

Office of Dispute Resolution for Acquisition

Federal Aviation Administration

Washington, D.C.

FINDINGS AND RECOMMENDATION

Protest of Fisher-Cal Industries, Inc.

Pursuant to Solicitation DTFA03-96-R-0001 and

Contract Dispute of Art-Z Graphics, Inc.

Docket: ODRA Dockets 98-ODRA-00081 and 00083 (Consolidated)

Appearances:

For the Protester, Fisher-Cal Industries, Inc.: Luis A. Caldero, Secretary-Treasurer

For the FAA Technical Center: James J. Drew, Esq., Senior Attorney

For the Interested Party, Art-Graphics, Inc.: Brian W. Craver, Esq., Person & Craver LP

I. Introduction

The current disputes arise as a result of a settlement agreement ("Settlement Agreement") entered into by Art-Z Graphics, Inc. ("Art-Z") and the FAA Technical Center ("Center") on March 11, 1998. The agreement settled and resulted in the dismissal of Art-Z's protest of an award to Fisher-Cal Industries, Inc. ("Fisher-Cal"), which had been docketed as ODRA 96-ODR-00012. The Settlement Agreement, which was executed by Art-Z and a warranted Contracting Officer ("CO"), reflected recognition by the Center that its decision to award the contract to Fisher-Cal "may have been improper." *See* Settlement Agreement, dated March 10, 1998, page 1. The Settlement Agreement provided that the Center would not renew its option under the protested contract, and make an award to the protester for one base year and one option year based on the protester's original cost proposal. The awardee, Fisher-Cal, participated as an interested party in the protest, but was not a signatory to the Settlement Agreement. However, on March 13, 1998, Fisher-Cal received a copy of the Settlement Agreement, and on April 3, 1998, it received a copy of the Administrator's Order dismissing the protest on the basis of the Settlement Agreement.

Subsequently, on June 23, 1998, the ODRA received a protest by Fisher-Cal against the Settlement Agreement. The protest was never filed directly with the ODRA, but rather was received by the ODRA as an undated attachment to a Congressional inquiry. Nevertheless, the ODRA treated Fisher-Cal's undated letter as a protest to be resolved in accordance with Section 3.9 of the Acquisition Management System ("AMS"). Fisher-Cal's undated letter purports to protest a decision by the ODRA which allegedly "terminates our FAA Graphic Arts Contract for no reason or cause by our company." The records of the ODRA show that there was no decision by the ODRA in the original protest and there has been no termination of Fisher-Cal's contract. In spite of these errors, the ODRA construes Fisher-Cal's letter to allege the following: (1) that any award "without a new bid procedure" to Art-Z pursuant to the March 11, 1998 Settlement Agreement is improper; (2) that the Center failed to follow the evaluation procedures set forth in the solicitation when it evaluated past experience of Art-Z; and (3) that the Center overlooked the Organizational Conflicts of Interest clause in evaluating Art-Z's proposal.

During a preliminary teleconference with the ODRA on July 15, 1998, Fisher-Cal indicated that it was not a party to the Settlement Agreement and contended that it knew nothing about it. The parties agreed to meet on July 17, 1998, in order to explain the basis for settlement to Fisher-Cal and to explore alternative ways of resolving the parties' differences. Immediately following that meeting, the Center counsel issued a letter stating that:

- Although the FAA acknowledged some irregularities in the award to Fisher-Cal, it was not prepared to concede that the award was improper.
- The FAA is not obligated to exercise the option to Fisher-Cal.
- The FAA will not award a single source award to Art-Z based solely on the Settlement Agreement "to which Fisher-Cal was not a party."
- The FAA is examining its requirements to see if the present contract meets its needs. The alternative would be to take the function "in-house" pursuant to a reverse A-76 study.

On July 23, 1998, Art-Z intervened in the protest of Fisher-Cal, requested reinstatement of its original settled protest, and requested a suspension of contract performance. Art-Z also asserted that it considered the Settlement Agreement wrongfully and intentionally breached by the FAA as a result of the Center's July 17 letter. On July 24, 1998, the ODRA received a letter from Fisher-Cal stating that it was withdrawing its protest based on the Center's July 17 letter. Fisher-Cal subsequently retracted its withdrawal as a result of the newly filed Art-Z dispute.

On July 24, the ODRA issued an Order notifying the parties that it would review and adjudicate to a final decision by the FAA Administrator the allegations raised by Art-Z, including the alleged breach of the Settlement Agreement. Pursuant to a status conference on July 28, 1998, the Center agreed to voluntarily suspend all activities relative to the underlying procurement until at least August 31, 1998, after which the Center would notify the ODRA if it intended to take any action with respect to the procurement. The

ODRA has consolidated the Art-Z dispute and the Fisher-Cal protest for adjudication and decision.

On August 3, 1998, Art-Z filed a Motion for Summary Disposition of the Fisher-Cal protest and for a declaration that the FAA/Art-Z Settlement Agreement of March 11 is binding and enforceable. Art-Z's motion makes the following assertions: (1) the Settlement Agreement was executed by a warranted FAA contracting officer; (2) the Settlement Agreement was authorized in writing by Order dated April 3, 1998 from the FAA Administrator; (3) the April 3 Order dismissing Art-Z's protest constitutes a final agency order or decision as to Art-Z's original protest within the meaning of 49 U.S.C. § 46110 and AMS § 3.9.3; (4) Fisher-Cal's protest is an improper, ineffective response to the Administrator's April 3 Order under 49 U.S.C. § 46110 and the AMS; and (5) Fisher-Cal's protest is untimely and should be dismissed.

For the reasons set forth herein, the ODR recommends that (1) Fisher-Cal's protest regarding the Center's evaluation of Art-Z's proposal and propriety of its award to Art-Z be denied; and (2) Art-Z's request for summary disposition of this matter be granted.

II. Findings of Fact

1. On September 27, 1996, Art-Z protested the award of an illustrator service contract made to Fisher-Cal by the FAA's William J. Hughes Technical Center, Atlantic City, New Jersey. The contract was to provide all labor categories and hours necessary for the management, supervision, and operations of the Graphic Arts Facility located at the FAA Technical Center. The services were to be performed on a labor hour basis. Solicitation, Amendment 2, Section B.1.
2. The solicitation instructed offerors to provide their fixed burdened hourly rates for the labor categories of Illustrators II and III for the base and four option periods. These rates were used to price the contract. Solicitation, Amendment 2, Section B.2.2, pages 2 – 5.
3. The solicitation's Basis for Award clause stated that "[a]ward will be made to the responsible offeror whose proposal provides the overall greatest value to the Government considering technical merit and price" and "[t]echnical considerations are more important than price/cost." The solicitation further provided that "[t]he Government reserves the right to waive minor irregularities and discrepancies in the proposals received, and to make an award based on the initial offers submitted without negotiating and without soliciting best and final offers." Solicitation, Amendment 2, Section M.1, page 100.
4. The Center received three offers, including those of Art-Z and Fisher-Cal. CO's Detailed Statement of Award, dated August 28, 1996. The third offeror was disqualified and never challenged the original award to Fisher-Cal.
5. In relevant part, the evaluators made the following comments regarding the Art-Z proposal:

- Had no weaknesses or deficiencies.
- Strengths included previous experience in Government graphic arts.
- Proposal to supply three illustrators exceeded the solicitation requirements of two.
- Had greatest number of total years experience in all mandatory software/hardware/GFP by proposed personnel.
- Exceeded minimum experience requirements.

Technical Evaluation Team's Evaluation of Art-Z.

6. No further discussions were conducted with Art-Z. The technical evaluation team determined that "Art-Z's proposal was acceptable as originally submitted and saw no reason to have any further discussions." The CO found that "even though there might have been some room for discussion left by the fact that they [Art-Z] had proposed to supply three illustrators where the solicitation called for two ... but since it was evident that this fact contributed to the scoring for the proposal, the Contracting Officer considered same acceptable [sic]." CO's Detailed Statement of Award, dated August 28, 1996.

7. In relevant part, the evaluators made the following comments regarding the Fisher-Cal proposal:

- Strengths in the areas of previous experience in Government graphic arts, proposal to provide additional education for one employee, and experience in desirable software and hardware.
- Advantage of being the incumbent contractor.
- Weaknesses were lack of management experience; proposed Illustrator II lacked experience in mandatory software/shared hardware/GFP; experience unsubstantiated; experience with four shared hardware items was by reference only, and the software versions information was not provided.
- Illustrator III did not meet minimum education requirements.
- The personnel proposed lacked experience in two mandatory software items.
- The Illustrator II did not meet minimum experience requirements.

8. The Center conducted discussions with Fisher-Cal; however, Fisher-Cal's proposal still contained uncorrected weaknesses. The CO, by letter dated July 5, 1996, informed Fisher-Cal as to the weaknesses and deficiencies in its proposal that "need to be addressed and/or corrected" before its proposal could be further considered for award. Subsequently, Fisher-Cal attempted to address these weaknesses and deficiencies in a letter, dated July 13, 1996. Fisher-Cal also filed a protest with the CO alleging that Ms. Zaleski, a former employee of Fisher-Cal was not entitled to bid on the procurement by reason of an alleged organizational conflict of interest. In response, the CO by letter dated July 25, 1996, denied Fisher-Cal's protest on the basis that it was "not a party in line for this award" as its proposal did not meet the solicitation's minimum educational requirements and was unacceptable.

9. On August 2, 1996, the CO sent a letter to Fisher-Cal asking it to "disregard my previous letter, dated July 25, in which I issued my response to your protest letter. Be informed that the proposals and responses to my clarification request letter of July 5 are still currently being evaluated." The CO also explained that he denied Fisher-Cal's protest because its "concerns about Ms. Zaleski are not a matter which involves this agency and there was nothing found that would preclude her from competing on this procurement."

10. At some point thereafter, the technical evaluation team evaluated a "Revised Technical Proposal August 11, 1996" submitted by Fisher-Cal. The team noted that (1) Fisher-Cal lacked personnel with experience in two mandatory software items, one mandatory hardware item and nine mandatory GFP items; and (2) they could not evaluate the overall quality of work "in the target areas" for the newly proposed Illustrator. Nevertheless, the technical evaluation team recommended award to Fisher-Cal. The team commented that:

[a]s part of a negotiated agreement for award to Fisher-Cal, [it] ... would propose that the incumbent employees, David Hess and Amy Drane be provided as the contractor personnel. It would be required that, as proposed originally by Fisher-Cal, additional schooling be provided to David Hess

As stated many times by Fisher-Cal in their [sic] proposals, the incumbent personnel have been accomplishing all work within the minimum requirements of the Government. The Technical Evaluation Team agrees that proposal would be successful assuming ALL current incumbent personnel working at the Technical Center are retained.

(Emphasis in original).

11. The CO then found that Fisher-Cal's revised proposal was technically acceptable and that even though Fisher-Cal's newly proposed Illustrator III only provided minimum art samples, he met the qualifications required. CO's Detailed Statement of Award, dated August 28, 1996.

12. Subsequently, the proposal submitted by Fisher-Cal was deemed by the CO to be the lowest priced at \$457,600, and to be "technically acceptable." CO's Detailed Statement of Award, dated August 28, 1996. The contract was awarded to Fisher-Cal on August 30, 1996, for a one-year base period and four one-year renewal options.

13. The parties, without involvement of the ODRA, engaged in protracted discussions aimed at settling the matter. Ultimately, on the ODRA's initiative as part of an ADR effort, an ODRA Dispute Resolution Officer ("DRO") was assigned to mediate the protest. The DRO analyzed the facts and determined that there were significant problems with the manner in which the procurement had been conducted, particularly given the fact that the Center had failed to amend the solicitation to give other offerors an opportunity to revise their offers after relaxing the minimum requirements for Fisher-Cal.

14. Art-Z submitted documentation on February 25, 1998, showing that had it been given the opportunity to submit a revised proposal based on the relaxed requirements of providing Illustrators I and II, Art-Z's price would have been the lowest at \$410,233 (as opposed to Art-Z's original proposal price of \$691,513 for Illustrators I, II and II). Moreover, under the express terms of the solicitation, Art-Z was the only offeror that actually met the minimum requirements and thus the only offeror eligible for award.

15. Based on his evaluation of the merits of the protest, the ODRA DRO advised the Center counsel that the most likely outcome of an adjudication would have been either to sustain the protest and direct that the contract with Fisher-Cal be terminated for convenience and awarded to Art-Z, or to recompile the requirement. The DRO suggested the following settlement proposal to Center Counsel on March 3, 1998:

- a. Even though it had not been properly awarded, Fisher-Cal's graphics contract would not be terminated for convenience, but be allowed to expire by its own terms at the end of the current option year (August 30, 1998).
- b. Art-Z would be awarded one-year of the contract beginning in August 1998, with a single one-year renewal option.
- c. The Art-Z contract would be awarded for the services of Hess and Drane at the rate proposed by Art-Z for those two illustrators for the year in question – \$80,204 for Fiscal Year 1998 – with the option year at the succeeding year's rate.
- d. Art-Z would be required to continue funding Hess' education costs during the contract period and during the option year, if the option is exercised.
- e. Assuming the option is exercised for a second year for Art-Z, both contractors would have had two years. The contract would then be relet as of the end of four years, rather than the original five.

16. Based on the result of the ADR evaluation, the Center, without further involvement of the ODRA, negotiated a settlement of the protest with Art-Z on March 11, 1998. The Settlement Agreement was executed by a warranted contracting officer and stated, among other things, that the Center believes that the protest entails litigative risk and "that the award of the ... contract may have been improper." The conditions of settlement include the following terms:

- a. Effective upon the execution of this Settlement Agreement, the Protester agrees that the ... protest will be withdrawn with prejudice.
- b. The Center agrees that it shall not exercise the option to Contract DTFA03-96-C-00037 awarded on August 29, 1996 to Fisher-Cal

Industries, Inc. The Center shall award a contract to Art-Z Graphics wherein performance begins on August 30, 1998. This contract shall be for a base year ending August 29, 1999 and one option year beginning on August 30, 1999 and ending on August 29, 2000.

c. Protester agrees to perform at the price stated in its proposal dated May 31, 1996, Vol. II, Cost and Pricing Proposal. The price shall be \$136,000 for the base year and \$148,000.00 for the option year. Protester further agrees to use those persons who are currently employed as Illustrators I and II under the contract.

17. Pursuant to the terms of the Settlement Agreement, Art-Z withdrew its protest under 96-ODR-00012. Based on the settlement, the Administrator dismissed the protest by issuing FAA Order Number ODR-98-56 on April 3, 1998.

III. Discussion

Timeliness of the Fisher-Cal Protest

Because Fisher-Cal's protest was not filed until June 23, 1998, an issue was raised as to its timeliness. During the ODRA preliminary conference on July 15, Fisher-Cal claimed that it knew nothing of the basis for settlement. The parties agreed to schedule a meeting on July 17 for purposes of discussing the Settlement Agreement. The record subsequently showed that Fisher-Cal had in fact received a copy of the Settlement Agreement on March 13, 1998. Regardless of whether Fisher-Cal's protest is technically untimely, the ODRA will, in the interest of a full exposition, address the issues raised in the Fisher-Cal protest. Nevertheless, the ODRA will decide the issues raised in these protests because the parties agreed to treat the July 17 meeting as a "debriefing."

Standard of Review

In making its findings and recommendations concerning substantive protest issues, the ODRA will apply the same standard of review that is to be applied under the Administrative Procedure Act, 5 U.S.C. § 706. Agency actions will be upheld, so long as they have a rational basis, are neither arbitrary nor capricious, and are supported by substantial evidence. *See Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971).

Art-Z's Protest: The Initial Award to Fisher-Cal Was Improper

The record demonstrates that Art-Z was the only offeror eligible for award. The record further shows that had Art-Z been allowed to compete on the same basis as did Fisher-Cal, it would have been the lowest-priced offeror. Fisher-Cal failed to propose personnel with experience in two mandatory software items, one mandatory hardware item and nine

mandatory GFP items required by the solicitation. Thus, Fisher-Cal's proposal should have been viewed as technically unacceptable. *See Container Products, supra, citing W.D.C. Realty Corp.*, 66 Comp. Gen 302 (1987), 87-1 CPD ¶ 248; *IRT Corp.*, B-246991, Apr. 22, 1992, 92-1 CPD ¶ 378; *Cylink Corp.*, B-242304, Apr. 18, 1991, 91-1 CPD ¶ 384. Instead, "as part of a negotiated agreement" proposed by the technical evaluation team, the CO waived the minimum educational requirements for Fisher-Cal on condition that it provide additional schooling to one of its employees. Art-Z was afforded no opportunity to negotiate such an agreement based on the relaxed mandatory requirements.

The AMS § 3.2.2.3.1.2.4 states that if, after release of a Screening Information Request ("SIR"), it is determined that there has been a change in the FAA's requirement(s), all offerors competing at that stage should be advised of the change(s) and afforded an opportunity to update their submittals accordingly. In this case, the CO violated AMS § 3.2.2.3.1.2.4 by (1) changing the mandatory education requirements for Fisher-Cal; (2) effectively waiving mandatory requirements regarding software and hardware experience for Fisher-Cal alone; and (3) failing to advise other offerors of the change and affording them an opportunity to revise their proposals accordingly.

The principle set forth in AMS § 3.2.2.3.1.2.4 is the same as that found in GAO decisions that hold

[I]t is a fundamental rule of competitive procurements that all offerors be provided a common basis for submission of proposals. *Container Products Corporation*, B-255883, April 13, 1994, 94 CPD ¶ 255, *citing AT&T Communications*, 65 Comp. Gen. 412 (1986), 86-1 CPD ¶ 247. When an agency relaxes its requirements before or after receipt of proposals, it must issue a written amendment to notify all offerors of the changed requirements. *Container Products, supra*. The GAO will sustain a protest where an agency, without issuing a written amendment, relaxes an RFP specification that may prejudice the protester, *e.g.*, where the protester would have altered its proposal to its competitive advantage had it been given the opportunity to respond to the altered requirements. *Id.*, *citing AT&T Communications, supra; Federal Computer Corp.*, B-239432, Aug. 29, 1990, 90-2 CPD ¶ 175.

Furthermore, the change cannot be considered a "minor irregularity or discrepancy" since it was a waiver of *mandatory* requirements expressly set forth in the solicitation. The record further shows that the change had a significant impact on price. Art-Z demonstrated that had it been given the opportunity to submit a revised proposal based on the relaxed requirements, its proposal price would have been reduced by \$281,280. The record demonstrates that Art-Z was substantially prejudiced by the CO's failure to inform it of the change to the mandatory requirements.

The facts further show that the CO's award determination failed to comply with AMS § 3.2.2.3.1.2.5, which states that all SSO decision should be based on the evaluation criteria established in the SIR and have a rational basis. According to the CO's Detailed Statement of Award, dated August 28, 1996, the CO deemed Fisher-Cal to be the "lowest technically acceptable offeror." Notably, this explanation of the award decision is

inconsistent with the solicitation's Section M.1, Basis for Award clause, which states "[a]ward will be made to the responsible offeror whose proposal provides the overall greatest value to the Government considering technical merit and price." It further states that "technical considerations are more important than price/cost [and as] ... the difference in competitive technical scores decreases, the relative importance of price may increase." The record is devoid of any evidence that the CO considered the importance of price relative to the differences in the technical scores received by the offerors. The Contracting Officer improperly converted the evaluation criteria for award from one based on best value to an award based on the lowest cost, technically acceptable offer.

In its June 23 protest, Fisher-Cal argues that the Center failed to follow the evaluation procedures set forth in the solicitation when it evaluated past experience of Art-Z. Specifically, it alleges that Solicitation Section L.4, Proposal Instructions, requires the contractor to list "[t]he names of at least three references of efforts completed that were of equal or larger value." That solicitation section also directs offerors to "[i]nclude efforts completed, date, contact person, and telephone number." Fisher-Cal claims that the evaluators did not address the lack of previous experience of Art-Z under this clause. In support of this claim, Fisher-Cal cites the Contracting Officer's August 28, 1996 Statement which states that Fisher-Cal was the only company which had its previous experience listed and checked to verify *responsibility*.

The verification of a potential contractor's *responsibility* is not the same as the technical evaluation of offerors' previous experience. AMS § 3.2.2.7.2 provides that no award can be made unless the contracting officer makes an affirmative determination of responsibility. Under AMS Section § 3.2.2, the term *responsibility* means 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. Under that section of the AMS, the contracting officer's signing of the contract will constitute a determination that the prospective contractor is responsible with respect to that contract. The determination of *responsibility* occurs with regard to a "prospective contractor," in other words, after an offer is selected for award. Accordingly, since Art-Z was not selected for award, the question of its responsibility was never considered by the Center.

In contrast, the technical factors for evaluating Past Performance are set forth in the solicitation's Section M.2.1.2 and apply to all offers submitted in response to the solicitation. With regard to Section M.2.1.2, the evaluators reviewed the following factors: (A) Quality of Product, (B) Timeliness of Performance, (C) Business Practices/Relations, (D) Customer Satisfaction and (E) Performance of Key Personnel. The record shows that the evaluator did consider Art-Z's previous experience in accordance with Section M.2, as they commented

Previous experience in government graphic arts Greatest number of total years experience in all Mandatory software, hardware and GFP by proposed personnel. Experience in all Desirable software and hardware. Personnel experience with work

requirements of FAA Technical Center. Substantiation of quality work. Exceed minimum experience requirements.

Neither clause L.4, Proposal Instructions, cited by Fisher-Cal nor the record supports the allegation that the Center failed to follow the evaluation procedures set forth in the solicitation when it evaluated past experience of Art-Z and recommended it for award.

Fisher-Cal further contends in its June 23 protest letter that the Center should have considered the Organizational Conflicts of Interest ("OCI") clause, 3.2.5-10, in evaluating Art-Z's proposal, because Ms. Zaleski, a former employee of Fisher-Cal, resigned in order to submit a competing bid for the solicitation. The OCI clause provides in relevant part

[t]he 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 FAA Acquisition Management System, "Organizational Conflicts of Interest (3.1.7)" or that the contractor has disclosed all such relevant information.

The AMS 3.1.7 states that "[a]n organizational conflict of interest means that, because of activities or relationships with other persons, a person is unable or potentially unable to render impartial assistance to the agency, or the person's objectivity in performing the contract work is or might be impaired, or the person has an unfair competitive advantage." There is no evidence that because Ms. Zaleski was a former employee of Fisher-Cal that this fact would somehow compromise her ability to provide services to the Agency in any way. Although the term "unfair competitive advantage" is not specifically defined in the AMS, there is simply no evidence in the record showing that, for example, Ms. Zaleski possessed proprietary information obtained from a Government official without proper authorization or source selection information that was not available to all competitors. Thus, there was no OCI for the Center to consider.

In sum, the record demonstrates that the procurement resulting in the original award to Fisher-Cal was seriously flawed. Because offerors competed under different mandatory requirements and the CO justified the award on a basis other than that stated in the Basis for Award clause, the Center's decision to award the contract to Fisher-Cal lacked a rational basis and was not supported by substantial evidence. Had ODRA adjudicated the original Art-Z protest, it would have recommended that the Administrator sustain the protest. The recommended remedy would have been to terminate the contract awarded to Fisher-Cal for convenience and to direct the award to Art-Z. Alternatively, since Fisher-Cal was already into its first option year, the ODRA could have recommended that the Center's requirements for Graphic Arts services be re-competed upon expiration the option period. Such recommendations are well within the purview of the ODRA's authority under AMS 3.9.4.2. The Center recognized its vulnerabilities, and pursuant to ADR, negotiated a Settlement Agreement along the lines suggested by the ODRA's DRO.

Fisher-Cal's Protest: The Settlement Agreement is a Valid and Enforceable Contract

Art-Z requests that the ODRA summarily dismiss the protest of Fisher-Cal. AMS § 3.9.3.2.3.3 states that where a protest has no basis in fact or law, the ODRA may issue a summary decision as the recommendation to the FAA Administrator who would issue the Final agency decision concerning the merits of the protest. Summary dismissal is proper when there is no genuine issue as to any material fact and the moving party is entitled to relief as a matter of law. Inferences drawn from the facts must be viewed in the light most favorable to the party opposing the motion. *See Boeing Defense & Space Group, ASBCA No. 50048, 98-2 BCA ¶ 29,779, citing Mingus Constructors, Inc. v. United States, 812 F.2d 1387, 1390-91 (Fed. Cir. 1987).*

This dispute as to whether the Settlement Agreement is a valid contract involves no genuine issues of material fact. Rather, it involves basic principles of contract formation. Section 24 of the Restatement (Second) of Contracts defines an "offer" as "the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it." Section 50 defines "acceptance" of an offer as "a manifestation of assent to the terms thereof made by the offeree in a manner invited by the offer." Section 71 defines "consideration" as a bargained for return promise. Here, the Settlement Agreement has all the earmarks of a valid contract, namely, an offer, acceptance and a bargained for exchange.

The facts show that the Center implemented corrective action after determining that Art-Z's protest presented litigative risk and promised to award the contract to Art Z upon expiration of Fisher-Cal's first option year. In exchange, Art-Z withdrew what it believed to be a meritorious protest. Significantly, because of Art-Z's assent to these terms, Fisher-Cal benefited from the settlement as well, even though it was not a party to the settlement negotiations. The settlement terms provided Fisher-Cal with a guarantee that it could complete performance of its first option year, rather than have its contract immediately be terminated for convenience; and could compete for the final option year of the contract.

The March 10, 1998 Settlement Agreement memorializes the exchange and is signed by the authorized representatives of both parties, namely, Ms. Laurie Zaleski for Art-Z and Ms. Deborah M. Germak, Contracting Officer. Art-Z contends (and the Center does not dispute) that Ms. Germak was a warranted contracting officer at the time the agreement was signed. *See* ¶ 6 of Art-Z's Motion for Summary Disposition; ¶ 6 of the Center's Proposed Findings of Uncontroverted Fact, August 13, 1998.

The AMS authorizes COs to enter into agreements to settle protest disputes. AMS § 3.9.2 provides that "[p]rotests concerning FAA SIRs or awards of contracts ... arising under or related to FAA contracts, shall be resolved at the agency level through the FAA Dispute Resolution System." The AMS also expresses a preference for settlement of protests at the CO level, where possible. AMS § 3.9.3.1.1 provides that with regard to SIRs and contract awards, "[o]fferors should first seek informal resolution of any issues concerning potential protests with the Contracting Officer. COs should make reasonable efforts to promptly and completely resolve concerns or controversies, where possible." AMS §

3.9.3.2.1.1 further provides that if resolution at the CO level is not desired or successful, offerors may file a protest with the ODRA. *See also* AMS § 3.9.3.2.2.1.

Although the ODRA has "broad discretion to resolve protests," it may only *recommend* to the Administrator a remedy for a successful protest dispute that is consistent with the AMS and applicable statutes. The ODRA, however, does not have authority to impose a settlement on the Agency; nor does it have authority to execute settlements on behalf of the Agency. Only the Administrator has final authority to impose a remedy. See AMS § 3.9.3.2.3.4 and AMS § 3.1.4. Until the Administrator issues a final decision, the authority to settle remains with the CO.

Thus, with respect to the instant dispute, the CO had full authority to execute the protested Settlement Agreement regarding the Art-Z protest. Had the Agency subsequently not taken the position that the Settlement Agreement is void, the March 11, 1998 settlement would have been entirely consistent with the ODRA's mandate, which is to emphasize the resolution of bid protests using ADR techniques, such as early neutral evaluation and mediation. Here, in accordance with AMS § 3.9.3.2.3.1, the DRO provided an early neutral evaluation after reviewing the submissions of the parties in the Art-Z protest. Based on the DRO's evaluation and the exchange of information between the parties, the Agency voluntarily entered into a Settlement Agreement. As is amply demonstrated herein, the CO's belief that there was "litigative risk" associated with the protest of Art-Z was well founded and in any case resulted in a settlement that was well within her authority under the AMS. The preparation by the ODRA of such a recommendation under its default adjudicative process pursuant to AMS § 3.9.3.2.3.2 is not required to sanction a settlement and is the exception, not the rule. ADR will be used whenever feasible, and settlement agreements will be encouraged and enforced.

Most importantly, contrary to the assertions of Counsel for the Center and Fisher-Cal, the Settlement Agreement does *not* purport to make a sole source award. Rather, the Settlement Agreement serves to implement corrective action that was required to remedy an unfair and noncompetitive evaluation that favored Fisher-Cal. Had the original competition been fairly conducted with all offerors competing on an equal basis, Art-Z would have been the awardee. Thus, the Settlement Agreement merely achieves what would have been the result of a fairly conducted, competitive process.

IV. Conclusion and Recommendation

For these reasons, the ODRA recommends that the Settlement Agreement be enforced and that the Administrator direct the Center (1) not to renew the second year option and (2) make an award to Art-Z in accordance with the Settlement Agreement. In addition, but for the Center's agreement to voluntarily suspend all procurement activities relative to the contract until August 31, 1998, the Center's July 17 letter stating that it will not award a single source award to Art-Z Graphics "based solely on the Settlement Agreement" would have constituted anticipatory repudiation of the Settlement Agreement

and entitled Art-Z to breach damages. However, in the ODRA's view, in light of the Center's voluntary suspension of all related procurement activities until August 31, the Settlement Agreement remains intact. The letter further states that pursuant to an OMB Circular A-76 study, the Center is in the process of examining its requirements to see if government employees could satisfy its graphic arts requirements. The ODRA's recommendation does not interfere with the study. Should the Center subsequently determine that its need for graphic arts services can be met "in-house," it retains the authority to terminate the contract with Art-Z for the convenience of the FAA.

_____/s/_____
Marie A. Collins
Dispute Resolution Officer
For the Office of Dispute Resolution for Acquisition

APPROVED:

_____/s/_____
Anthony N. Palladino
Director, Office of Dispute Resolution for Acquisition