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**IN THE UNITED STATES COURT OF FEDERAL CLAIMS  
BID PROTEST**

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**Number 09-758C  
Senior Judge Eric G. Bruggink**

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**HYPERION, INC.,**

**Plaintiff,**

**v.**

**THE UNITED STATES,**

**Defendant.**

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**PLAINTIFF'S BRIEF IN SUPPORT OF MOTION FOR JUDGMENT ON THE ADMINISTRATIVE RECORD**

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WITH U.S. COURT OF FEDERAL CLAIMS PROTECTIVE ORDER**

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**PLAINTIFF'S BRIEF IN SUPPORT OF  
PLAINTIFF'S MOTION FOR JUDGMENT ON THE ADMINISTRATIVE RECORD**

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**QUESTIONS INVOLVED**

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I. Was there a proper coordinated, comprehensive assessment of the Offerors' initial Competitive Proposals?

II. Did Defendant Defense Intelligence Agency provide, as promised, a *full* assessment of Offerors' "ability to provide the required services"?

III. Was there a correct evaluation and color rating of Hyperion's Technical/Management volume?

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**STATEMENT OF THE CASE**

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**PARTIES**

PLAINTIFF AND ITS TEAMING PARTNERS

Hyperion is a closely-held Virginia corporation and a qualifying Small Business (the applicable Small Business Size Standard is three-year averaged annual receipts under \$25,000,000 per year) teamed with six other Small Businesses. Hyperion has over nineteen years' experience in de-

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signing, installing, and maintaining classified and unclassified information technology systems and services in secure and in non-secure areas. Hyperion has deployed technical teams to consult, survey, install, maintain, and/or operate automated systems throughout the United States, Europe, the Pacific Rim, the Middle East, and Southwest Asia. Statement of Facts, Number 1.

#### DEFENDANT

Defendant Defense Intelligence Agency (DIA) is a Defense Agency within the United States Department of Defense (DoD), 10 U.S.C. § 101(a)(11); DoD is an Executive Department of the United States, 10 U.S.C. § 111; and Defendant DIA and its Virginia Contracting Activity are instrumentalities of the United States. Defendant DIA is a Combat Support Agency within DoD, 10 U.S.C. § 193(f)(2). Defendant DIA and its Virginia Contracting Activity is an “Agency” just as this term is defined in 28 U.S.C. § 451, and thus Defendant DIA and its Virginia Contracting Activity is also a “Federal agency” as is required by 28 U.S.C. § 1491(b)(1). Statement of Facts, Number 2.

#### THE SOLICITATION

#### THE ACQUISITION PLAN

The Acquisition Plan for Defendant DIA’s Solutions for the Information Technology Enterprise (SITE) Acquisition explains that the purpose of the SITE Acquisition is to “create a vehicle that will provide worldwide coverage for Information Technology (IT) requirements and technical support

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services . . . .” The proposed SITE Contract will replace current multiple-award Contracts in place at Defendant DIA, at the Department of the Air Force, and at other user locations. The proposed SITE Contract will be a multiple-award Indefinite Delivery/Indefinite Quantity Contract with worldwide Intelligence Community requirements competed on a Task Order basis, this as is authorized by 10 U.S.C. § 2304a(a). Statement of Facts, Number 3.

Multiple awards of the proposed SITE Contract will be made to four large businesses and to four small businesses. The SITE Contract ordering period will consist of a Base Year and four one-year Options. The maximum ceiling amount of the SITE Acquisition is \$6,600,000,000. While Task Orders will be competed among the successful SITE Contractors, some Task Orders may be set-aside for Small Businesses only, and requirements will be reviewed before any Task Orders are competed “to ensure small business is adequately represented.” Statement of Facts, Number 4.

The Acquisition Plan provides that Source Selections will be premised on three non-Price Evaluation Factors: Past Performance, Security, and Technical/Management capability. The Price Evaluation Factor is premised on analysis of Offerors’ ceiling bill rates, ceiling mark-up, ceiling fixed-fee, and other direct costs mark-up. Past Performance is to be evaluated by “assessing the offeror’s recent performance on projects similar in scope to SITE.” Statement of Facts, Number 5.

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#### THE SOURCE SELECTION PLAN

The Source Selection Plan establishes separate teams to evaluate Offerors' Past Performance volumes and to evaluate Offerors' Technical/Management volumes. The evaluations of Offerors' Past Performance volumes and the evaluations of Offerors' Technical/Management volumes are to be presented to a Source Selection Advisory Council. The Source Selection Plan provides no mechanism, and no review process, to reconcile any disparate assessments in these separate evaluation reports. Statement of Facts, Number 6.

The Source Selection Plan requires that members of these separate evaluation teams need to read only those sections of Offerors' Competitive Proposals "that are applicable to their specific part of the evaluation, [sic] (e.g., the small business subcontracting plan evaluators are not required to read other portions of the Technical/Management proposal factors)." *The requirement to make a coordinated, comprehensive assessment of Offerors' Competitive Proposals is optional, not mandatory:* "Panel members may read other portions of the proposals, if they deem it necessary to make an informed rating." There is a requirement that each separate evaluation team is to "evaluate all proposals in a consistent manner." Statement of Facts, Number 7.

The Source Selection Plan provides for a Competitive Range Decision under Federal Acquisition Regulation 15.306(c)(1) if discussions are deemed necessary and it provides also that Defendant

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DIA may limit the Competitive Range for purposes of efficiency, this in accordance with 10 U.S.C. § 2304(b)(4) and Federal Acquisition Regulation 15.306(c)(2). The Contracting Officer is to make the Competitive Range Decision “on the basis of initial proposal evaluations,” and this Competitive Range Decision is subject to approval by the designated Source Selection Authority. Statement of Facts, Number 8.

The Source Selection Plan adds a fourth non-Price Evaluation Factor, “Small Business Plan,” but this fourth non-Price Evaluation Factor is to be assessed only in rating the Competitive Proposals of large business Offerors. Statement of Facts, Number 9.

The Source Selection Plan provides for color ratings of the Technical/Management volumes and for color ratings of the Past Performance volumes. There are four color ratings for the Technical/Management volumes: “Exceptional (Blue),” “Acceptable (Green),” “Marginal (Yellow),” and “Unacceptable (Red).” A Competitive Proposal rated as “Marginal (Yellow)” on the Technical/Management volume is one which has been assessed as:

The proposal is marginal; Government doubts the offeror will be able to meet all performance requirements. *Based on the Offeror’s performance record*, doubt exists that the Offeror can satisfactorily perform the proposed effort.

Emphasis added. Notice that this color rating of “Marginal (Yellow)” on the Technical/Management volume implies a coordinated, comprehensive assessment of both the Technical/Management vol-

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ume and the Past Performance volume whereas the Source Selection Plan itself establishes separate teams to evaluate Offerors' Past Performance volumes and to evaluate Offerors' Technical/Management volumes, and the Source Selection Plan provides no mechanism, and no review process, to reconcile these separate evaluation reports. Statement of Facts, Number 10.

A Competitive Proposal color rated as "Unacceptable (Red)" on the Technical/Management volume is one which has been assessed as:

The proposal is highly inadequate; the offeror cannot meet performance requirements. The proposal is likely to cause serious disruption of schedule, significant increases in cost, erosion of quality, or degradation of performance even with special Contractor emphasis and close Government monitoring.

In order for a Technical/Management volume to be color rated as "Unacceptable (Red)," the evaluators must find "no beneficial strengths." Statement of Facts, Number 11.

There are five color ratings for the Past Performance volumes: "Exceptional (Blue)," "Acceptable (Green)," "Marginal (Yellow)," "Unacceptable (Red)," and "Neutral (White)," this last color rating to satisfy the requirement of 41 U.S.C. § 405(j)(2), *viz.* that Offerors lacking Past Performance information "may not be evaluated favorably or unfavorably on the factor of past contract performance." A Competitive Proposal color rated as "Acceptable (Green)" on the Past Performance volume is one which has been assessed as:

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Acceptable past performance ratings in most functional areas. The proposal could have an inconsistent achievement of acceptable performance; however, minimum doubt exists, based on the Offeror's performance record, that the Offeror can successfully perform the proposed effort.

Statement of Facts, Number 12.

#### THE SITE ACQUISITION

The SITE Acquisition, Solicitation Number HHM402-09-R-0050, was issued by Defendant DIA's Virginia Contracting Activity on May 26<sup>th</sup>, 2009. There are four announced non-Price Evaluation Factors. In descending order of importance, these four announced non-Price Evaluation Factors are Technical/Management, Past Performance, Small Business Subcontracting, and Security. The Small Business Subcontracting Evaluation Factor is not to be rated for qualifying Small Businesses. The Technical/Management Evaluation Factor is comprised of five elements: experience and expertise performing as a prime or subcontractor in sixteen functional areas; the Offeror's proposed SITE Organization/Management Team and Proposed Management Structure; the Offeror's proposed Recruiting, Training, and Employee Retention Plan; the Offeror's Transition Experience; and the Offeror's Logistics Administration and Worldwide Support Capability. Past Performance is to be evaluated based on performances under ten Contracts within the last three years, five of which must have been performed by the Offeror, and five of which have been performed by Team Members. These combined Past Performance efforts must have been valued in excess of \$10,000,000. The Se-

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curity Evaluation Factor is “pass/fail” and it requires that Offerors and their Team Members must possess a Top Secret facility clearance and that they must demonstrate experience and ability in providing Top Secret cleared personnel under DoD Contracts. Statement of Facts, Number 13.

The Price Evaluation Factor for the SITE Acquisition requires that Offerors provide fully-loaded labor rate ceilings for the Base Year and for each of the four Option Years. These fully-loaded labor rate ceilings are to be provided for each labor category and for both CONUS and OCONUS locations. Offerors are to provide fully-loaded labor rate ceilings for fifty-one labor categories. These fully-loaded labor rate ceilings for the Base Year and for each of the four Option Years are also to be provided for locations in Japan, Okinawa, Korea, and Djibouti and country-wide rates are to be provided for Columbia, Kosovo, Thailand, and Turkey. These fully-loaded labor rate ceilings are to be evaluated against a predetermined and undisclosed quantity of hours which will not be provided by Defendant DIA to any of the Offerors. Statement of Facts, Number 14.

Initial Competitive Proposals are to be submitted in six separate volumes: Executive Summary/Contract Information volume, Past Performance volume, Security volume, Small Business Subcontracting volume (not required for Small Business Offerors), Technical/Management volume, and Price/Cost volume. The Past Performance volume is to include a Past Performance Matrix wherein Offerors are to map the ten submitted Contracts in the Past Performance volume to the

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Statement of Objectives set out as Section C of the Site Acquisition. Offerors are to submit Technical/Management volumes which “provide the depth and breadth of [their] *experience and expertise* performing as a prime or a subcontractor with respect to the functional areas identified in the [Statement of Objectives].” (Emphasis added). Statement of Facts, Number 15.

In only one section of the Technical/Management volume, this “Transition Experience,” is there an explicit request for a “narrative of . . . experiences in transitioning work from an incumbent contractor to a new contract.” Nowhere else in the Technical/Management volume is there an explicit request for a narrative of Past Performance. Statement of Facts, Number 16.

The SITE Acquisition promises that Defendant DIA will “assess fully your ability to provide the required services . . . .” There is a page limit of thirty-five pages for the Past Performance volume and a page limit of one hundred pages for the Technical/Management volume. While hyperlinks are permitted within a Competitive Proposal volume, these hyperlinks in one Competitive Proposal volume may not link to other Competitive Proposal volumes. The SITE Acquisition announces that Competitive Proposals must “address all functional areas,” but the SITE Acquisition does not place any limitation on just how these functional areas are to be addressed, i.e., functional areas can be addressed in one or more Competitive Proposal volumes, and need not be addressed in just a single Competitive Proposal volume. The SITE Acquisition announces that all qualified Small Business

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Competitive Proposals will be evaluated in one “track,” and that all large business Competitive Proposals will be evaluated in another “track.” Statement of Facts, Number 17.

The SITE Acquisition explains that the Competitive Range may be limited for purposes of efficiency if (a) the number of initial Competitive Proposals “exceeds the number at which an efficient competition can be conducted,” and if so, then (b) the Contracting Officer is to decide just how many initial Competitive Proposals are “the greatest number that will permit an efficient competition among the most highly rated proposals.” Statement of Facts, Number 18.

#### THE CHALLENGED COMPETITIVE RANGE DECISION

##### INITIAL COMPETITIVE PROPOSALS

Defendant DIA’s Virginia Contracting Activity received and evaluated [REDACTED] initial Competitive Proposals, [REDACTED] initial Competitive Proposals from qualified Small Businesses, and [REDACTED] initial Competitive Proposals from large businesses. [REDACTED] initial Competitive Proposals from large businesses, or [REDACTED] percent, were included within the Competitive Range. [REDACTED] initial Competitive Proposals from qualified Small Businesses, or only [REDACTED] percent, were included within the Competitive Range. Statement of Facts, Number 19.

The substance of the Competitive Range Decision is contained in a forty-nine page report of the Source Selection Advisory Council, and the Source Selection Advisory Council consists of the sep-

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arate teams established by the Source Selection Plan to evaluate Offerors' Past Performance volumes, to evaluate Offerors' Technical/Management volumes, to evaluate Offerors' Small Business Subcontracting volumes, to evaluate Offerors' Security volumes, to evaluate Offerors' Cost/Price volumes, and to evaluate Offerors' Contract Information volumes. The Competitive Range Decision is made by the Contracting Officer in a one-page memorandum. The Contracting Officer says that the Competitive Range has been established based on "the need to conduct an efficient competition," but there is no detail. The Contracting Officer provides no rationale for her implicit decision that the number of initial Competitive Proposals received has exceeded the number at which an efficient Competition can be conducted, and the Contracting Officer does not explain why the number of initial Competitive Proposals selected for the Competitive Range has been set at just [REDACTED] large business Competitive Proposals and just [REDACTED] qualifying Small Business Competitive Proposals, or why it is necessary to select only [REDACTED] initial Competitive Proposals for both the large business "track" and for the qualified Small Business "track." Statement of Facts, Number 20.

The designated Source Selection Authority approves the Contracting Officer's Competitive Range decision for the qualified Small Business "track" in just one short paragraph:

[REDACTED]

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[REDACTED]

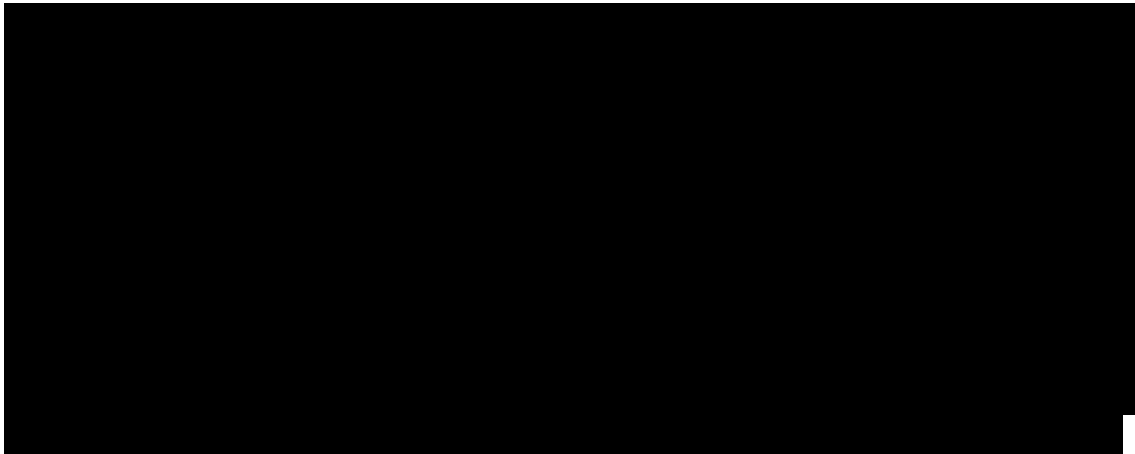
Statement of Facts, Number 21.

A tabular presentation in the forty-nine page report of the Source Selection Advisory Council shows that of the [REDACTED] initial Competitive Proposals from qualified Small Businesses which have been retained in the Competitive Range, [REDACTED] color rated “Exceptional (Blue)” on a Technical/Management volume, [REDACTED] color rated “Green (Acceptable)” on Technical/Management volumes, and [REDACTED] rated “Yellow (Marginal)” on Technical/Management volumes. Of the [REDACTED] initial Competitive Proposals from qualified Small Businesses which have been retained in the Competitive Range, [REDACTED] color rated “Exceptional (Blue)” on Past Performance volumes, and [REDACTED] color rated “Green (Acceptable)” on Past Performance volumes. [REDACTED] initial Competitive Proposals from qualified Small Businesses [REDACTED] in the Competitive Range are rated “Green (Pass)” on Security volumes. Statement of Facts, Number 22.

The Source Selection Advisory Council provides a Consensus Report to support the selection of those initial Competitive Proposals from qualified Small Businesses whose Technical/Management volumes are deemed to be correctable:

[REDACTED]

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Statement of Facts, Number 23.

HYPERION'S INITIAL COMPETITIVE PROPOSAL

Hyperion submitted its own Past Performances on five Contracts and Hyperion's Small Business Team Members submitted their past performances on five additional Contracts. These combined Past Performances in Hyperion's Past Performance volume exceed \$114,000,000. In its initial Competitive Proposal for the SITE Acquisition, Hyperion uses ninety-seven of the one-hundred pages allowed for the Technical/Management volume, and thirty-two of the thirty-five pages allowed for the Past Performance volume. Statement of Facts, Number 24.

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THE RATING OF HYPERION'S INITIAL COMPETITIVE PROPOSAL

The separate team established to evaluate the Past Performance volumes has rated Hyperion's Past Performance volume as "Acceptable (Green)." Per the color rating schema established for the SITE Acquisition, this assessment of Hyperion's Past Performance volume concludes:

Acceptable past performance ratings in most functional areas. The proposal could have an inconsistent achievement of acceptable performance; however, *minimum doubt exists, based on the Offeror's performance record, that the Offeror can successfully perform the proposed effort.*

(Emphasis added). The Consensus Report for this color rating of Hyperion's Past Performance volume provides:

The offeror and their team are very good at meeting the customer's scheduling standards; finding cleared and qualified managers and personnel that can provide good performance during surges. They are very good at resolving problems quickly. The team will be able to manage large contracts similar in scope to SITE. Very good business associations and cost saving solutions. They showed strength in teaming and a good business relationship between the government and the offeror and the offeror and other contractors by having good managers, employees and good corporate managers.

Statement of Facts, Number 25.

The separate team established to evaluate the Technical/Management volumes has wrongly color rated Hyperion's Technical/Management volume as "Unacceptable (Red)." Per the color rating schema established for the SITE Acquisition, this assessment of Hyperion's Technical/Management volume concludes:

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The proposal is highly inadequate; *the offeror cannot meet performance requirements*. The proposal is likely to cause serious disruption of schedule, significant increases in cost, erosion of quality, or degradation of performance even with special Contractor emphasis and close Government monitoring.

(Emphasis added). This “Unacceptable (Red)” color rating of Hyperion’s Technical/Management volume is entirely inconsistent with the “Acceptable (Green)” color rating of Hyperion’s Past Performance volume. The one would have it that “minimum doubt” exists that Hyperion can successfully perform the SITE Contract whereas the other conflictingly concludes that Hyperion “cannot meet performance requirements.” Statement of Facts, Number 26.

There is one announced color rating established for Technical/Management volumes submitted in response to the SITE Acquisition which is consistent with the announced “Acceptable (Green)” color rating for Past Performance volumes submitted in response to the SITE Acquisition and this is the “Marginal (Yellow)” color rating. This “Marginal (Yellow)” color rating melds assessments of Technical/Management volumes with color ratings of Past Performance volumes, and it reflects the relevance of similar Past Performances to technical evaluations—just as Federal Acquisition Regulation 15.305(a)(2)(i) provides, “[p]ast performance information is one indicator of an offeror’s ability to perform the contract successfully . . . .” Statement of Facts, Number 27.

The separate team established to evaluate the Technical/Management volumes has wrongly color rated Hyperion’s Technical/Management volume as “Unacceptable (Red)” because this separate

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team has found four beneficial strengths in Hyperion's Technical/Management volume—strong, relevant experience in web services, strong web and application development expertise and experience, strong cable installation experience, and a high retention rate. Under the color rating schema established for the Technical/Management volumes, the “Unacceptable (Red)” color rating can be assigned to a Technical/Management volume *only if there are no beneficial strengths*. This separate evaluation team *has in fact assessed four beneficial strengths* for Hyperion's Technical/Management volume. Statement of Facts, Number 28.

The separate team established to evaluate the Technical/Management volumes has wrongly assessed a Significant Weakness under Hyperion's Technical/Management volume as to Network Operations and Administration experience, there contending that Hyperion's stated experience “focused on installation rather than operations for the systems specified and is therefore irrelevant to this functional area.” The functional area in question is section 3.5.4 of the Statement of Objectives, and this functional area requires that the “Contractor shall provide expertise to design, install, integrate and manage existing systems as well as support all upgrade activities or improvements to those systems.” Hyperion's Technical/Management volume addresses this functional area at section 1.4.16, and clearly offers both expertise and experience, both referring to a recent system deployment. This assessment of a Significant Weakness based on supposed “irrelevance” of installation

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work ignores the words of the functional area itself, which clearly states that installation is required. Statement of Facts, Number 29.

The separate team established to evaluate the Technical/Management volumes has wrongly assessed a Significant Weakness under Hyperion's Technical/Management volume as to Development and Release Management, there contending that Hyperion's Technical/Management volume does not provide "specific results [and] it is impossible for the government to assess how well the offeror performed the work cited." The functional area in question is section 3.3.5 of the Statement of Objectives, and this functional area nowhere requires a narrative of the results of specific experiences. Hyperion's Technical/Management volume addresses this functional area at section 1.3.5 and very clearly lists three Federal agencies where this work has been performed. Statement of Facts, Number 30.

The separate team established to evaluate the Technical/Management volumes has wrongly assessed a Weakness under Hyperion's Technical/Management volume as to Testing and Verification Services, there contending that Hyperion's Technical/Management volume "did not demonstrate adequate depth and breadth of experience with testing and verification services," and that the "response provided does not demonstrate a complete appreciation for the complexity and scope of the work intended . . . ." Hyperion's Technical/Management volume addresses this functional area

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(section 3.15 of the Statement of Objectives) at section 1.14, and section 1.14 references section 1.3.6. for method and section 1.3.1 for the repeatable process as part of an overall application development process. At debriefing, these sections of Hyperion's Technical/Management volume were said to have focused "primarily on expertise rather than experience," and these sections of Hyperion's Technical/Management volume were characterized as follows: "The expertise within the proposal was high . . . ." There is no functional area in the SITE Acquisition which requires that an Offeror's Technical/Management volume must demonstrate "appreciation" of scope and complexity. Statement of Facts, Number 31.

The separate team established to evaluate the Technical/Management volumes has wrongly assessed a Weakness under Hyperion's Technical/Management volume as to Acquisition and Property Management Services, there contending that Hyperion's Technical/Management volume "did not demonstrate adequate acquisition and property management services experience," and that Hyperion's Technical/Management volume fails to "demonstrate acquisition and property management services experience in relation to the proposed team." Hyperion's Technical/Management volume addresses this functional area (section 3.8 of the Statement of Objectives) at sections 1.7, 1.7.1, and 1.7.2. In section 1.7.2, Hyperion's Technical/Management Volume lists two separate Federal programs, two Federal Departments, and one Federal Agency as sample experiences for the re-

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quired capabilities and approaches. There is no functional area in the SITE Acquisition which requires that an Offeror's Technical/Management volume must demonstrate experience "in relation to its proposed team." Statement of Facts, Number 32.

#### HYPERION'S NOTICE AND DEBRIEFING

On Thursday, October 8<sup>th</sup>, 2009 Defendant DIA wrote Hyperion that Hyperion's initial Competitive Proposal had been ejected from the Competitive Range "based on significant weaknesses and weaknesses across major components of the 16 Technical and Management Functional Areas Price [Sic]." Defendant DIA wrote that Hyperion's initial Competitive Proposal:

does not provide detailed information and evidence that demonstrates an ability to successfully perform in 12 of 16 functional areas . . . . The proposal lacked sufficient evidence to demonstrate depth or breadth to successfully execute major components of the SITE Statement of Objectives. In addition, your evaluated price was not competitive. . . .

Statement of Facts, Number 33.

Hyperion received a written debriefing on Monday, October 26<sup>th</sup>, 2009, and a final debriefing on Tuesday, October 27<sup>th</sup>, 2009. Statement of Facts, Number 34.

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ARGUMENT

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**I. There Was Not, As Required By Statute And Regulation, A Proper Coordinated, Comprehensive Evaluation Of Initial Competitive Proposals, Nor Has Defendant DIA Provided, As Promised, A Full Assessment Of Offerors' Ability To Perform The Prospective Contract Successfully.**

Federal Acquisition Regulation 15.305(a) explains that “[p]roposal evaluation is an assessment of the proposal *and the offeror’s ability to perform the prospective contract successfully.*” (Emphasis added). Federal Acquisition Regulation 15.305(a)(2)(i) implies a coordinated, comprehensive assessment of Past Performance evaluation and Technical evaluation when it provides that “[p]ast performance information is one indicator of an offeror’s ability to perform the contract successfully.” Federal Acquisition Regulation 15.305(a)(2)(i) implements the requirement of 41 U.S.C. § 405(j)(1)-(C)(ii) that relevant information on Past Performance “submitted by offerors is considered . . . .”

Statute and Regulation thus require the coordinated, comprehensive evaluation of Competitive Proposals. But here there was not, as was promised in the SITE Acquisition, and as is required by Statute and Regulation, a *full* assessment of the Offerors’ “ability to provide the required services.”

An “Acceptable (Green)” color rating on a Past Performance volume should have had a significant impact on the Competitive Range Decision, because, among other things, such an “Acceptable (Green)” color rating on a Past Performance volume means that *minimum doubt exists, based on the*

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*Offeror's performance record, that the Offeror can successfully perform the proposed effort.* Stated differently, in the views of Defendant DIA's own evaluators, the actual experiences and Past Performances of Hyperion and its Teaming Partners left little or no doubt that Hyperion could, in fact, successfully perform on functional areas of the SITE Acquisition.

But this color rating of Hyperion's Past Performance volume cannot be squared with Defendant DIA's evaluation of Hyperion's Technical/Management volume—the volume whose separate evaluation caused Hyperion's ejection from the Competitive Range. It is the responsibility of Defendant DIA, or any other Federal Agency, to conduct a cohesive and integrated evaluation that links-up all the non-Price Evaluation Factors and the Price/Cost Evaluation Factors. As Hyperion has shown, that did not happen here, and this resulted in an arbitrary, irrational, and incoherent Competitive Range Decision which has unlawfully deprived Hyperion of an opportunity to compete for the promised SITE Task Orders.

The problem is that the SITE Source Selection Plan fails to *require* a coordinated, comprehensive assessment of Competitive Proposals and whether or not the use of separate evaluation teams is proper, when separate evaluation teams are so established, there must be mechanism to reconcile their inevitably disparate evaluation reports—and here there was no such mechanism.

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The result of this mechanism missing from the SITE Source Selection Plan is that the “Unacceptable (Red)” color rating of Hyperion’s Technical/Management volume is entirely inconsistent with the “Acceptable (Green)” color rating of Hyperion’s Past Performance volume. The one would have it that “minimum doubt” exists that Hyperion can successfully perform the SITE Acquisition whereas the other conflictingly concludes that Hyperion “cannot meet performance requirements.”

Likewise, this missing mechanism has resulted in irrational and incoherent evaluations of Hyperion’s Technical/Management volume as to Network Operations and Administration, as to Development and Release Management, as to Testing and Verification Services, and as to Acquisition and Property Management Services. Nowhere did Defendant DIA ever find or conclude that Hyperion lacks the knowledge, expertise, understanding, or ability to successfully perform the SITE Acquisition. Rather, all of the weaknesses and deficiencies observed in Hyperion’s Technical/Management volume concern only Hyperion’s failure to articulate its “experience” in sufficient detail to suit the vicissitudes of the team separately evaluating the Technical/Management volumes.

## **II. The Evaluation And Color Rating of Hyperion’s Technical/Management Volume Is Not Grounded In Reason.**

Federal procurement decisions must be “grounded in reason.” A Federal procurement decision is wholly without reason if it is not logical or if it significantly differs from the evaluation scheme which was publicly disclosed. *Serco, Inc. v. United States*, 81 Fed. Cl. 463, 496-497 (2008).

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This “grounded in reason” test is further explicated in the procurement Statutes: 10 U.S.C. § 2305(b)(4)(C) requires that Awards shall be made “considering only cost or price and the other factors included in the solicitation.” This statutory requirement abjures Agencies from making procurement decisions using a significantly different basis than that which was publicly disclosed. *Banknote Corporation of America, Inc. v. United States*, 56 Fed. Cl. 377, 386-387 (2003), *aff’d*, 365 F.3d 1345 (Fed. Cir. 2004).

Here Defendant DIA has promised a *full* assessment of Offerors’ ability to successfully perform the Task Orders which are to be issued under the SITE Acquisition, but that which has happened is that the Source Selection Plan’s failure to *mandate* a comprehensive, coordinated assessment of initial Competitive Proposals relegates Past Performance, just as Security, to a “pass/fail” process and then unlawfully further elevates the assessment of Offerors’ Technical/Management volumes. This is significantly different from the promised relationship of the non-Price Evaluation Factors publicly announced in the SITE Acquisition.

Federal Acquisition Regulations 1.102(b)(3) and 1.102-2(c)(3) obligate Agencies to act with integrity, fairness, and openness. *Dynacs Engineering Company, Inc. v. United States*, 48 Fed. Cl. 124, 131 (2000). A significantly different evaluation than that which was publicly announced for the non-Price Evaluation Factors is not fair. A complete remedy for the significant and prejudicial procure-

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ment process errors here requires that Hyperion be restored to the Competitive Range and allowed to submit a revised Competitive Proposal.

### **III. The Color Rating Of Hyperion's Technical/Management Volume Is Irrational And Arbitrary.**

It is irrational and arbitrary to conclude, as does this Competitive Range Decision, that Hyperion's Technical/Management volume is properly color rated as "Unacceptable (Red)." The separate team established to rate the Technical/Management volumes has found four beneficial strengths in Hyperion's Technical/Management volume—strong, relevant experience in web services, strong web and application development expertise and experience, strong cable installation experience, and a high retention rate. Yet under the color rating schema established for the Technical/Management volumes, the "Unacceptable (Red)" color rating can be assigned to a Technical/Management volume *only if there are no beneficial strengths*. But this separate evaluation team *has in fact assessed four beneficial strengths* for Hyperion's Technical/Management volume. Thus this color rating is irrational and arbitrary.

Federal Acquisition Regulation 15.305(a) approves the use of color ratings for the assessment of Competitive Proposals, but this comes with the proviso of Federal Acquisition Regulation 15.303-(b)(3) that evaluation methods must be consistent. Here the "Unacceptable (Red)" color rating assessed for Hyperion's Technical/Management volume is inconsistent with the standard for this color

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rating—in order for a Technical/Management volume to be color rated as “Unacceptable (Red),” the evaluators must also find “no beneficial strengths.”

This “Unacceptable (Red)” color rating of Hyperion’s Technical/Management volume is summary and unreasoned, this followed by “formulaic incantations [which] particularly miss the mark” when, as here, there is a fatal confusion between the assessed color rating and the announced color rating schema for the Technical/Management volumes. *Serco*, 81 Fed. Cl., at 499.

The full and open competition demanded by 10 U.S.C. § 2305(a)(1)(A)(i) requires that Hyperion’s initial Competitive Proposal with only minor deficiencies or weaknesses (this as is evidenced by the “Marginal (Yellow)” color rating which could have been assessed for Hyperion’s Technical/Management volume) be retained within the Competitive Range and that Hyperion be afforded an opportunity to accommodate these separate evaluation teams through the submission of a revised Competitive Proposal. *Dehler Manufacturing Co.*, B-250850, February 17<sup>th</sup>, 1993, 1993 U.S. Comp. Gen. LEXIS 152, \*3-\*4.

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CONCLUSION

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For all of the reasons set forth in the foregoing Brief in Support of Plaintiff’s Motion for Judgment on the Administrative Record, Hyperion respectfully requests that the Court enter Judgment

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ment for Hyperion on this Administrative Record, RCFC 52.1(c)(1), together with: (1) a Declaration that Defendant DIA's Competitive Range Determination of Thursday, October 8<sup>th</sup>, 2009 lacks a rational basis and is unreasonable or irrational, and thus arbitrary and capricious; (2) a Permanent Injunction ordering Defendant DIA to make a new Competitive Range Determination from among the existing initial Competitive Proposals submitted in response to the SITE Acquisition, Solicitation Number HHM402-09-R-0050; (3) a Declaration that Hyperion is entitled to equitable relief, and money damages, for the Defendant DIA's breach of its obligations under Federal Acquisition Regulations 1.102(b)(3) and 1.102-2(c)(3) to act with integrity, fairness, and openness, and to treat Offerors fairly; and (5) such further and other relief as the Court may deem just and proper.

Respectfully submitted,

/s/ Cyrus E. Phillips IV

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Cyrus E. Phillips IV

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November 23<sup>rd</sup>, 2009

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CERTIFICATE OF SERVICE

I hereby certify, under penalty of perjury, that on Monday, November 23<sup>rd</sup>, 2009 a true and complete copy of this Plaintiff's Brief in Support of Plaintiff's Motion for Judgment on the Administrative Record was filed electronically via the Court's Electronic Case Filing System, through which notice of this filing will be sent to:

William J. Grimaldi, Esq.

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Attorney of record for Defendant,  
U.S. Department of Energy.

/s/ Cyrus E. Phillips IV

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