¹⁵ AR 35. Given that VTC was essentially "firewalled" from the TSIF acquisition in these respects, and the fact that Assistant Administrator [DELETED] had no involvement in the actual development of the TSIF requirements, the ODRA finds that the TSA rationally considered the proximity of VTC's office to that of Assistant Administrator [DELETED] not to pose an OCI risk. FF 121.

4. OCI Allegations of Bias or Bad Faith

It is a well-established principle of procurement law that a presumption of regularity and good faith attaches to the actions of government officials, and that a party alleging bad faith on the part of the Government must ordinarily come forward with "well nigh irrefragable" or otherwise "clear and convincing" proof in order to overcome the presumption. *Maximus, citing Protest of Royalea'L Aviation Consultants*, 04-ODRA-00304. Bad faith will not be attributed to the Product Team solely on the basis of inference or supposition. *See Protest of Optical Scientific, Inc.*, 06-ODRA-00374; *See also Protest of Camber Corp.*, 98-ODRA-00102. As for allegations other than bad faith, speculative assertions do not satisfy the protester's burden to demonstrate by substantial evidence that the award decision lacked a rational basis or was otherwise improper. 14 C.F.R. §17.37(j).¹⁶ Inferences will not substitute for substantial facts and hard evidence of an OCI. *Operational Resources Consultants, Inc.*, B-299131.1, B-299131.2, February 16, 2007.

¹⁵ Even so, the record shows that no contractor assisted with the development of Solicitation Amendment 1. FF 44.

¹⁶ Without substantive evidence, Ribeiro alleges that VTC appears to have made misrepresentations and false statements to the contracting officer to mask its true involvement in the TSIF project and the procurement, in violation of the Solicitation and its existing Task Orders; and asserts that "these false statements among other things should be referred to the TSA Inspector General for further investigation." Comments at 4.

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Except for speculation and conjecture, Ribeiro presents no credible evidence in support of its allegation that VTC had “unbridled” access to TSA decision makers involved in the TSIF program and this procurement, and had prior working relationships with more than half of the TSA personnel assigned official roles in the technical evaluation, including the Chair of the evaluation team. Comments at 3. In fact, the record contradicts this assertion. FFs 34, 122 and 124. Access to key personnel and the existence of prior working relationships does not necessarily translate into an actual OCI, absent substantial evidence showing otherwise. Likewise, Ribeiro asserts with respect to the BSIS and PGDS publications, that the “real problem with Vic Thompson’s work on these guidelines is not the publications themselves, but the close working relationships he developed and maintained with agency personnel who were then involved with this procurement.” Suppl. Comments at 17. Again, implying that these “close working relationships” are indicative of an OCI, or worse, *i.e.*, bias and bad faith; Ribeiro’s assertion fails for lack of proof.

Ribeiro also asserts that the Task Plan contemplated that VTC would receive a \$50 Million sole source award to design, build and operate the TSIF, and that this fact somehow is indicative of an actual OCI. Suppl. Comments at 2. As discussed above, the Task Plan was not used to develop the TSIF solicitation. As for VTC’s aspirations to receive a sole source award, the fact remains that TSA competed this requirement and took all actions available to level the playing field, short of excluding VTC, which is essentially the remedy that Ribeiro advocates. The ODRA does not view VTC’s proposal to be evidence of an OCI. The ODRA also takes note of the fact that there is no evidence in the record to suggest TSA even considered VTC’s proposal for a sole source contract. Rather, the record shows that TSA moved forward with a competitive acquisition in accordance with the AMS preference for competition.

The record also shows that that the Contracting Officer: was sensitive to the potential of an improper OCI with VTC; addressed these concerns to counsel; and took actions to address the potential existence of an OCI on the part of VTC.¹⁷ FF 120. As discussed

¹⁷ Ribeiro argues that the sheer number of man hours billed under GSA’s Schedule Task Orders does not comport with the “mere 70 pages of documents” produced by TSA in this regard and belies the fact that the

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above, the TSA took action to “firewall” VTC from the TSIF acquisition. The record also shows that the TSA released significant amounts of information on the TSIF, including volumes of detailed design drawings of the TSIF, building survey information, the PGDS, TSA construction standards and various other documents. FFs FF 41-42, 45 – 46.

The Contracting Officer also specifically addressed issues concerning the mitigation of a potential OCI throughout the course of the procurement. FF 120, 125 and 126. For example, the Contracting Officer explains how he later learned of additional information that caused him concern about the existence of a potential OCI with VTC, namely, that VTC had been involved in site survey activities in connection with the TSIF under Task Order Nos. HSTS04-07-F-DEP131 and HSTS04-06-F-CTO048. FF 126. The Contracting Officer states that he questioned VTC in this regard and learned that Mr. Vic Thompson had visited the USPS facility three times, each visit lasting approximately two hours; moreover, two of his site visits were in connection with “scouting locations for the TSIF and one involved a site survey for the PAX 2.0 program.” *Id.* The record shows that the Contracting Officer determined that VTC assisted TSA in identification of potential locations for the TSIF, including the USPS facility, but that was TSA OST that recommended the USPS site to the TSA Office of Real Estate. *Id.* The Contracting Officer also concluded that VTC did not gain access to any non-public information, and even if it did, that the release of the as-built TSIF drawings and other documentation was sufficient mitigation. *Id.*

The Contracting Officer also revisited the question of whether VTC had an improper OCI following the filing of this Protest, and reviewed the Task Orders at issue, the deliverables provided by VTC and the declarations. He confirmed with respect to the OCI question that:

TSA made any meaningful consideration of the potential existence of an OCI. Suppl. Comments at 11. The record, however, reflects that the TSA represented that it has produced all documents relating to source selection, the integration facility under the TSA Task Orders awarded to VTC, and potential OCI matters. FF 137.

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(1) [T]he deliverables provided by VTC related to the TSIF are high level conceptual documents used for other purposes, (2) none of the deliverables contain TSIF requirements, (3) VTC was not engaged to provide TSIF requirements, (4) VTC did not gain access to any nonpublic information from Task Order work that gave it an unfair competitive advantage in the TSIF acquisition, even visits to the USPS location, (5) any advantage VTC may have obtained from viewing the TSIF site was mitigated by release of facility information with the TSIF Solicitation, (6) VTC did not gain any access to nonpublic information because of its presence at TSA headquarters, (7) there was no more advantage for VTC, if it had any, than that an incumbent would enjoy, [and] (8) TSA took appropriate action to include disinterested personnel in the TSIF acquisition and evaluation.

FF 128.

5. Incumbent Advantage

Any competitive advantage enjoyed by VTC was akin to that normally enjoyed by an incumbent contractor. The record confirms that as a result of its prior task order work, VTC was very familiar with the concepts involved in the TSIF. FF 8 – 17, 19, 23, 25-30. The fact of prior related work does not mean, however, that an OCI exists or that the Government must exclude such a contractor from future competitions. *Protest of Crown Consulting, Inc.*, 01-ODRA-00181. In *Crown*, the ODRA stated “[t]he AMS allows contracting officials broad discretion in determining how to deal with OCIs and does not mandate exclusion of contractors from procurements in every instance where there is a prior contract or current contractual relationship between the FAA and a particular firm.” *Id.* citing *Protest of Washington Consulting Group*, 97-ODRA-00059. Moreover, there is no requirement for an agency to equalize a competitive advantage that a firm may enjoy because of its own particular circumstances or because it gained experience as a result of performing prior contract work. *See Maximus, supra*; *see also Protest of Geographic Resource Solution*, B-260502, 95-1 CPD ¶ 278. It is well established that a contracting agency is not required to compensate for every competitive advantage inherently gleaned by a competitor’s performance of a particular requirement. *Protest of Northrop Grumman Systems Corporation*, 06-ODRA-00384 (Decision on Motion to Dismiss, *citing Protest of Raytheon Company*, 01-ODRA-00177; nor is an agency prevented from

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considering the advantages to be gained by award to a company with incumbent type experience. *See Enroute Computer Solutions*, 02-ODRA-00220, *citing Universal Systems & Technology, Inc.*, 01-ODRA-00179 (consideration of the advantages to be gained by award to incumbent is not inherently “unfair”).

In sum, the ODRA finds the Contracting Officer’s conclusions to be consistent with the record and his broad authority to determine how to deal with potential or actual OCI’s in accordance with TAMS §3.1.7 and AMS §3.1.7 to further the interests of the Agency, while at the same time, promoting the integrity of the competitive process. *See Protest of Washington Consulting Group, Inc.* 97-ODRA-00059, ODRA Decision dated February 18, 1998. The Contracting officer’s actions demonstrate no abuse of discretion; nor were they arbitrary or capricious. Substantial evidence supports a finding that the decision not to exclude VTC from the competition had a rational basis.

C. TSA’s Evaluation of the VTC and Ribeiro Proposals had a Rational Basis

Ribeiro alleges that TSA conducted a flawed evaluation and best value analysis of both initial proposals and of VTC’s modified proposal. Comments at 38. Specifically, Ribeiro also contends that the TSA Technical Evaluation Team (“TET”) evaluated as [DELETED] aspects of Ribeiro’s proposal that were substantially identical to aspects of the VTC proposal that were evaluated as [DELETED]. Comments at 5. Ribeiro also argues that TSA [DELETED] and [DELETED] those of VTC, demonstrating a bias towards VTC. Suppl. Comments at 33-34.

TSA asserts that the Government fairly treated and evaluated all offerors and rationally determined that VTC’s technical proposal was clearly superior and represented the best value, while the Ribeiro proposal contained [DELETED]. Agency Response at 24. The TSA also asserts that the TET evaluated Ribeiro’s proposal based on the requirements stated in the Solicitation, Agency Response at 25, and that Ribeiro did not propose to the stated requirements. Agency Response at 26.¹⁸

¹⁸ TSA also argues that Ribeiro’s challenge against the TET’s findings of [DELETED] is untimely. TSA Suppl. Response at 22-23. The ODRA disagrees that these arguments constitute untimely new protest

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The Solicitation informs offerors that the TSA would make the award to the proposal that conforms to the Solicitation and represents the best value solution to the TSA. FF 69. Proposals were to be evaluated against the evaluation factors of Technical Approach, Past Performance, Business Management, and Pricing/Cost. FF 71 and 72. Among the non-price factors, the technical approach was more important than past performance and past performance was more important than business management. FF 71. The Solicitation also states that the TSA could waive informalities and minor irregularities in the offers received, and reject any submittal if it was in the public interest to do so. FF 69. Additionally, the Solicitation states that in order to receive consideration for award, a proposal had to be deemed acceptable by meeting the requirements in each area. FF 71 and 81.

Despite a rating of [DELETED] under the Business Management Factor, the initial TET findings rated Ribeiro as [DELETED] for the other factors, and gave Ribeiro an overall rating of [DELETED]. FF 87. VTC was assigned a rating of [DELETED] for the Technical Approach Factor, [DELETED] for the other factors, and received an overall rating of [DELETED]. *Id.*

1. Evaluation of Non-Price Factors

Ribeiro challenges the TET's evaluation findings of [DELETED] in the non-price factors set forth in Section M.3.2. FF 72. These non-price factors were considered to be "significantly more important than price," with the Technical Approach Factor being the most important. FF 71. According to the Source Selection Plan ("SSP"), a "significant weakness" is assigned to a "flaw in the proposal that appreciably increases the likelihood of unsuccessful performance," while a "weakness" is defined as a "flaw in the proposal that increases the likelihood of unsuccessful contract performance." FF 82.

a. Evaluation of Technical Approach

grounds. Rather, they flow from Ribeiro's original protest assertion that TSA's evaluation of proposals lacked a rational basis and offerors were treated unequally in the procurement with respect to allowing them to respond to [DELETED]. Protest at 19-21.

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The Solicitation instructs offerors to provide information on their proposed Facility Design that describes the approach used to ensure that the facility design supports TSIF operations. Specifically, with respect to the checked Baggage Test Area Design, the offerors were asked to describe in detail the “ease of maintenance, flexibility for reconfiguration, utilization of Checked Baggage environment components and the ability to meet the mission of the TSIF. FF 65.

Ribeiro asserts that the evaluation’s conclusions that led to its [DELETED] rating lacked a rational basis and were unfair with respect to its BHS design. Ribeiro argues that contrary to the findings of the TET, [DELETED]. Comments at 43. Ribeiro also contends that a portion of the VTC design involved [DELETED]. *Id.* Ribeiro further disagrees with the TET’s finding that [DELETED]. *Id.* Ribeiro also challenges the TET’s conclusion that its design [DELETED], citing to sections of the Ribeiro proposal that discuss [DELETED]. Comments at 44.

The record shows that the TET rated Ribeiro as [DELETED] for the Technical Approach Factor for several reasons. Specifically, the TET found as [DELETED] the fact that Ribeiro’s proposed [DELETED]. FF 90. The TET found the Ribeiro design [DELETED]. *Id.; see also* TSA Suppl. Response at 26. The passenger screening area will test every aspect of checkpoint screening, citing AR 168-169, and the TET found [DELETED]. *Id.* As for Ribeiro’s allegation that VTC also proposed [DELETED], Comments at 43, the TSA points out that VTC’s reference to [DELETED] refers to [DELETED] and not [DELETED]. TSA Suppl. Response at 26.

As for the question of BHS design flexibility, the TET found that Ribeiro [DELETED]. FF 90; AR 168-169, 230; 376-391;455-463; 734-735; 751. The TSA explains that the references [DELETED] cited by Ribeiro refer to [DELETED] to accommodate rapid changes in technology, without impacting testing operations. *See* TSA Suppl. Response at 27.

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In addition to these [DELETED], the TET found the Ribeiro proposal to contain [DELETED], namely, [DELETED]. Moreover, the TET viewed as a [DELETED] Ribeiro's proposed design [DELETED]. FF 90. The TET further found there to be [DELETED]. FF 92. The TET also found that [DELETED]. *Id.* Specifically, it found [DELETED]. *Id.* In addition, the TET indicated that Ribeiro [DELETED] as required by the Solicitation. *Id.*

In contrast, the TET rated VTC's [DELETED] as [DELETED] because it provided a discussion of [DELETED]. FF 87. The TET found that VTC also proposed [DELETED]. *Id.* The TET also found that VTC's proposal provided an [DELETED]. *Id.* The TET further viewed VTC's proposed BHS design as [DELETED], yet still addressed every key aspect of the requirements; and a [DELETED]. *Id.* The TET also found [DELETED] in VTC's proposed Technical Approach. AR 730.

Technical evaluators have considerable latitude in assigning ratings, which reflect their subjective judgments of a proposal's relative merits. *Protest of Universal Systems & Technology, Inc.*, 01-ODRA-00179. The ODRA will not substitute its judgment for that of the technical evaluators, where their ratings and findings are properly supported, rationally based, and consistent with the Solicitation and the AMS. *Id.* It is well established that the evaluation of technical proposals is a matter within the contracting agency's soundly-exercised discretion, since the agency is responsible for defining its needs and the best method of accommodating them. *Id.*

The ODRA finds that, based on the record, the TET had a clear and well-substantiated rationale for the identified technical concerns and [DELETED] rating with respect to Ribeiro's Technical Approach.¹⁹ Ribeiro's objection to the TET's evaluation conclusions in this regard amounts to nothing more than mere disagreement—which is not sufficient to invalidate the TET's findings or establish disparate treatment. *See Protest of Global Systems Technologies, Inc.*, 04-ODRA-00307; *Protest of Raytheon Technical Services*

¹⁹ In the ODRA's view, based on the [DELETED] found with the Ribeiro design, and the fact that [DELETED] are flaws which appreciably increase the likelihood of unsuccessful contract performance, the TET [DELETED]. FF 82.

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Company, 02-ODRA-0021, citing *Protest of Universal Systems & Technology, Inc*, *supra*.

b. Evaluation of Past Performance

With respect to the Past Performance Factor, the Solicitation instructs the offeror to provide “an example for each of the following tasks: 1) Facility Design, 2) Facility Construction, 3) Checked Baggage Screening system Design, 4) checked Baggage Screening system Construction, 5) Baggage Handling Systems Maintenance, and 6) Test Area Support.” FF 66. The Solicitation further states that “[e]ach example must have been performed within the past five years and be of similar size, scope, and complexity to the tasking defined in the SOW.” *Id.*

Ribeiro challenges the TSA’s evaluation of Ribeiro’s past performance as [DELETED], finding that its construction references were [DELETED]. Protest, pages 19-20; Comments at 45.

The Protest also alleges that its past performance experience well exceeds that of VTC’s in terms of dollar value, and that VTC [DELETED]. Protest, page 17 - 18. The Protest also asserts that VTC’s relevant past performance experience [DELETED] with respect to scope. Protest, page 18. The Protest also questions whether the VTC had the required subcontracting support in place and committed to perform prior to submitting its proposal. *Id.* These facts, the Protester argues, indicate that VTC lacked adequate experience to be rated [DELETED] for past performance. Protest, page 19; Comments at 45. Ribeiro further contends that the TSA downgraded Ribeiro’s past performance because its [DELETED] facility construction experience examples were [DELETED], but failed to downgrade VTC’s experience, [DELETED]. Comments at 5.

In the Agency Response, the TSA asserts that its evaluation of past performance was consistent with the Solicitation requirements. Agency Response at 32-33. In response to Ribeiro’s challenge that the VTC lacks the required past performance, TSA argues that the references it relies upon as the basis for its argument are incorrect and were not those

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provided with the Awardee's technical submission and evaluated by the TET. Agency Response at 33, *citing* Protest at 17; Attach. A. ¶19.B.

The record shows that the TET rated Ribeiro as [DELETED] under Factor 2 "Past Performance," however, it considered the Ribeiro proposal to contain [DELETED]. FF 93. The TET found Ribeiro's references for facility construction [DELETED], indicating that the construction references were for [DELETED]. *Id.* The record shows that the two facility construction references performed by Ribeiro were for [DELETED], *see* AR 401-402; 735, 753. The TET considered the citing of only these projects to constitute a [DELETED] in terms of Ribeiro's past performance. Moreover, the TET considered facility construction to be one of the most important efforts under the contract. *Id.* In addition, the record shows that, under the Past Performance Factor, the TET contacted the reference provided, who was the project manager on the job, [DELETED]. *Id.* The TET reported that the contact [DELETED]. *Id.* Based on the record, the ODRA finds that the TET's evaluation of past performance properly focused on the relevance of the work to the scope and complexity to the TSIF, rather than simply focusing on the dollar size of the project, and that the TET's rating of [DELETED] therefore has a rational basis and is not arbitrary or capricious.

Ribeiro argues that under the AMS, TSA had an affirmative obligation to seek clarification of negative information from Ribeiro, particularly where such information had a decisive impact on the award decision. Comments at 50-51, *citing Protest of Mid Eastern Builders, Inc.*, 04-ODRA-00330. Notably, in *Mid Eastern Builders*, the ODRA stated that "[u]nder the AMS, offerors should be provided an opportunity to address negative past performance references, where such references have a significant impact on the selection process," *citing Protest of J. Schouten Company*, 98-ODRA-66; however, in *Mid Eastern Builders*, the ODRA explained that, although this is not a mandatory policy, the failure to allow a bidder to address adverse past performance information would be considered irrational where "(1) the impact of that information has a decisive effect on the award decision; and (2) the information in question is uncertain or otherwise unreliable." The ODRA has no basis to find the information provided by Ribeiro's past performance reference to be uncertain or otherwise unreliable. The individual simply did

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[DELETED]. AR 735, 753. The record also shows that the information did not have a decisive or prejudicial effect on the award decision, since Ribeiro's [DELETED] rating for Past Performance is based primarily on the TET's finding of a [DELETED].

For Factor 2 "Past Performance", the TET also rated VTC as [DELETED] based on the fact that all of VTC's references showed a wide range of experience and were applicable to the TSIF in size, scope and complexity. FF 88. For example, one of VTC's references was for [DELETED] doing work directly relevant to the TSIF. AR 529. The TET found many of VTC's past performance references mentioned [DELETED]. FF 88. Additionally, the TET viewed the past performance reference contacted for checked Baggage Screening System design/construction as very positive, stating that VTC was very responsive and did excellent work. *Id*

Based on substantial evidence in the record, the ODRA finds that the TET's evaluation of past performance of the Awardee and Ribeiro was rational and consistent with the Solicitation requirements and evaluation criteria. As discussed previously, mere disagreement with the TET's findings is not proof of unfair or unequal treatment, nor of an irrational result. *See Protest of Global Systems Technologies, Inc., supra.*

c. Evaluation of Business Management Factor

The Solicitation requires the offeror to provide information in the Business Management Section of its proposal Volume I that describes the offeror's approach to fulfilling all the SOW requirements. FF 67. It also requires the Offeror to "identify any perceived risks associated with the SOW and propose mitigation strategies" and to "provide a description of how the perceived risks will be managed to minimize technical, cost, and schedule risks. *Id.*

Ribeiro alleges that the evaluation of the Business Management Factor by the TET was irrational because it treated offerors unequally by relaxing or waiving a material solicitation requirement for VTC. Protest, page 19-20; Supplemental Protest at 3-5. In this regard, the Contract Data Requirements List ("CDRL") provision of the Solicitation

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required the development of specific documentation, *i.e.*, design documents at the 40%, 70% and 100% stages of design within 10 days of contract award. Supplemental Protest at 3, *citing* Solicitation, P00001, page 62, Section J.1.1. Ribeiro argues that it did propose [DELETED], contrary to the evaluation findings, but it did not specify [DELETED] set forth in the SOW. Comments at 47. Ribeiro further notes that it was criticized unfairly for [DELETED], while the identical approach of VTC was accepted without any downgrade, which constitutes evidence of unequal treatment. Comments at 48.

Ribeiro further admits that its proposal did not respond to explicit requirements. Comments at 59, *citing* TSA Statement of Position at 33. Ribeiro alleges, however, that, prior to contract award, the TSA improperly [DELETED]. See Supplemental Protest at 4; Comments at 48. Moreover, on information and belief, Ribeiro contends that this [DELETED] it had submitted to TSA under a previous task order. Supplemental Protest at 5.

Ribeiro additionally alleges that its proposal unfairly had received a [DELETED] for its approach to schedule risk mitigation, while the TSA relaxed “mandatory critical” milestone dates for VTC. *Id.*, *citing* Solicitation, P0001, page 11, Section 6.1 and Protest Exhibit 2, Debriefing Document, item 10. Ribeiro argues that this relaxation of the schedule for VTC prejudiced Ribeiro as it could have been more flexible in its schedule risk mitigation plan, and developed cost savings had it known it would have more time to complete the project. Supplemental Protest at 6. Ribeiro also challenges the evaluation finding of a [DELETED] in its Staffing Plan, Comments at 46, and questions the TET’s view of VTC’s more [DELETED] staffing plan as a [DELETED]. *Id.* Ribeiro asserts that the TSA’s allegedly inconsistent approach in this case is evidence of bias. *Id.*

TSA argues in response that the Solicitation requirement was not relaxed improperly and that the offerors were not treated unequally. TSA asserts that both offerors were evaluated similarly because neither offeror responded to the [DELETED] requirement and both accordingly received lower evaluations. Agency Response at 33. TSA asserts, however, that Ribeiro also did not respond to the requirement for 40% design submittals

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and proceeded straight to the 100% submittal; thereby depriving TSA or MWAA of any prior review. The TSA argues that because Ribeiro did not respond to the specification's requirements for 40%, 70%, and 100% design submittals, and did not address the absence of a response to this requirement in its proposal, it cannot later complain if the TSA subsequently waived the 70% requirement. Agency Response at 34.

Ultimately, Ribeiro must bear responsibility for the contents and adequacy of the information contained in its initial proposal. *See Royalea'L Aviation Consultants*, 04-ODRA-00304C (citing *Protest of International Services, Inc.* 02-ODRA-00224). Since the TSA's evaluation was dependent upon the information furnished in its proposal, it is Ribeiro's burden to submit an adequately written proposal for the TSA to evaluate, especially where it specifically was on notice that the Agency intended to make award based on initial proposals without discussions. *See Infotec Development, Inc.*, 1994 WL 750482 (Comp. Gen. 1994).

The record shows that, under the "Business Management" Factor, the TET rated Ribeiro as [DELETED] because it viewed the Ribeiro proposal as containing [DELETED]. FF 94. In the TET's view, Ribeiro's proposal included a schedule solution that defied the clear and unambiguous RFP requirements – Ribeiro [DELETED], review and approval required by the TSIF SOW, Section J, Deliverable Tables, Table 1. *Id.* The TET also found the fact that Ribeiro's proposed approach [DELETED]. *Id.* This opportunity for review was an express requirement of the Solicitation and the [DELETED] prior to 100% submittals is contrary to the TSIF requirements and unacceptable to both TSA and MWAA. *Id.* The ODRA therefore finds that the TET's finding that Ribeiro's proposed approach [DELETED] to the Government, given that Ribeiro did not proposed in accordance with the stated Solicitation requirements, was rational and based on substantial evidence.

The record further shows that the TET noted that the Ribeiro Staffing Plan shows an [DELETED] when the only on-going activity will be BHS maintenance (CLIN 3) and test area support (CLIN 4). *Id.*; AR 417. The TET did not expect such work to reach anywhere [DELETED], since the Critical Milestone in the original RFP and Amendment 1 stated that the construction effort under the contract was to be completed by September

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30, 2008, after which the only activity to be performed by the contractor was BHS maintenance under CLIN 3. FF 89; AR 7 and 167. The ODRA finds that, given that the construction portion of the project was scheduled to be completed by September 30, 2008 and Ribeiro's proposal [DELETED], the TET's finding of a [DELETED] in this regard had a rational basis.

As for perceived risks and potential mitigation strategies, the TET noted that Ribeiro's proposal identified [DELETED] to the Project, [DELETED], and the [DELETED]. FF 95. The TET noted that Ribeiro's proposal provided [DELETED]. *Id.* With respect to the [DELETED], the TET considered Ribeiro's proposed [DELETED]. *Id.* The ODRA finds that the record supports the TET's view of these items and that the TET's consideration of them rationally contributed to its overall rating of [DELETED] for the Business Management Factor.

In contrast, the record shows that the TET gave VTC a rating of [DELETED] for Business Management. This rating was based, in part, on the TET's finding that VTC's proposal provided a [DELETED]. FF 89. Additionally, although the TET noted VTC's proposal schedule [DELETED], as was required by the TSIF Solicitation, Section J-1, Table 1, it did address [DELETED] requirements. The TET nevertheless [DELETED]. AR 743. Notably, there is no evidence in the record to suggest that neither the "concept paper" nor any other deliverable that VTC previously provided to the TSA was considered in the TET's finding of a [DELETED] in this area, contrary to Ribeiro's assertions. The TET indicated that VTC also demonstrated [DELETED] by citing to several relevant risks and providing significant detail on mitigation steps. VTC proposed [DELETED], which the TET considered to be an [DELETED]. *Id.* The ODRA finds that the TET's evaluation of VTC's proposal in this regard had a rational basis and was well supported in the record. The ODRA also considers the TET's finding of a [DELETED] for Ribeiro's failure to [DELETED], as compared to finding a [DELETED] for VTC's failure to [DELETED], to be consistent with the Solicitation requirements and evaluation criteria, as well as rational and not indicative of unequal treatment.²⁰

²⁰ During negotiations and subsequent documentation, VTC explained that [DELETED]. FF 109.

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In sum, the ODRA finds the TET's finding of [DELETED] with respect to Ribeiro's proposal to be rational in that: (1) Ribeiro failed to adequately address the stated requirements for design review and approval from the TSA and MWAA; and (2) labor hours for design and construction services were [DELETED]. In addition to these, the TET's conclusion that Ribeiro's response to identification of perceived risks and proposed mitigation [DELETED], provided substantial evidence for its determination that Ribeiro's proposed approach merited an overall rating of [DELETED] for the Business Management Factor. Moreover, this rating for the Business Management Factor, which essentially found that Ribeiro's proposal failed to adequately address a requirement necessary to meet the objectives of the project and reflected too great a risk, is consistent with the evaluation criteria set forth in the Source Selection Plan. FF 85.

2. The Determination that VTC met the Bonding Requirements of the Solicitation had a Rational Basis

Ribeiro alleges that the evaluation of VTC's proposal was irrational because it treated offerors unequally by not requiring a bid bond from VTC. Protest, page 19-20; Comments at 54. Specifically, Ribeiro asserts that VTC's proposal did not meet the requirements of the Solicitation, which as revised, required the offeror to provide with their proposal "a Bid Bond worth 20% of their total proposed value of CLIN 00002 Construction Services as listed in Section B.2." FF 58. Ribeiro argues that the fact that the VTC was permitted to [DELETED] rendered its proposal noncompliant with a material requirement of the Solicitation and thus ineligible for award. Protest, page 8; Comments at 4. Ribeiro further claims it was prejudiced by TSA's lowering of the bid bond requirement even though it met the requirement. Comments at 55.

The TSA states that the Contracting Officer reasonably determined that VTC was financially responsible and capable of self-insuring, pointing to the fact that it was able to [DELETED] for the benefit of the government, well more than a partial collateralization of a traditional loan. Agency Response at 31. The TSA further argues that the VTC properly was allowed an opportunity to modify its bond submission and that Ribeiro was not prejudiced by this action. *Id.*

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Section M.1 of the Solicitation provides that “The Government intends to award a competitive contract to the contractor whose proposal, conforming to the solicitation, represents the best value to the TSA.” FF 69. This section further provides that the Government may “(1) Reject any or all submittals if such action is in the public interest; (2) Accept other than the lowest price submittal; and, (3) Waive informalities and minor irregularities in offers received.” *Id.* Section M.1 also states, “[t]he Government intends to evaluate submittals and award a contract, either on initial submittals without communications, or on initial or subsequent submittals with communications. In evaluating the submittals, the Government may conduct written or oral communications with specific Offerors only, with all Offerors, or with no Offerors, as circumstances warrant. A submittal in response to an RFP must contain the Offeror’s best terms from a technical and cost or price standpoint.” FF 70.

The record shows that VTC provided bonding with its proposal consisting of [DELETED]. These bonds raised a concern in the mind of the Contracting Officer because [DELETED] value of their subcontract work. According to the Contracting Officer, he did not know if bonds submitted in this manner would be acceptable. FF 78. He subsequently sought legal review and guidance and concluded that the VTC bond submission was flawed but could be made acceptable. Subsequently, he advised VTC of the issue and sought from VTC a revised bid bond, with VTC named as principal, [DELETED]. The ODRA finds that these actions were not inconsistent with the Solicitation language that permits the TSA to waive irregularities in offers received and make an award based on subsequent submittals, following communications with Offerors.

It is well established that the question of acceptability of an individual surety is a matter of responsibility, which may be determined any time before contract award, and the contracting officer is vested with a wide degree of discretion and business judgment in determining the acceptability of an individual surety. *See generally, Tip Top Construction Corporation*, B-311305, 2008 CPD ¶ 91, 2008 WL 1948064, (Comp.Gen.), May 02, 2008. Likewise, under the AMS, contracting officers are afforded “great discretion” in their responsibility determinations, and affirmative determinations of

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bidder responsibility are matters ordinarily not reviewed by the ODRA in the context of a bid protest. *See Washington Consulting Group, Inc.*, 97-ODRA-00059. Such determinations should not be disturbed provided that the Contracting Officer has ensured that a prospective contractor has “(1) adequate resources to perform the contract, or the ability to obtain them; (2) the ability to comply with the required or proposed performance schedule; (3) a satisfactory record of integrity and business ethics; and (4) the qualifications and eligibility to receive an award.” *Protest of Mechanical Retrofit Solutions Incorporated*, 07-ODRA-00402 (quoting AMS § 3.2.2.2). Since use of an individual surety is permitted under the AMS, *see generally* AMS Procurement Guidance T3.4.1: A: 3: e.3, and there is no indication in the record that the considerations set forth in AMS § 3.2.2.2 were not satisfied, the ODRA finds the Contracting Officer’s acceptance of VTC’s revised bonds had a rational basis.

Ribeiro also complains that it was prejudiced by the TSA’s acceptance of VTC’s bid bonds, as well as its failure to communicate to Ribeiro the \$3 Million limitation for bid bond submission. FF 79. The record shows that Ribeiro already had submitted an acceptable bond when the TSA conducted its preliminary assessment of proposals. FF 79; F.N. 5. Since Ribeiro was eliminated from the competition based on the technical evaluation of its proposal, there is no credible evidence that the fact that the Contracting Officer failed to communicate to Ribeiro the \$3 Million limitation, or accepted VTC’s bid bonds, resulted in actual prejudice or harm to Ribeiro in terms of its ability to receive the contract award. The Protester bears the burden of proof and must demonstrate prejudice. *See Protest of Computer Associates International, Inc.*, 01-ODRA-00177. *See also Consolidated Protests of Consecutive Weather, Eye Weather, Windsor Enterprises and IBEX Group, Inc.*, ODRA Docket Nos. 02-ODRA-00250 – 00254.

D. TSA’s Determination to Eliminate Ribeiro From Competition Based on Initial Proposals had a Rational Basis and TSA had no Obligation to Conduct Discussions

Ribeiro argues that the TSA conducted a flawed best value analysis of the initial proposals and that the determination to eliminate Ribeiro from the competition lacked a rational basis. Protest at 38. Ribeiro also challenges as unfair the TSA’s decision not to

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conduct discussions with Ribeiro based on language in the Solicitation that notified offerors that initial proposals must meet every requirement and that TSA reserved the right to make award based on initial proposals. Comments at 58. Ribeiro also places great significance on the fact that prior to its removal from the competition, the TSA had prepared a negotiation memorandum that contemplated holding discussions with Ribeiro and had scheduled a meeting with Ribeiro to conduct negotiations. Suppl. Comments at 30.

Ribeiro states that the TSA planned to give Ribeiro an opportunity to address [DELETED] and revise its proposal, but then, without justification, removed Ribeiro from the competition. Ribeiro asserts that this action was improper and prejudicial. Suppl. Comments at 31. Ribeiro also challenges as inconsistent TSA's characterization of the decision to eliminate it from the competition as initially based on the [DELETED] of Ribeiro's proposal and then subsequently on a "downselection" determination. Ribeiro also asserts that it was treated unequally, since VTC engaged in communications with TSA, received Solicitation Amendment 3, and was allowed to submit a revised technical and price proposal. *Id.*

In response, TSA asserts that there is no basis for Ribeiro to assume that it would have an opportunity to improve its initial proposal through discussions, and points to Section M of the revised Solicitation which instructs offerors to submit a proposal that conforms to the Solicitation requirements and contains the offeror's best terms. Agency Response at 27, *citing* AR 242. TSA also argues that the Solicitation expressly provides that discussions are not required to be conducted with every offeror, but only as circumstances warrant. *Id.* Moreover, the TSA contends that AMS § 3.2.2.3.1.2.2 provides authority for its decision to conduct one-on-one discussions with VTC only. Agency Response at 28.

The ODRA finds that the TSA's determination to eliminate Ribeiro was rational and supported by substantial evidence. The record reflects the fact that the Solicitation expressly notifies offerors that the intent of the TSA was to evaluate proposals and make award without discussions. FF 62. As such, Offerors were instructed to convey their best

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terms within the proposed technical approach, FF 62, and to “clearly and concisely” describe and define their responses to the Solicitation requirements. FF 63, in enough detail for the TSA to understand the overall approach. FF 64. Moreover, Section M.1 of the Solicitation clearly informs offerors of the TSA’s intent to evaluate submittals and award a contract, either on initial or subsequent submittals, and that such evaluation or award could be made with or without communications with offerors, as circumstances warrant. FF 70.

The record shows that Ribeiro failed in its initial proposal submission to adequately address requirements set forth in the Solicitation and the Contracting Officer rationally determined that a significant re-write of its technical proposal would be required. The record further shows that, after consultation with the TET, the Contracting Officer determined there was little likelihood that Ribeiro was capable of revising its technical proposal to be competitive for award. The record shows that, after the evaluation of Ribeiro’s initial proposal, the Contracting Officer viewed [DELETED] in Ribeiro’s proposal as calling into question the likelihood that further communications with Ribeiro would substantially improve its position for award from a technical standpoint. FF 102.

After review of the AMS regarding communications with offerors, the Contracting Officer determined that further communications with Ribeiro were unnecessary as they were not in the TSA’s best interests and that inclusion of Ribeiro in communications would not provide a commensurate benefit to its competitive position.²¹ *Id.* The Contracting Officer did not believe that Ribeiro would be capable of revising its technical proposal to address TSA’s concerns in an acceptable timeframe, while he viewed VTC’s technical weaknesses as relatively minor. *Id.*; FF 106.

The OIRA considers the Contracting Officer’s determination to conduct communications only with VTC to be rational and consistent with the record. It did not provide VTC with an unfair competitive advantage, since the decision was based strictly

²¹ The record also shows that, while the Contracting Officer considered [DELETED], he also considered [DELETED] on CLINS 0001, Design, and 0002, Construction, and that that these prices in particular would be substantially affected by clarifications regarding CLIN 0003 and BHS maintenance requirement. FFs 106.

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on the evaluation of initial proposals and is consistent with the terms of the Solicitation. *See Martin Marietta Corporation*, 1995 WL 864093 (Comp. Gen. 1995); *A.G. Crook Company*, B-255230, 94-1 CPD ¶ 118 (There is no obligation to conduct discussions with an offeror whose proposal has been properly excluded from the competition).

The ODRA finds the Contracting Officer's views to be consistent with the award criteria set forth in the Solicitation, which among other things, listed non-price factors as "significantly more important than price," with the Technical Approach Factor being the most important. FF 71, 105. The Contracting Officer's views also are consistent with the contemporaneous documents concerning Ribeiro's technical evaluation, which show [DELETED] in the Technical Evaluation, as well as a finding of [DELETED] under the Business Management Factor. *See* FFs 94-95 and discussion *supra*. Under the circumstances, the ODRA finds that the Contracting Officer's decision to eliminate Ribeiro from the competition had a rational basis and was supported by substantial evidence in the record. FF 105.

As for the significance of the Negotiation Memorandum and Ribeiro's argument that TSA was required to engage in communications with Ribeiro, the ODRA views the negotiation memorandum only as evidence that up until March 12, 2008, the TSA had not made a final decision on whether to continue to evaluate Ribeiro's proposal, but it was nevertheless proceeding through the evaluation process as if it would do so. The mere fact that the Memorandum shows that the TSA contemplated conducting such discussions with Ribeiro, FF 104, did not obligate TSA to do so. The record shows that the TSA's ultimate decision to eliminate Ribeiro was based on technical considerations in the initial proposals. Regardless of how TSA characterizes the decision to eliminate Ribeiro from the competition, *i.e.*, either based on the "unacceptability" of Ribeiro's proposal or as a "downselection" determination, Suppl. Comments at 30, the fact of the matter is that under the AMS and the express terms of the Solicitation, the TSA has discretion to eliminate Ribeiro's proposal from the competition based on its evaluation of initial proposals.

As argued by TSA in its Supplemental Statement of Position:

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The AMS was created to facilitate the faster acquisition of higher quality, more affordable products and services. See Public Law No. 104-50, § 348, 109 Stat. 436, 460 (1995). In pursuit of this goal, the AMS procurement system “enables the [TSA] to be innovative and creative so that the right vendor is selected to implement a solution.” See, Protest of New Bedford Panoramex Corporation, 07-ODRA-00414 (quoting from AMS § 3.1.1, “Introduction”). To that end, “screening” is the chief process by which TSA determines which offeror provides the best value. See AMS § 3.2.2.3.1.2, “Screening” *Id.* The screening process “is flexible” and generally “improves source selection by focusing” the TSA’s “efforts on those offerors most likely to receive award.” *Id.* Specifically, through a screening decision process, “the number of offerors participating” in a procurement is narrowed via one or more “downselection” steps to only those offerors most likely to receive award. See AMS, *Appendix C, Definitions*, “Screening decision,” see also, *Protest of J. Schouten Construction, Inc.*, 98-ODRA-00064.

E. Ribeiro Lacks Standing to Challenge the Issuance of Amendment 3, the Evaluation of VTC’s Revised Proposal and TSA’s Best Value Determination.

The ODRA finds that Ribeiro is not in line for and lacks standing to protest the award because, as discussed above, it was properly removed from consideration on March 12, 2008. Once properly eliminated from the competition, Ribeiro could no longer be said to have a direct economic interest in the award of the Contract and therefore lacks standing to protest the issuance of Amendment 00003 and the subsequent evaluation of VTC’s revised proposal, as well as the award to VTC.²² After Ribeiro’s elimination, there was nothing, from a legal standpoint, to distinguish it from a non-bidder seeking to file a post-award protest. See *Protest of International Services, Inc.*, *supra*, citing *Edward B. Block Consulting*, O2-ODRA-00225. Moreover, because Ribeiro was rightfully removed from the competition, it was not prejudiced by and lacks standing to challenge the TSA’s subsequent actions, *i.e.*, issuing Amendment 3 to VTC, holding communications solely

²² Notwithstanding Ribeiro’s lack of standing, with respect to Ribeiro’s allegation that Amendment 3 substantially changed the requirements of CLIN 3, Comments at 38, 50, the record shows that Amendment 3 clarified the requirements of CLIN 003 to emphasize that the CLIN was for BHS maintenance only and not maintenance of other equipment deployed at the TSIF. AR 172-173 through 253-255. Moreover, the fact that the CLIN would have allowed an offeror to reduce its pricing for that CLIN has no relationship to the TSA’s decision to remove Ribeiro from further consideration, which was based on technical reasons.

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with VTC, evaluating VTC's revised proposal, and awarding to VTC.²³ Protest, page 19-20; Comments at 38. *See Protest of L. Washington & Associates, Inc.*, 02-ODRA-00232, *citing Protest of Enroute Computer Solutions*, 02-ODRA-00220; (In order to prevail, a protester must demonstrate that but for complained of actions, protester would have had substantial chance of receiving award).

F. Ribeiro has not met its Burden of Proof of TSA Bias in Favor of VTC

Ribeiro fails to prove its allegation of bias on the part of TSA. Comments at 38. Long-standing precedent recognizes that government officials are presumed to act in good faith and that a "party alleging bad faith on the part of the Government must ordinarily come forward with 'well nigh irrefragable' proof in order to rebut the presumption." *Protest of Royalea'L Aviation Consultants*, 04-ODRA-00304; *Royalea'L Aviation Consultants v. Administrator of the Federal Aviation Administration*, No. 04-2412 (1st Cir. October 7, 2005), *dismissed as moot*; *see also Galen Medical Associates, Inc. v. U.S.*, 369 F.3d 1324 (May 25, 2004) (presumption that Government officials act in good faith can only be overcome by "almost irrefragable proof" which amounts to clear and convincing evidence of specific intent to do harm). The ODRA finds the record lacking the requisite proof.

IV. Conclusion

For the reasons above, the ODRA finds the protested actions of the TSA and the decision to make award to VTC had a rational basis, were not arbitrary, capricious or an abuse of discretion, and are supported by substantial evidence. The ODRA therefore recommends that the Ribeiro Protest and Supplemental Protests be denied.

²³ The ODRA finds that the record further does not support Ribeiro's allegation of a prejudicial and material change to the Solicitation resulting from an extension of performance dates and critical milestones. Comments 60-61. Rather, the record shows that the milestones set forth in the contract would have had to be adjusted regardless of the awardee. As awarded to VTC, the completion schedule for the TSIF project provided for an approximate overall 30 day extension as a result of an approximate 30 day delay in award. Based on the delay in award, critical milestones in the contract were proportionately adjusted, including the milestone for the initial high speed EDS test, *i.e.*, the date for this milestone completion was extended 30 days from the date established in the revised SOW 6.1 from August 15 to September 15, so as to be consistent with the extension of the other critical milestones. FF 116.

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Anthony N. Palladino
Director
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August 5, 2008