Exhibit E
In the matter of: Helicopter Transport Services LLC B-400295.2

SUPPLEMENTAL MEMORANDUM OF LAW

With this memorandum, the U.S. Department of Agriculture, Forest Service (Agency) responds to the supplemental protest grounds filed August 4, 2008 (Supp. Protest), by protestor Helicopter Transport Services LLC (HTS) (attached, without exhibits, as Exhibit A). In particular, this memorandum will address concerns raised in an email (attached as Exhibit B) and during a telephone call by the Government Accountability Office (GAO) subsequent to the filing of the supplemental protest, which are summarized as follows:

1. By evaluating the “aircraft technical capability” factor on an acceptable/unacceptable basis, did the Agency neutralize what the RFP called its most important factor? GAO’s concern is that “all the offerors who proceeded in the competition got the same score, thus negating, rather than recognizing and appreciating, any differences.” See Exhibit B.

2. Did the Agency conduct a meaningful, deliberate weighing of the costs and benefits of awarding line items to higher-priced, higher-technically-rated aircraft over the lower-priced aircraft proposed by HTS?

3. How does the Agency defend the performance, in light of the technical evaluation team’s (TET’s) summary comments (Exhibit B), and the lack of contemporaneous documentation? How does the Agency respond to HTS’s allegation that it considered HTS’s performance in only one of the three required years?

This memorandum provides detailed responses to each of these questions and demonstrates the reasonableness of the Agency’s procurement decisions. In particular, with respect to number (1), above, the Agency believes GAO so far has been simply unaware of what

[Redacted for Intervenor]

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the Agency considered relevant to "aircraft technical capability." Completely irrelevant to that factor is whether any helicopter exceeded the Agency's performance specifications, since the Agency needed only to determine whether those the specification could be met, as based on current and complete documentation. The acceptable/unacceptable evaluation lent itself to that determination, whereas the qualitative assessment HTS now wants would not have done so.

FACTS RELEVANT TO SUPPLEMENTAL PROTEST

In the Technical Proposal Instructions, Solicitation No. AG-024B-S-08-9003 (the RFP) informed offerors that "[t]he technical proposal will be used to make an evaluation and arrive at a determination as to whether the proposal will meet the requirements of the Government." AR, Tab 7, at 212 (emphasis added). In addition, offerors were told that "[a]ward [would] be made to those offerors whose proposals [were] technically acceptable and whose technical/price relationships [were] the most advantageous to the Government." AR, Tab 7, at 216 (emphasis added).

Factor 1 Evaluation

With respect to an offered aircraft's technical capability (factor 1), the determination whether each aircraft met the government's requirements consisted of the TET's reviewing documentation for each offered aircraft to ensure it was current, complete, and demonstrated that the aircraft could perform as required for that particular line item. For factor 1, the TET did not consider, or care, whether a helicopter exceeded the Agency's requirements. Exhibit C, at ¶ 6.

To use an example, line items 1 through 10 required helicopters that could lift 5,000 pounds at an altitude of 8,000 feet and 25 degrees Celsius. AR, Tab 7, at 102. For each aircraft offered for line items 1 through 10, the TET reviewed the offeror's proposal to see that, based on
the information provided, the aircraft could lift 5,000 pounds at an altitude of 8,000 feet and 25
degrees Celsius. If it could not, then the aircraft was deemed "unacceptable" for that line item
and it was not considered further in the evaluation process. An aircraft also could be deemed
unacceptable under factor 1 if the offeror failed to provided all of the materials listed in Section
E of the RFP for factor 1: i.e., an Interagency Helicopter Load calculation (based on weights
determined within a specified timeframe), copies of certain certificates, current weight and
balance, a current equipment list, and performance data. AR, Tab 7, at 212-213. That is
because, among other reasons, current, complete information was necessary for the Agency to
determine price per pound (PPP) under its best value formula. Exhibit C, at ¶ 6. The submission
of incomplete or old information under factor 1 would improperly skew the results of the
Agency’s best value analysis. Therefore, proposals that contained incomplete or old
information, or that failed to demonstrate the offered aircraft could not perform as required, did
not move forward in the competition. This occurred with respect to one of the 11 helicopters
HTS offered. Exhibit C, at ¶ 7.

On the other hand, if the offeror submitted all of the information required under Section
E, and showed that at least one of its aircraft could perform to the specifications of the line
item(s) for which it was offered, then the offeror was deemed “acceptable” under factor 1 and
received a score of 2 for that factor.

Under this evaluation method, an offeror that failed to offer any acceptable helicopters
(either for lack of proper documentation or because they could not perform to specifications) was
not further evaluated by the TET for technical factors 2 through 4, or for price. That offeror was
removed from the competition. Likewise, if, hypothetically, one of several helicopters an offeror
proposed was unacceptable, the offeror would proceed in the competition with a score of 2 on
factor 1, but the unacceptable helicopter would not. This explains what GAO has raised as an apparent inconsistency in the Agency Report, which stated, "[p]roposals were submitted by 34 offerors for a total of 88 helicopters," (AR, Tab 2, at ¶ 5) but that "evaluations included 32 vendors offering a total of 80 helicopters." AR, Tab 5, at 1. The decrease in number of offerors and helicopters represents those offerors and helicopters that were deemed unacceptable under factor 1 and were not evaluated under factors 2 through 4, or for price.

Although the evaluation scoresheet indicates that an "unacceptable" rating on factor 1 would result in a score of 5, in practice, an unacceptable aircraft was disqualified entirely, without receiving a score. (Indeed, it would be nonsensical to apply any score to an aircraft that already was determined not to meet the Agency's requirements for that line item.) However, offerors that had at least one technically acceptable aircraft did receive a 2 for factor 1, and that score was incorporated into the offeror's total adversive score. This outcome was consistent with the RFP notification that "[a]ward [would] be made to those offerors whose proposals [were] technically acceptable and whose technical/price relationships [were] the most advantageous to the Government." AR, Tab 7, at 216.

Past Performance Evaluation and Tradeoff Analysis

Further explanation of the Agency's past performance evaluation and tradeoff analysis is provided in statements submitted herewith from the CO (Exhibit C) and the TET Chair (Exhibit D). In response to HTS's claim that the Agency only considered one of three past performance years, the TET describes his own personal experience with HTS, which dates back to 2005. Exhibit D, at ¶ 5. He also states that ten of the TET members had personal experience dealing with HTS, which was discussed as part of the past performance evaluation. Only one evaluator had no such experience. Id. at ¶ 4. The TET Chair also specifically addresses GAO's concern

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regarding the apparent contradiction inherent in the award of some line items to HTS despite the 
Agency's dissatisfaction with HTS's performance. He states,

The first ten (10) items in the contract called for a payload of 5,000 pounds. The only 
aircraft that are capable of this are the S-64, CH-54, and BV-234." Exhibit D, at ¶ 17. In other 
choice but to award co. The CO statement echoes this 
reasoning: "[I]f for a particular line item we . . . 
choose it. W!

was not a deal breaker in this 
procurement." Exhibit C, at ¶ 13. (Nor should it have been, because past performance was the 
second least important technical evaluation factor.)

The CO also provides further explanation of the cost/technical tradeoff analysis 
performed by the Agency, after receiving the Optimization Model's (OM's) recommendations 
for award. "The evaluation team . . . reviewed the OM recommendations to ensure the 
Government was obtaining the best combination of aircraft, not necessarily the aircraft that was 
recommend by the OM." Exhibit C, at ¶ 2. So, although the OM functioned as a sort of 
computerized tradeoff analysis, the Agency did not mechanically adopt its recommendations. 
They "studied each recommendation provided by the OM model and looked at the overall 
scoring, gallons delivered, price per pound index and the overall price for each recommendation. 
For each line item, the team either concurred with the OM recommendations or made a 
recommendation to award to a different vendor. We did change a couple of the OM 
recommended items." Exhibit C, at ¶ 3.
ARGUMENT

A. The Agency’s Evaluation of Aircraft Technical Acceptability on an Acceptable/Unacceptable Basis Was Reasonable and Consistent With the RFP

HTS argues the Agency’s decision to evaluate factor 1 on an acceptable/unacceptable basis was inconsistent with the RFP for the following reasons: (a) the Agency did not “meaningfully consider the different features and capabilities of competing aircraft and whether any of those characteristics presented advantages to the government” (Supp. Protest, at 11), thereby negating the importance of factor 1; and (b) the acceptable/unacceptable evaluation was “irrational,” because it did not provide “a meaningful basis for determining whether any of [the differences between aircraft] amounted to an advantage that might inure to the government’s benefit.” Supp. Protest, at 12.

As this part of the Argument will explain, the Agency was not required to qualitatively assess aircraft under factor 1. Contrary to numerous misleading statements by HTS on this point 1, nowhere did the RFP promise such an assessment, nor did it imply that factor 1 would be evaluated using any particular method. In addition, the use of a pass/fail rating system for factor 1 served to magnify, not negate, its importance vis-à-vis other factors, because helicopters that received unacceptable ratings on factor 1 were eliminated from the competition. Finally, the fact that, under factor 1, the Agency did not take into account differences between offered aircraft does not render “irrational” its evaluation. The acceptable/unacceptable standard is precisely what worked for the Agency under factor 1, which was intended only to determine the technical acceptability of each aircraft -- whether it could perform under the stated conditions for the line item -- not the aircraft’s technical superiority. If HTS’s helicopter indeed had

1 HTS’s response at least twice gives the impression the Agency promised offerors a “qualitative” assessment of their aircraft’s technical capabilities under factor 1. That statement is simply untrue. See Supp. Protest, at 11 and 12.
that would have been reflected in its PPP, which is where the evaluation process took into account how well a helicopter performed. Simply put, the Agency did not care, with respect to "aircraft technical capability," whether one helicopter outperformed another, as long as each could perform to the specifications.

1. The RFP Did Not Promise Offerors a Qualitative Evaluation of Factor 1.

According to HTS, evaluating factor 1 on an acceptable/unacceptable basis was inconsistent with the RFP, which "contemplated a best value procurement, based upon the qualitative assessment of price and four technical factors." Supp. Protest, at 2. This statement misleadingly implies the RFP promised a qualitative assessment of every technical evaluation factor, including factor 1, which it did not. HTS also argues the Agency was required to qualitatively evaluate factor 1, based on Lithos Restoration, Ltd., B-247003.2, 1992 U.S. Comp. Gen. LEXIS 501 (Apr. 22, 1992), which is distinguishable from this protest.

HTS cites Lithos Restoration, Ltd. for the principle that the most important evaluation factor must be evaluated qualitatively, and not on a pass/fail basis. It is true that in that case GAO found improper the agency's "go/no-go" treatment of what happened to be the most important evaluation factor (the qualifications of key personnel). However, GAO's reasoning was based on facts that are not present in this protest: In Lithos Restoration, Ltd., the solicitation first told offerors that key personnel would be evaluated on a go/no-go basis, then it listed "key personnel" among the factors that would be balanced against price to determine which offer was most advantageous to the government. The dual reference to "key personnel" created an ambiguity -- which is not present in our case -- as to how that factor would be evaluated, so GAO interpreted the solicitation in a way that made sense. It would not make sense to evaluate the "key personnel" factor on only a go/no-go basis, since it also appeared in a list of factors that
clearly would not be evaluated that way (because they had not been singled out for such
treatment). So, the agency in Lithos Restoration, Ltd. should have done a qualitative assessment
of key personnel once a proposal made it through the pass/fail evaluation. Here, because the
Agency did not expressly state that some factors would be go/no-go, while others would not,
there is no basis for assuming the list of technical factors was intended to be qualitatively
assessed.

Nothing in the RFP creates such an assumption, particularly as to factor 1. To the
contrary, the RFP asks offerors only to demonstrate the capability of each helicopter to perform
as each line item required. Consider, for example, the following:

a. Section B of the RFP, Supplies or Services and Prices, defined each of the three
tiers of the procurement (items 1 through 10, items 11 through 18, and items 19
through 34) in terms of their “capability.” AR, Tab 7, at 102. Whether an aircraft
was eligible for award under a particular tier depended on whether it met the
minimum performance requirements specified in Section B. In keeping with that
requirement, the “Aircraft Technical Capability” factor considered only whether
an aircraft met -- as opposed to exceeded -- the minimum performance
requirements.

b. The information HTS believes should have been part of the factor 1 analysis --
i.e., that its particular make and model of helicopter could carry more than other
makes and models -- was expressly made part of a different evaluation factor;
namely, price. The RFP states, under Business Proposal Instructions, “The base
value formula will be used to make trade-off determinations to measure aircraft
efficiencies of make and models of helicopters offered.” AR, Tab 7, at 211
(emphasis added).

c. In contrast, the Technical Proposal Instructions request only enough information
to determine “whether the proposal will meet the requirements of the
Government.” AR, Tab 7, at 212 (emphasis added)

d. As to factor 1 specifically, the RFP instructions state, “[p]erformance enhancing
data . . . shall not be used and will not be considered for the evaluation of
proposals.” AR, Tab 7, at 213.

e. Offerors were informed that awards would be made to “those offerors whose
proposals are technically acceptable and whose technical/price relationships are
the most advantageous to the Government.” AR, Tab 7, at 216 (emphasis added).
This is exactly the process the Agency implemented when it disqualified technically unacceptable aircraft following the factor 1 evaluation.

Each of these examples shows that the Agency never intended to perform a qualitative evaluation of aircraft under factor 1, nor did it try to give, or succeed in giving, offers that impression. Rather, the Agency consistently informed offers that for factor 1, it was interested in determining only whether the offered aircraft could perform to its specifications, and whether that fact was supported by current documentation.

Finally, factor 1 was the most important technical factor in the TET’s evaluation, as stated in the RFP (AR, Tab 7, at 212), and the Agency treated it as such. The decision to evaluate factor 1 on a pass/fail basis did not neutralize its importance, as HTS claims. For factor 1, if an aircraft was deemed unacceptable, it was disqualified from further competition. Under any other technical evaluation factor, if an aircraft (or offeror) was deemed unacceptable, it received a score of 5 for that factor. For technical factors 2 through 4, a score of “Unacceptable (5)” had a negative impact on the total adjudicial score, but it did not result in the offeror’s total disqualification. That result was reserved for the most important factor -- factor 1. We struggle to understand how factors 2 through 4 could be considered more important than factor 1, where only the factor 1 evaluation could result in the total disqualification of an aircraft.

HTS mistakenly argues that the pass/fail scoring of factor 1 renders that factor unimportant merely because it did not allow the agency to “meaningfully consider the different features and capabilities of competing aircraft and whether any of those characteristics presented advantages to the government.” Supp. Protest, at 11. This argument incorrectly presumes that

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2 The Agency’s intention becomes even more clear in the Source Selection Plan, which states, “(a)ward may not necessarily be made for technical capabilities that would appear to exceed those needed for the successful performance of the work.” AR, Tab 7, at 8. This statement directly contradicts HTS’s claim that the “Solicitation never intended a pass/fail evaluation scheme for this factor,” as does the pre-made evaluation sheet that eliminated the possibility of scoring anything other than acceptable or unacceptable. AR, Tab 7, at 15.

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the Agency cared (for purposes of factor 1) about the different features and capabilities of competing aircraft. It did not. Moreover, the Agency did eventually consider the different features and capabilities of competing aircraft, in the context of the Best Value Formula (AR, Tab 7, at 211), and as part of the cost/technical tradeoff analysis, following the O.M. recommendations. Exhibit C, at ¶ 3.

For GAO to require the Agency to perform a qualitative assessment of offered aircraft under factor 1 would be to improperly dictate how the Agency should determine which helicopters meet its needs. "The evaluation of technical proposals is a matter within the discretion of the contracting agency since the agency is responsible for defining its needs and the best method of accommodating them." CGI Information Services, Inc., B-282074, 1999 WL 429465, *2 (Comp. Gen. 1999). The Agency, based on past experience, determined that for factor 1, what mattered most was that offerors (a) demonstrate their proposed helicopters could perform to the RFP specifications, and (b) that they provide all of the information requested. Exhibit C, at ¶ 6. It is not for GAO to second-guess that determination, unless it is shown to be unreasonable. Here, the use of a pass/fail evaluation method for factor 1 was not unreasonable. It suited factor 1, which sought only a yes or no answer regarding each aircraft’s capabilities, and the sufficiency of the offeror’s documentation. GAO “will not substitute [its] judgment for that of the agency; rather, [it] will review the record to determine whether the judgments are reasonable and consistent with the solicitation criteria.” Wackenhut International, Inc., Wackenhut Jordan, Ltd.--A Joint Venture, B-299022, B-299022.2, 2007 U.S. Comp. Gen. LEXIS 44, *9 (Jan. 23, 2007).
2. **HTS Was Not Prejudiced By the Agency's Alleged Failure to Notify Offerors of the Acceptable/Unacceptable Factor 1 Assessment.**

GAO “will not sustain a protest absent a reasonable showing of competitive prejudice, that is, unless the protester demonstrates that, but for the agency's actions, it would have a substantial chance of receiving award.” *OfficeMax, Inc.*, B-299140.2, 2007 WL 2255096, *7 (Comp. Gen. 2007). In this case, even if the RFP expressly referred to factor 1 as a pass/fail factor, HTS would have had no greater chance of receiving awards for the four protested line items. HTS would not have done anything differently, had the Agency’s evaluation method been made more clear.

HTS alleges it suffered competitive prejudice from the Agency’s evaluation of factor 1 on a pass/fail basis, claiming it would have had a reasonable chance of being awarded the 1. See Supp. Protest, at 25.

HTS’s method of determining prejudice, however, is misguided. In considering the prejudice issue, GAO may not, in effect, substitute a different procurement method that incorporates a qualitative assessment, if such a system would not address the Agency’s needs; i.e., determining whether a helicopter could meet (not exceed) its requirements. GAO “will not disturb an agency’s determination of the procurement method to be used in accommodating its minimum needs unless it is shown clearly to be unreasonable.” *Cornell University*, B-196915, 1980 WL 17281, *1 (Comp. Gen. 1980). So, the question GAO should ask itself is, “what could HTS have done differently if it knew factor 1 was pass/fail, and not a qualitative assessment?” The answer is “nothing.”

1. so no prejudice was suffered, and no remedy is necessary.

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requirement for this helicopter, wouldn’t it have done so? HTS knew the Agency would evaluate offers without discussions and that its “initial offer should contain [its] best terms from a cost and technical standpoint” (AR, Tab 7, at 210) and still.

“TS cannot now ask GAO for the chance to try harder with respect to its wing being sufficiently warned that it must put its best foot forward initially. See OfficeMax, Inc., supra, at *8 (protester suffered no prejudice from lack of clear notice that its failure to comply with mandatory solicitation requirements would result in disqualification, because protester could not have complied with the requirement anyway).

B. The Agency’s Cost/Technical Tradeoff Analysis Was Sufficient and Adequately Documented.

HTS alleges that the Agency based its source selection on a “purely mechanical” application of numerical scores (Supp. Protest, at 17), a claim that has now twice been refuted by the CO in his initial and supplemental statements of relevant facts. GAO has indicated that additional contemporaneous documentation is needed to support these statements. See Exhibit B. But, while it is true that GAO accords “greater weight to contemporaneous evaluation and source selection documents,” GAO also must “consider the entire record, including statements and arguments made in response to a protest, in determining whether an agency’s evaluation and selection decision are supportable.” Motorola, Inc., B-254489, B-254489.2, 1993 WL 530673,

HTS was informed of this fact during its debriefing.

4 See AR, Tab 2, at ¶ 14-15 (“The team reviewed each Item being recommended [by the OM] by looking at the overall score and the best value formula and the make and model of the aircraft.... I reviewed the TET recommendations to determine, for each line item, whether the recommended aircraft was the best value to the government at the offered price, given how it was rated in the technical evaluation”); see also Exhibit C, at ¶ 3 (“The evaluation team then reviewed the OM recommendations to ensure the Government was obtaining the best combination of aircraft, not necessarily the aircraft that was recommended by the OM. This process was subjective and allowed for adjustments to the OM recommendations”).

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at 44 (Comp. Gen. 1993). Therefore, GAO must credit the CO’s assertion that he and the TET performed a subjective, non-mechanical best value analysis after obtaining the OM recommendations, particularly where HTS has not challenged the statements’ veracity.5

More important, the Agency Report does contain contemporaneous source selection documents that show the CO and the TET performed a meaningful tradeoff analysis. The CO’s pre-protest “Request for Source Selection Authority” to Ron Hooper provides, for each line item, two or three sentences explaining why the Agency in some cases recommended a higher-priced aircraft; e.g.,

“AR, Tab 5,

at 3 (line item 7).6 In cases like this one, where the RFP informed offerors that technical factors were significantly more important than price, GAO has accepted even less documentation than what the Agency has provided here, as evidence of the agency’s tradeoff analysis. That makes sense, because where an RFP emphasizes the significantly greater importance of technical factors over price, it is not much of a stretch to award to a higher-priced, technically superior offeror. Under those circumstances, “an agency has considerable discretion to award to an offeror with a higher technical rating and higher price.” Tesea & Associates, Inc., B-293942, 2004 WL 1791348, 6 (Comp. Gen. 2004).

In Motorola, Inc., for example, the Army produced no contemporaneous documentation that referred to a tradeoff analysis or explained, specifically, why it made award to a technically superior, higher-priced proposal. Post-protest, the Army repeated what it had told the protester

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5 HTS does not specifically dispute the CO’s statement that conducted a subjective best value analysis, arguing only that the Agency Report does not sufficiently document it.

6 These statements are not quite as “rote” as they initially may have appeared in the Agency Report, which the Agency redacted (upon GAO’s instruction) to omit irrelevant references to non-protested line items. For example, the explanation for one such line item stated, “

\[\text{Upon request by GAO, the Agency will provide the omitted pages for GAO’s in camera review.}\]
at its debriefing: "[S]ince Motorola's cost was lower by only approximately 18 percent and since GTE had a technically superior proposal, there was no need to conduct a formal trade-off involving percentages etc., since there was a Superior proposal with relatively little cost difference and the RFP stated that technical was more important than all other factors combined." Motorola, Inc., supra, at *7. GAO denied the protest, finding the agency's explanation was rational and supported by the record. It said, "[t]he agency here made a rational (albeit informal) trade-off decision by considering the fact that although GTE's proposed costs were higher than the other offerors, GTE's technical and management proposals were uniquely rated superior." Id., at *8. That is precisely the logic the Agency here applied to the protested line items, but with the written explanations that the Army lacked in Motorola, Inc.

Another case, Virginia Technology Associates, B241167, 1991 WL 72921 (Comp. Gen. 1991), more closely resembles this one, in that the agency produced documentation that referred to the awardee's proposal as a better value to government. Also, as here, the agency acknowledged in writing both the protester's lower cost and the awardee's technical superiority, but did not refer specifically to a tradeoff analysis. When the protestor complained that "the agency failed to make a specific determination that the awardee's technical superiority warranted the additional cost," GAO disagreed. It stated that the "source selection authority's selection decision did not refer to a cost/technical tradeoff per se, but it is clear from her written decision that she considered [the awardee's] technical superiority worth the additional cost." Virginia Technology Associates, at *5. The same rationale is clear in the CO's "Request for Source Selection Authority," which, for each protested line item,

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Finally, HTS attempts to fit its proposal into the category by referring to its supposed ability to 


In this procurement, whether a proposal was technically superior depended on the ratings it received on the four technical factors: aircraft technical capability, safety/risk management, past performance, and organizational experience. Technical superiority did not depend — as HTS would have GAO believe — on the degree to which one helicopter could outperform another. For that reason, even if, for sake of argument, was not even a consideration for factor 1, so

with a score. (AR, Tab 5, at 15), as compared with their scores of 2 and respectively.

See AR, Tab 5, at 13-14.

GAO has similarly found reasonable the government's decision to pay the awardee a price "125 percent higher" than the protestor's price, stating its conclusion was not changed by the "gross" cost difference. "Implicit in the contracting officer's cost/technical tradeoff is the determination that [the awardee's] outstanding approach is worth the difference in price." General Services Engineering, Inc., B-245458, 1992 WL 15031, at *8 (Comp. Gen. 1992). In that case, as in the instant protest, the technical factor was more important than price. Id. at *1.

* Even if, in the face of these cases, GAO finds the Agency did not adequately document its tradeoff analysis, that deficiency cannot be found to have caused any prejudice to HTS unless GAO also determines that the awards to Erickson and Columbia were unreasonable.
C. The Technical Evaluation Team Appropriately Based Its Past Performance Evaluation on the Limited Documentation Provided By HTS and On Evaluators' Personal Knowledge

1. HTS Failed In Its Duty to Provide Any Documentation That Would

The RFP informed offerors it would evaluate their past performance "for the past 3 years (2005-2007)." AR, Tab 7, at 213. HTS complains that the Agency failed to consider its performance in 2005 and 2006, stating, "there is an absence in the record of documentation regarding the services that HTS performed during the 2005 and 2006 fire seasons." Exhibit A, at 20. The Agency's most immediate response to this complaint is that, if the Agency lacked information relating to the 2005 and 2006 fire seasons, it is because HTS did not provide any. With the Forest Service, HTS had only one contract in each of the years 2005 and 2006, which explains why the Agency had limited discussions about HTS's performance during those years. Exhibit D, at ¶ 5. (HTS did not have multiple contracts with the Forest Service until 2007. Exhibit D, at ¶ 11.) If HTS had relevant contracts with parties other than the Agency in 2005 and 2006 that would have bolstered its past performance, it should have provided them.

The RFP instructed offerors to "[i]dentify and submit your references with verifiable telephone numbers to support your past performance. We may contact your references . . . ." AR, Tab 7, at 213. What HTS submitted under "Past Performance" with its proposal was as follows:

1. A list of four contracts (without any references names or contact information).
2. Three certificates of appreciation for work on two fires in 2007 (signed, but with no contact information).

*The Agency also asked offerors to submit performance evaluations during the Pre-Proposal Conference held March 19, 2008. Included in the transcribed questions and answers, which all offerors received, is the following: "Q. - Do you want performance evaluations sent in with proposals? A. - Yes. There is no issue with submitting performance evaluations as part of your proposal. Q. - Do you look at these performance evaluations as part of past performance? A. - Yes."

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3. A thank-you letter from a Fire Captain, dated November 2002 (three years prior to the relevant time period).

4. One positive evaluation report from what appears to be a 2005 contract (no year provided, but contract number indicates "05,"; reviewer is named, but there is no contact information).

See AR, Tab 8, at 267-275.

HTS failed entirely to provide any references in support of its past performance (even for 2007), but it now argues the Agency’s past performance evaluation was deficient, because the Agency did not consider information from two of three prior years—information HTS did not supply. It was HTS’s responsibility—not the Agency’s—to supply references from each of the past three years that would attest to HTS’s past performance. “An agency’s evaluation is dependent upon information furnished in a proposal, and it is the offeror’s burden to submit an adequately written proposal for the agency to evaluate.” Leader Communications Inc., B-298734, B-298734.2, 2006 WL 3525376, at *6 (Comp. Gen. 2006) (rejecting the protester’s argument that the agency should have, on its own, verified the past success of the protester’s management approach). HTS cannot complain that the Agency did not consider information that it never supplied.

2. The Agency’s Evaluation of HTS’s Past Performance Was Properly Based on TET Members’ Personal Experiences with HTS and Supported by Performance Reviews.

The Agency did, in fact, consider HTS’s performance, thanks to TET members’ extensive dealings with HTS in the preceding contract year. Although HTS failed to provide any references or contact information, most members of the TET (in addition to the CO) had worked for years with HTS. See Taylor Declaration, Exhibit D, at ¶ 4. It is well established that “[e]n evaluator’s personal knowledge of an offeror may be properly considered in a past performance evaluation.” Omega World Travel, Inc., B-271262.2, 1996 U.S. Comp. Gen. LEXIS 378, at *7
Comp. Gen. 1996; see also Daylight Tree Service & Equipment, LLC, B-310808, 2008 U.S. Comp. Gen. LEXIS 12 (Comp. Gen. 2008) (denying protest, where evaluation team provided documentation from prior contracts with protester to support their personal knowledge). In this case, the TET members verbally discussed their experiences with HTS and determined that, based on those experiences, HTS deserved

Although the TET did not document these discussions, which GAO cites as a concern, other documents in the Agency Report, such as performance reviews by the agency and letters to HTS from past years, provide evidence that supports the TET.

In Omega World Travel, a case with facts that are remarkably similar to those in this protest, OAO denied a protest that was based in part on a complaint that the agency’s past performance evaluation was inadequately supported with contemporaneous documentation. As HTS does now, the protester pointed to a few positive comments included in customer surveys (one reference rated the protester “good”) that appeared to contradict the agency’s overall negative past performance evaluation, and it objected to the evaluators’ reliance on their personal experiences with the protester, which was the incumbent contractor. To support its evaluation, the agency provided negative customer surveys, internal memoranda, and post-protest declarations that explained the evaluators’ rating, but no contemporaneous documentation to explain the rating. GAO found this was sufficient, stating, “while we accord more weight to contemporaneous documents in determining whether an evaluation was reasonable, our review is based on all the information in the record, including documentation prepared in response to the protest contentions.” Omega World Travel, at *9.
3. That HTS Was Awarded Some Line Items And Received Some Positive Reviews Does Not Undermine the Reasonableness of its past performance. See Supp. Protest, at 21 (quoting reviewed who "enjoyed working along with" HTS employees). It also argues that HTS must have been underrated in past performance, given the TET summary comment calling HTS "o" "Id. at 22. GAO, too, refers to this comment as "fairly positive," and points to another comment in which the evaluator stated he or she would again work with HTS. See Exhibit B. GAO has asked the Agency to defend the past performance rating in light of these arguments.

That some positive comments existed, and that HTS ultimately was awarded some line items, do not contradict rating. The contracts HTS received are, if anything, evidence that the past performance factor was treated as only the second least important technical evaluation factor, as the RFP informed offerors it would be treated. Had past performance been the most important factor, then HTS may have received no awards at all. But because it was the third most important factor, the effect of rating was not so severe.

The Agency's evaluation of HTS's past performance is not unreasonable merely because some positive comments exist to contradict the negative. rating reflects the TET's balancing of positive against negative. In particular, the TET balanced positive experiences with "Exhibit D, at ¶ 11. This was reasonable, given that the pilots and mechanics have been forced to do as HTS management instructs. Exhibit D, at ¶ 17.
Had the TET not considered the positive comments at all, or its members' positive experiences with HTS pilots and mechanics,

"Regarding the relative merits of offerors' past performance information, this matter is generally within the broad discretion of the contracting agency, and our Office will not substitute our judgment for that of the agency. . . . A protester's mere disagreement with the agency's judgment does not establish that an evaluation was improper." AT&T Corp., B-299542.3, B-299542.4, 2007 U.S. Comp. Gen. LEXIS 250, at *40 (Nov. 16, 2007).

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