PUBLIC VERSION

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

FINDINGS AND RECOMMENDATIONS

Matter: Protest of Informatica of America, Inc.
Under Solicitation No. DTFA03-99-R-00020

Docket No. 99-ODRA-00144

Appearances:

For Informatica of America, Inc. (Protester): Patricia H. Wittie, Esq. and Karla J. Letsche, Esq., Wittie & Letsche, a Professional Limited Liability Company

For Multimax, Inc. (Intervenor): Timothy Sullivan, Esq. and Katherine S. Nucci, Esq., Adducci, Mastriani & Schaumberg, L.L.P.

For the Federal Aviation Administration William J. Hughes Technical Center: James J. Drew, Esq.

I. Introduction

Protester, Informatica of America, Inc. ("IAI"), on September 28, 1999, filed a protest with the Office of Dispute Resolution for Acquisition ("ODRA"), challenging the September 15, 1999 award by the FAA William J. Hughes Technical Center (the "Center") of a contract to Multimax, Inc. ("Multimax") for the furnishing of information technology ("IT") support services to the Center under Solicitation No. DTFA03-99-R-00020 (the "Solicitation"). IAI filed a supplemental protest with the ODRA on October 1, 1999. For the reasons set forth below, the ODRA recommends that IAI's protest be sustained, because the Center acted without a rational basis and contrary to the Solicitation's evaluation criteria in making its award to Multimax. The ODRA further recommends that the Multimax contract be terminated forthwith for the Government's convenience and that an award be directed to IAI for all work but tasks 5 and 6.

II. Findings of Fact

1. On May 11, 1999, a Screening Information Request ("SIR") for the Center's IT support service procurement was issued by means of an Internet announcement. The procurement was to be set aside exclusively for competition among Socially and Economically Disadvantaged Businesses ("SEDBs") certified by the Small Business Administration ("SBA") for participation in the SBA's 8(a) program.[1] A preliminary statement of work and a listing of labor categories and personnel educational and experience requirements were also provided at an Internet site referenced in that May 11, 1999 announcement. Potential offerors were advised that the Solicitation would be issued electronically and that they respond to the announcement, via e-mail or facsimile, if they wished to participate in the procurement. Agency Report ("AR"), Tab 1.

2. The Solicitation was issued on July 12, 1999 to the 56 companies that had responded to the Internet announcement. AR, Chronology of Events, p. 1. The Solicitation covered the following 6 IT task areas:

Task 1	Network Support
Task 2	Helpdesk/Desktop/Video Conferencing Support
Task 3	Electronic Mail Support
Task 4	Document Management Support
Task 5	Application Development Support
Task 6	Telephone Operator Support

AR, Tab 2, Section C, Statement of Work.

3. Section L, Paragraph L.4 of the Solicitation set forth 5 technical evaluation factors:

Factor 1	Management Plan/Technical Approach
Factor 2	Key Personnel

[1] Although, under Section 348 of Public Law 104-50, the 1996 Department of Transportation Appropriations Act, the Congress expressly made the Small Business Act inapplicable to FAA's new Acquisition Management System ("AMS"), the AMS calls for the identification of contracting opportunities for small businesses and SEDBs as a matter of agency policy, consistent with the Supreme Court's decision in *Adarand Constructors v. Peña*. *See* AMS §3.2.1.3.4.

Factor 3	Oral Presentation
Factor 4	Staffing Plan
Factor 5	Past Performance

The Solicitation advised offerors that award "would be made to the offeror whose proposal provides the best value to the Government." The Solicitation further advised that for purposes of evaluation, "the combined technical criteria are more important than price" and that the "successful offeror may not necessarily be the [one providing the] lowest priced offer." In this regard, the Solicitation stated: "Price may become more important as the difference between competing technical scores decrease." The contract was to include a brief transition service period, a base contract period and four 1-year renewal options. Price was to be "evaluated and determined by adding the total proposed price for the transition service period, base period and all of the optional periods." AR, Tab 2, Solicitation ¶¶L.4 and M.1.

4. Under the Solicitation, proposal evaluations would be conducted in two phases. There would be an initial screening of potential offerors for Factors 1 and 2 (Management Plan/Technical Approach and Key Personnel) based on an initial written submission to be evaluated and price analyzed for 7 key personnel positions. Those offerors whose proposals were determined, based on that analysis, to be outside the "competitive range" would be eliminated, and a second written submission would be required of the remaining competitors. The second submission would consist of "two separate parts": (1) a written technical proposal, which was to "exclude any reference to the pricing aspects of the offer," and to contain "a straightforward, concise delineation of capabilities to perform the contract," including a staffing plan (Factor 4) not to exceed 5 pages in length, and a statement of past performance (Factor 5), not to exceed 1 page in length; and (2) a price submission. The Solicitation emphasized that "no pricing detail should be included in the technical . . . proposal." As to past performance, the statement to be furnished was to consist of an identification of "2 references for contracts, ***on which*** [the offeror was] ***prime***, of similar scope and complexity." AR, Tab 2, Solicitation, ¶L.4 at page 48 (emphasis added). In other words, the Solicitation, as originally issued, clearly

limited past performance references to contracts of the offeror, not contracts performed by one of its proposed subcontractors, and only to contracts on which the offeror had served as the prime contractor. Although the Solicitation required 2 contract references "of similar scope and complexity," the terms "similar," "scope" and "complexity" were not defined.

5. The Solicitation provided that, for "both the initial and second phase evaluations," proposals were to be "screened for conformance to the requirements of the solicitation" and that, if a proposal "fails to address the requirements of the solicitation" and is considered "grossly deficient to the extent that correction would involve significant and major rewriting of the proposal," it was to be "eliminated from the competition." *Id.*, page 45; AR, Solicitation Section M, 2.

6. Those offerors determined to be within the "competitive range" would be invited to make an oral presentation (Factor 4). AR, Solicitation Section L.4; Chronology of Events, page 1.

7. Two amendments were issued to the Solicitation, purportedly in response to questions posed by potential offerors. Both amendments addressed, *inter alia*, the evaluation of Factor 5, Past Performance. By e-mail message to the FAA Contract Specialist for the IT Solicitation, Ms. Anne Marie Ternay, dated July 14, 1999, Ms. Christine Brady of IAI asked whether, in response to Factor 5, IAI could provide past performance information for its proposed subcontractor, Federal Data Corporation ("FDC") as well as for itself. The e-mail indicates that Ms. Ternay had previously responded verbally that past performance references for both IAI and its subcontractors would be appropriate. Ms. Brady asked that this be confirmed (*i.e.*, in writing):

> Informatica would like to use references for our entire team, which includes FDC. Informatica is the current incumbent for the telephone operators and FDC is the current incumbent for the LAN/MAN/WAN contract, and we would like to be able to use that as a reference. Your initial response was yes, we could use team[m]ates' contracts for references. Would you please confirm these decisions for me.

AR, Tab 3.

8. As noted above (Finding 4), the Solicitation had clearly called for past performance reference information solely for the offeror and then only information for contracts on which the offeror had been the "prime" contractor. On July 15, 1999, in response to IAI's inquiry, Ms. Ternay issued Amendment No. 1 to the Solicitation. That amendment, according to Ms. Ternay, "eliminated the requirement that the references had to apply to the prime contractor's past performance." AR, Declaration of Anne Marie Ternay, ¶¶2,4. Amendment No. 1 also eliminated the restriction that past performance references be only for contracts performed as a "prime" contractor. The pertinent language of Amendment No. 1 was:

> Remove Factor 5 and replace with the following:
>
> "FACTOR 5 – Past Performance (not to exceed 1 page): Offeror shall provide, at a minimum, 2 references for contracts of similar scope and complexity. Information shall include the name, phone number and e-mail of a customer representative who may be con[tacted] by the Government. Additionally, indicate the period of performance, labor hours provided and dollar value of the contract.

AR, Tab 4.

9. The second Solicitation amendment has a somewhat more complex history. From July 19 through July 23, 1999, Ms. Ternay was on scheduled leave. In her absence, Ms. Lisa Ferrante, a Contracting Officer with an unlimited warrant, handled questions relating to the Solicitation, in coordination with Mr. Dennis A. Steelman, Chairman of the Technical Evaluation Team ("TET") for the procurement, and Ms. Shelley Yak, Branch Manager of the Center's Information Technology and Services Branch. AR, Chronology of Events, page 2; AR, Declaration of Lisa Ferrante, ¶2. Among several questions fielded by Ms. Ferrante was one from Vistronix, one of the potential offerors. In terms of Factor 5, Vistronix (in an e-mail message dated 7/22/99) requested that the Government clarify whether the wording regarding "two references" was intended to mean that two references – *i.e.*, individual persons to contact -- were "expected for each relevant

contract" or whether, instead, two contract references were "expected overall." AR, Tab 5. Ms. Ferrante coordinated her response to this question with both Mr. Steelman and Ms. Yak and, with them, drafted and issued a second amendment to the Solicitation. Apparently, until that time, Mr. Steelman was unaware that Amendment No. 1 had been issued and that the original Solicitation language regarding the evaluation of Factor 5 had been amended. *See* AR, Declaration of Dennis A. Steelman, ¶7. In this regard, Mr. Steelman explains the origin of Amendment No. 2, which was issued on July 22, 1999:

> 8. On July 22, 1999, I was asked by Ms. Ferrante to address specific questions on the effect of Amendment 1 raised by some of the remaining offerors. I noticed that Amendment 1 no longer required the prime to submit evidence of its own past performance as a prime contractor. This effect was contrary to the original purpose of that evaluation factor.
>
> 9. I, along with Ms. Ferrante, wrote the change to Factor 5 that was incorporated into Amendment 2, which was issued on July 22, 1999. My intent was to restore the requirement, originally stated in the SIR, that the offerors submit references that supported their past performance as a prime contractor. In addition, that change specified that a total of two such references were to be supplied, instead of a minimum of two.

Id., ¶¶8 & 9. Ms. Ferrante likewise explains that it was Mr. Steelman's intent "that evidence of the past experience of the offeror *as prime contractor* be submitted" and that she, Ms. Yak and Mr. Steelman "concurred in the wording incorporated into Amendment 0002." AR, Declaration of Lisa Ferrante, ¶4 (emphasis added). The language of Amendment No. 2 regarding the evaluation of Factor 5, Past Performance, reads as follows:

> Factor 5 – (Past Performance). The offeror is required to submit a total of two separate references, indicating the *capability of the prime* to perform the work of similar scope and complexity.

AR, Tab 6, page 2 (emphasis added).

10. Neither Solicitation amendment modified the proposal submission closing date, July 27, 1999. *See* AR, Tabs 4 and 6. By that closing date, the Center received 16 proposals. AR, Chronology of Events, page 2; AR, Declaration of Anne Marie Ternay,

¶6. On that date, Ms. Ternay delivered copies of the technical proposals for each of the 16 offerors to Mr. Steelman for evaluation by the TET in accordance with the established Evaluation Plan. *Id.* The Evaluation Plan provided with regard to each proposal received that the Contracting Officer would "retain the cost/price proposal" and would review and retain one copy of the technical proposal, and that only after the technical evaluation was completed and a written report was submitted to the Contracting Officer would TET members be permitted to "assist in reviewing the cost/price proposals." AR, Tab 7, page 2. The Evaluation Plan contained the Solicitation's language regarding the award being based on "best value to the Government," the language concerning technical criteria being "more important than price," and the Solicitation's statement that "[p]rice may become more important as the difference between competing technical scores decreases." *Id.* In terms of scoring, the Plan called for technical proposals to be "evaluated, rated, and scored in accordance with a pre-established evaluation plan" that would utilize the following rating table:

RATING TABLE

Adjective	Numerical Score	Definition
Excellent	90-100	Outstanding in essentially all respects; represents the best that could be expected of any contractor. None or very few minor deficiencies and none pertaining to the stated performance requirements.
Good	80-89	Cannot be considered outstanding but is above average expected from any qualified contractor. Lacking in one of three areas of feasibility, manageability, or practicality. Minor deficiencies which would require correction and/or expansion before the contractor would be permitted to begin work.
Average	70-79	Satisfactory; represents the norm from a qualified contractor. Lacking in the areas of feasibility, manageability, or practicality. Several deficiencies including at least one that risks causing difficulty in performance.

Marginal	60-69	Less than satisfactory; below the standard expected from a qualified contractor. Lacks reasonableness, tractability and practicality. Many deficiencies. Substantial revision would be required to perform at an average or above average level.
Poor	0-59	Unacceptable. Many deficiencies. Contractor would have to completely revise proposal, tantamount to submitting a new proposal.

Id., page 3. The Evaluation Plan called for the Technical Evaluation Report to be issued by the TET to "justify the [adjectival] rating assigned" and, more particularly, to "support the assigned rating" "within the narrative," "by using the definitions set forth in the Rating Table above." *Id.*, page 5. In terms of price proposal evaluation, the Evaluation Plan stated that price proposals would not be scored, but rather would be "evaluated on the basis of reasonableness" and that a price proposal would have to be reasonable "for an offeror to be considered for award." *Id.*, page 3.

11. Under the Evaluation Plan, technical factors 1, 2 and 3 were to have "equal importance." Factor 4 was to be "slightly less important than factors 1, 2 or 3" and factor 5 was to be "significantly less important than factor 4." As to Factor 5, Past Performance, the language of the Evaluation Plan was identical to that of Solicitation Amendment No. 2:

> **FACTOR 5 –** Past Performance (not to exceed 1 page): The offeror is required to submit a total of 2 separate references, indicating the capability of the prime to perform the work of similar scope and complexity.

Id., page 4.

12. The Evaluation Plan required the TET to identify, as part of its evaluation report, proposal areas that it considered "deficient or in need of clarification or substantiation" to be used by the Contracting Officer to determine the need for "discussions/negotiations" and to be transmitted to the offeror involved during "written/oral discussions." *Id.*, page 5. Finally, as to the "final selection decision," the Evaluation Plan states that the decision regarding award "shall be made by the

Contracting Officer in concert with the technical evaluation team" and that "the selection authority shall review the cost/price evaluation and the recommendations of the evaluation team and shall, with the advice of appropriate technical and staff representatives, arrive at a best value assessment and final selection." *Id.* In this instance, the Source Selection Official ("SSO"), *i.e.*, the "selection authority," was Mr. Michael J. Ward, a Center Contracting Officer with an "unlimited warrant." AR, Declaration of Michael J. Ward.

13. On or about August 9, 1999, 12 of the 16 offerors were found "non-competitive" and were "eliminated from the competitive range." AR, Chronology of Events, page 2. On August 9, 1999, the remaining 4 offerors, Vistronix, Multimax, IAI, and RGII, were advised that they were selected to participate in Phase II of the procurement. *Id.* These four were requested to make an oral presentation (Factor 3) on August 13, 1999 and, by August 17, 1999, to submit their technical proposals, including staffing plans (Factor 4) and information regarding past performance (Factor 5). In addition, these four were asked for price proposals to cover the transition period, base, and optional service periods, as required in Section B of the Solicitation. *Id.*; Declaration of Anne Marie Ternay, ¶¶7 & 8. Phase II technical and price proposals were received from the 4 offerors on August 17, 1999. The technical proposals were given to Mr. Steelman on that same date. Declaration of Anne Marie Ternay, ¶9.

14. In terms of past performance, IAI's proposal contained two references, one for a subcontract it had performed as the "principal subcontractor" for EDS under a Department of Housing and Urban Development contract and the second for a prime contract performed for the FAA by IAI's proposed subcontractor, FDC. It appears that IAI had interpreted Solicitation Amendment No. 2 as solely aimed at limiting the past performance submittal to a "total" of 2 references, rather than the "minimum" of 2 references called for previously – so as to keep the Factor 5 submittal within the 1-page limitation specified for that factor. The Amendment's language regarding "capability of the prime" IAI apparently interpreted as meaning the capability of the offeror team, and

therefore provided the one reference for work done by FDC. *See* IAI Protest of September 28, 1999 at page 8.

15. On August 13, 1999, the four offerors made their oral presentations. IAI clearly evidenced superiority in this regard. The scoring by the five TET members was:

	INFORMATICA	Multimax	RGII	Vistronix
Eval 1	92.0	78.0	79.0	75.0
Eval 2	92.0	77.0	79.0	79.0
Eval 3	93.0	75.0	78.0	79.0
Eval 4	93.0	75.0	75.0	75.0
Eval 5	88.0	76.0	80.0	79.0
Average	91.6	76.2	78.2	77.4

16. On or about August 20, 1999, the TET members (other than one member who provided his scoring to Mr. Steelman on August 23, 1999) met and reviewed the offerors' staffing plans (Factor 4). AR, Tab 8, Technical Evaluation Report of August 26, 1999, page 19. From the following scoring, as reflected in the TET's August 26, 1999 report, the TET also appears to have addressed past performance (*i.e.*, Factor 5), albeit no individual scoring of that factor was reflected in the report:

Staffing Plan	INFORMATICA	Multimax	RGII	Vistronix
Eval 1	92.0	88.0	88.0	90.0
Eval 2	92.0	88.0	88.0	90.0
Eval 3	93.0	86.0	88.0	91.0
Eval 4	92.0	86.0	88.0	90.0
Eval 5	92.0	88.0	88.0	90.0
Average	92.2	87.2	88.0	90.2
Past Performance	70.0	80.0	80.0	80.0

Id. Those results and the ratings assigned by the TET for the other 3 factors were weighted per the Solicitation weighting criteria and summarized in the report:

	INFORMATICA	Multimax	RGII	Vistronix
Factor 1 (25%)[2]	22.8	23.4	22.7	22.4
Factor 2 (25%)	23.8	23.5	23.0	24.5
Factor 3 (25%)	22.9	19.1	19.6	19.4
Factor 4 (20%)	18.4	17.4	17.6	18.0
Factor 5 (5%)	3.5	4.0	4.0	4.0
Final	91.4	87.4	86.9	88.3

17. It is not clear when Factor 5 was discussed among the TET members or whether individual scores were actually provided. Mr. Steelman has indicated that the TET regarded Factor 5 as being "the least important factor" and that the TET's "perception" was "that it did not demand the same level of attention as the other four." AR, Declaration of Dennis A. Steelman, ¶10. Mr. Steelman has indicated that he was the "principal author" of the August 26, 1999 TET report and that he alone had prepared the first draft of the report. Supplemental Agency Report ("SAR"), Fifth Declaration of Dennis A. Steelman, ¶3. An August 24, 1999 draft technical evaluation report document consisting of a single page forwarded by Mr. Steelman to Ms. Ternay via e-mail contains

[2] The weighting percentages are consistent with the language of Section M of the Solicitation. *See* AR, Tab 2, Section M (fifth paragraph), page 49; Finding 11, above.

the following chart that reflects all four offerors being assigned the same weighted score for Factor 5:

	INFORMATICA	Multimax	RGII	Vistronix
Factor 1 (25%)	22.80	22.70	19.55	22.725
Factor 2 (25%)	23.75	23.50	23.00	24.50
Factor 3 (25%)	22.90	19.05	19.55	19.35
Factor 4 (20%)	18.44	17.44	17.60	18.04
Factor 5 (5%)	4.00	4.00	4.00	4.00
Final	91.89	86.69	83.70	88.615

IAI Comments, Tab 4. In the case of Factor 5, the weighted scores of "4.00" shown above for each of the offerors was derived by multiplying a raw score of 80 by a weight of 5%. A score of "80" therefore had been assigned to IAI initially, by Mr. Steelman and/or by the TET as a whole. It appears that further analysis of Factor 5 must have occurred between August 24, 1999 and August 25, 1999, when IAI's score for that factor was shown as "70". IAI Comments, Tab 8, Draft Technical Evaluation Report of August 25, 1999, page 19. As noted above (Finding 16), the August 26, 1999 Report (AR, Tab 8), which was signed by all TET members other than Mr. Patrick Hyle, ACT-209, reflected a Factor 5 score for IAI of "70" as well.

18. The August 26, 1999 TET report relates the following in terms of what was considered by the TET for IAI in connection with its evaluation of Factor 5:

> INFORMATICA provided references to US Housing and Urban Development as a subcontractor to EDS. This contract was for only three professionals and as such cannot be considered as similar in scope or complexity. Work performed by subcontractor FDC is extremely similar in both scope and complexity.

Id., page 20. IAI had submitted two contract references, one for itself and one for its proposed subcontractor, FDC. The FDC reference was for its work as the incumbent LAN contractor for the Center. As indicated in the above quotation, the other reference was for IAI's work as a subcontractor to EDS. IAI has advised that this work entailed

LAN work as well. IAI Protest of September 28, 1999, pages 18-19. Apparently "scope" and "complexity" to the TET, meant the size of the contract effort in terms of numbers of employees. Because the instant procurement was to involve 7 key employees and many more non-key personnel, the subcontract for EDS, which involved merely 3 professional employees, could not compare in terms of either "scope" or "complexity." Although Solicitation Amendment No. 2 called for the submission of past performance references "of the prime," the TET did not take issue with the submission of the reference for FDC, at least as of August 26, 1999, assigning IAI a passing grade of "70". Indeed, the TET's Technical Report of that date characterizes the IAI proposal as the "technically superior offer" and recommends award to IAI on that basis.

19. On Friday, August 27, 1999, in the absence of Ms. Ternay (who was on leave), Mr. Steelman delivered the signed Technical Evaluation Report (AR, Tab 8) to the Contracting Officer and SSO, Mr. Ward. On that occasion, Mr. Ward disclosed the price proposals of all four "finalists" to Mr. Steelman and Ms. Yak. AR, Declaration of Anne Marie Ternay, ¶10; AR, Declaration of Dennis A. Steelman, ¶11; AR, Declaration of Michael J. Ward, ¶2.

20. Upon her return from leave, on Monday, August 30, 1999, Ms. Ternay reviewed the TET's Technical Evaluation Report of August 26, 1999 and determined that "the numerical scores for Factor 5 were not consistent with the written evaluations of the TET." On Tuesday, August 31, 1999 at 9:57 A.M., Mr. Steelman transmitted to Ms. Ternay and Ms. Yak a draft award recommendation memorandum, which mirrored the language in the Technical Evaluation Report, stating that IAI had "presented the *clearly superior technical package*" and recommending award to IAI. IAI Comments, Tab 8, 8/31/99 e-mail with attached draft recommendation letter. Although not stated in the record, it appears that it was at some point later on August 31, 1999, that Ms. Ternay notified Mr. Steelman of "her concerns" regarding the Technical Evaluation Report and requested Mr. Steelman to "reconcile the evaluation of Factor 5 with the SIR (as amended) and the Evaluation Plan." *See* AR, Declaration of Anne Marie Ternay, ¶12; AR, Declaration of Dennis A. Steelman, ¶12. According to Ms. Ternay, the two

"determined that the TET failed to adequately distinguish the past performance of the prime contractor [*i.e.*, IAI] from that of the subcontractor [*i.e.*, FDC] as required by the SIR (as amended) and the Evaluation Plan." Ms. Ternay instructed Mr. Steelman "to place the error before the TET and correctly evaluate the proposals according to Factor 5." AR, Declaration of Anne Marie Ternay, ¶12. Also, according to Ms. Ternay, it was understood that "no other factors were to be revisited, nor were any other scores to be changed." *Id.*, ¶13.

21. On September 1, 1999, the TET was once again assembled (with the exception of one member who was on leave) "to discuss the scoring of Factor 5." At that meeting, according to Mr. Steelman, "the TET was probably informed that there was a difference in the prices submitted by Multimax, Inc. and INFORMATICA," but was not given the "specific price breakdowns." Further, according to Mr. Steelman, "the members present agreed that they had erred in scoring Factor 5" and that "[t]he correct evaluation of Factor 5 required the TET to consider the past performance of the prime only." AR, Declaration of Dennis Steelman, ¶13.

22. Mr. Steelman relates that he "asked the contract specialist [Ms. Ternay] to contact INFORMATICA to insure that it understood the requirement set out in the SIR (as amended) that was to be evaluated under Factor 5" and that, in response to Ms. Ternay's request, "INFORMATICA submitted three additional references on September 2, 1999." According to Mr. Steelman, 2 of the 3 additional references "supported INFORMATICA's performance as a prime contractor, but they were not similar in scope or complexity to the bulk of the work called for under the SIR," but were only "similar in scope and complexity to Task 4 (librarians) and Task 6 (telephone operators)." With regard to those 2 references, Mr. Steelman states: "These tasks were considered by the TET not to be representative of the complexity of the contract as a whole." AF, Declaration of Dennis A. Steelman, ¶¶14,15; AR, Declaration of Anne Marie Ternay, ¶¶14,15. The record initially was unclear regarding the third reference, but that was subsequently clarified. *See* Finding 39, below.

23. Mr. Steelman states that "[b]oth INFORMATICA's score and Multimax's score measured their respective past performance *as prime contractors*." AR, Declaration of Dennis A. Steelman, ¶16.

24. Attached to an e-mail message dated September 3, 1999 at 4:42 P.M. from Mr. Steelman to Ms. Yak and Ms. Ternay was a document still dated August 26, 1999 that the e-mail identified as "revised findings of the TET." With regard to the evaluation of IAI's proposal for Factor 5, the document contained the following information (the first three sentences of which are identical to the language of the August 26, 1999 TET report – *see* Finding 18, above):

> INFORMATICA provided references to US Housing and Urban Development as a subcontractor to EDS. This contract was for only three professionals and as such cannot be considered as similar in scope or complexity. Work performed by subcontractor FDC is extremely similar in both scope and complexity. On the basis of this, the TET Chair and Contracts Specialist determined that it was necessary to determine if INFORMATICA clearly understood that they were required to present examples of the Prime's capability to handle contracts of similar scope and complexity.
>
> As a result of this request, INFORMATICA furnished references to the current WJHTC telephone operators contract and a NAS Documentation support contract. Analysis by the TET indicated that these contracts are of similar scope and complexity to the telephone and DMO portions called for in the SOW. However, these areas represent a minor portion of the level of effort required and a miniscule amount of technical expertise. According[ly], the TET determined that INFORMATICA failed to provide the information requested in Factor 5.

IAI Comments, Tab 8, 09/03/99 Dennis Steelman e-mail message, attachment ("Afterlegal.doc"), page 20. In that document, the scores for Factor 5 were amended for 3 of the 4 offerors. IAI's score was reduced by 30 points from "Average (70)" to "Poor (40)." Multimax's score went up by 5 points, from "Good (80)" to "Good (85)," and Vistronix's score went down by 5 points, from "Good (80)" to "Average (75)". The array of scores for all five factors reflected in the document was as follows:

	INFORMATICA	Multimax	RGII	Vistronix
Factor 1 (25%)	Excellent (91)	Excellent (94)	Excellent (91)	Excellent (90)

Factor 2 (25%)	Excellent (95)	Excellent (94)	Excellent (92)	Excellent (98)
Factor 3 (25%)	Excellent (92)	Average (76)	Average (78)	Average (77)
Factor 4 (20%)	Excellent (92)	Good (87)	Good (88)	Excellent (90)
Factor 5 (5%)	Poor (40)	Good (85)	Good (80)	Average (75)
Final	Excellent (90)	Good (88)	Good (87)	Good (88)

Id., page 1. Whereas, the August 31, 1999 draft award recommendation, based on a 3.5% technical edge (91.4/88.3) between IAI and the next offeror, Vistronix, had characterized the IAI proposal as a "*clearly superior technical package*," the revised TET report appended to Mr. Steelman's September 3, 1999 e-mail referred to IAI – with only a 2% overall differential in comparison with the next high offers (90/88) -- as "the *marginally technically superior offeror"* and went on to underscore IAI's failure to provide contract references that would "demonstrate past performance in *managing* a contract of similar scope and complexity":

> It is the conclusion of the TET that the submission by INFORMATICA demonstrate that it is the marginally technically superior offeror. INFO[R]MATICA received an overall technical rating of "excellent" as defined in the evaluation plan (attached) while all others received an overall rating of "good." This rating is unfortunately marred by the fact that despite requested clarification, INFORMATICA was unable to demonstrate past performance in *managing* a contract of similar scope and complexity.

Id. (emphasis added). The use of the word "*managing"* clearly evidences that the TET was focusing solely on prior contracts that IAI had performed as the *prime contractor.*

25. Notwithstanding the language in this proposed revision of the TET report, Ms. Ternay, in a draft award recommendation transmitted by her to Mr. Steelman at 2:27 P.M. on September 8, 1999, still characterizes IAI as "clearly the highest technically rated offeror under the stated solicitation criteria," and recommends that award be made to IAI, noting that the Product Team "believes that, given the solicitation's emphasis on technical superiority over price, the qualitative differences between the two companies [*i.e.*, IAI and Multimax] "justifies paying a 4% premium for INFORMATICA over

Multimax." IAI Comments, Tab 8, Anne Marie Ternay e-mail of 9/8/99 at 2:27 P.M., Federal Aviation Administration Information Technology (IT) Contract Award Recommendation and Determination, at page 4.

26. An e-mail message transmitted by Mr. Steelman to Ms. Ternay, Mr. Ward, Mr. Drew, and Ms. Yak later on September 8, 1999 (at 4:23 P.M.) enclosed another version of the TET findings (Afterlegal.doc) as well as another draft Contract Award Recommendation and Determination (SSO-IT.doc). Initially, it should be noted that, although the signed version of the revised TET report found at Tab 11 of the Agency Report bears a date of "September 3, 1999", in light of the two e-mail messages of September 8, 1999, it appears unlikely that this document was signed by the TET members and presented to Ms. Ternay before Mr. Steelman transmitted his e-mail message on September 8. Significantly, although Mr. Steelman's forwarding e-mail refers to enclosing "a somewhat more polished version of the TET findings," it and the new draft award recommendation that accompanied the September 8 e-mail reflect a completely different source selection result. More specifically, the executed version of the "September 3, 1999" TET report reverses completely the TET's earlier finding regarding IAI's "clear superiority," eliminates the subsequent finding of "marginal superiority" for IAI, and reports instead that all four offerors were essentially "equal":

> It is the conclusion of the TET that the submissions by INFORMATICA, Multimax, RGII, and Visitronix, given their evaluations under the five evaluation criteria, and given the weights assigned to these factors, are equal, with no offeror emerging as clearly superior to the others. The TET finds that the overall technical ratings of each proposal are too close to identify the superior offeror, that each is capable of providing the services called for in the Statement of Work, and, for the purposes of this technical evaluation each is the equal of the other.

AR, Tab 11. The Award Recommendation and Determination forwarded with Mr. Steelman's e-mail of September 8, 1999 – sent less than two hours after that of Ms. Ternay -- represents a total about-face in terms of the proposed awardee:

> It is the opinion of the team that there is insufficient demonstrated technical superiority on the part of INFORMATICA to justify . . . the

> additional $965,718. It is therefore recommended that award be made to Multimax on the basis of best value to the government.

IAI Comments, Tab 8, e-mail of Dennis Steelman of September 8, 1999, 4:23 P.M., draft Award Recommendation and Determination. This language was further strengthened by Ms. Ternay in the final version of the Award Recommendation and Determination, which she prepared and executed along with Mr. Ward, the SSO:

> The solicitation stated that this is a "best value" acquisition in which the combined technical factors were more important than price. In accordance with Section M of the Solicitation, price becomes more important as the difference between competing technical scores decreases. Since neither INFORMATICA nor Multimax was found to be overall technically superior to the other, the different prices proposed by these two offerors are significant. It is the opinion of the team that there is insufficient demonstrated technical superiority on the part of INFORMATICA to justify the additional expense of awarding the IT contract to that offeror. Over the life of the contract, INFORMATICA would cost almost a million dollars more than Multimax. [$23,926,570.40 for INFORMATICA; $22,960,852.00 for Multimax. The difference is $965,718.40.] In the first year alone, INFORMATICA would cost $350,000 more than Multimax. [$2,949,941.60 for INFORMATICA; $2,597,310.00 for Multimax. The difference is $352,631.60.]

AR, Tab 12.

27. Consistent with that final recommendation document, Mr. Ward executed a contract with Multimax on September 15, 1999, Contract No. DTFA03-99-D00028. AR, Tab 13. Thereafter, on September 15, 1999, the first delivery order was issued to Multimax under its contract. That delivery order involved labor categories to support task areas 1 (network support), 2 (helpdesk/desktop/video conferencing support), and 3 (electronic mail support). AR, Chronology of Events, page 3; AR, Tab 14.

28. IAI was provided a post-award debriefing on September 21, 1999. AR, Chronology of Events, page 4; AR, Tab 15; AR, Tab17, IAI Protest of September 28, 1999, page 2. By letter of its counsel dated September 28, 1999, IAI filed a protest with

the ODRA against the award to Multimax. In that protest, IAI alleged four grounds, which it summarized as follows:

1. FAA's interpretation and application of Evaluation Criterion No. 5 was unreasonable and lacked any rational basis.

    - FAA improperly limited past performance references to contracts on which the offeror had been a prime contractor, in violation of the terms of the SIR, the AMS, and FAA's own Toolbox Guidance.

    - FAA failed to disclose that only past performance experience as a prime contractor for LAN services would be regarded as acceptable.

2. FAA re-scored the technical scores of each offeror after pricing information had been disclosed to the technical evaluation team, in violation of the terms of the SIR and of the Evaluation Plan.

3. The proposal of the awardee, Multimax, was not compliant with the requirements of Factor 4, Staffing Plan in that it did not have commitment letters for all non-key personnel as required by the SIR, and in fact, most of its proposed staff will not be used to perform work on this contract.

4. Although the SIR stated that this was a best value procurement, with technical factors being more important than price, when FAA discovered that the prices of all offerors exceeded the Government's estimate, FAA abandoned the best value analysis, performed an after-the-fact manipulation of the scores of the offerors so that it could superficially allege that all offerors were technically equal, and then made the award decision solely on the basis of what it regarded as its "best chance to save money."

AR, Tab 17, pages 2-3.

29. The Center issued a second delivery order to Multimax under its contract, for task area 4 (document management support), on September 30, 1999. AR, Tab 20. The remainder of the work under the instant solicitation was ordered, but not under the Multimax contract. Instead, as related by Ms. Ternay in her Chronology of Events, "[c]ontractor support for task area 5 (application development support)" was ordered by means of "an existing option under KENROB & Associates, Inc., Contract No. DTFA03-

96-C-00029 (Revision No. 3) on September 30, 1999," by the Contract Administrator on that contract. Similarly, "[c]ontractor support for task area 6 (telephone operator support)" was ordered from IAI "under an existing option" under its contract with the FAA, Contract No. DTFA03-98-C-000002 (Revision No. 5) on October 1, 1999, by the Contract Administrator on that contract. AR, Chronology of Events, page 4.

30. By letter of its counsel dated October 1, 1999 (AR, Tab 19), IAI filed a supplemental protest regarding the Center's exercise of options under the KENROB and IAI contracts, alleging that such action – which covered approximately "one-third of the work under the SIR" -- underscores that the Center's decision making "was driven by price and price alone." In this regard, IAI argued further in this supplemental protest that its proposal "would have looked very different, if it had known that price was the sole evaluation criterion." Also, in the supplemental protest, IAI raised as a separate ground (albeit a ground that relates to the original protest's contention regarding the Staffing Plan – see Finding 28, above) that Multimax had engaged in a "gross bait and switch in which the Agency itself was complicit." In particular, IAI asserted, as of October 1, 1999, the first day of contract performance, 54% of all employees and 71% of the key employees had been substituted with FDC personnel "stolen from IAI."

31. Such personnel were not offered by Multimax as part of its proposal. Instead, it had offered its own employees and those of its proposed subcontractor, SRC. Multimax Comments on Supplemental Agency Report, Declaration of Dr. Aldrin Leung, ¶2. On the other hand, the Multimax proposal had advised that Multimax would "make every effort to retain qualified incumbent personnel who meet both government and team standards." The substitution of personnel was approved by the Center and made part of Revision No.1 to the contract on October 5, 1999. AR, Chronology of Events, page 4; AR, Tab 20.

32. Multimax requested and was permitted to participate in the IAI protest as an intervenor, pursuant to 14 C.F.R. §§17.15(f) and (g). Multimax letter dated September 30, 1999; ODRA Initial Status Conference Memorandum, October 1, 1999.

33. With its protest, IAI requested that performance of the Multimax contract be suspended pending resolution of the protest. IAI Protest Letter of September 28, 1999. The Center and Multimax opposed this request, and the ODRA, by decision dated October 8, 1999, denied the request, finding that no compelling reasons existed that would overcome the presumption of the FAA Acquisition Management System ("AMS") calling for continuation of performance during the pendency of a protest. *See* AMS §3.9.3.2.1.6.

34. Upon receipt of the protest by the ODRA, the ODRA Director, Anthony N. Palladino, Esq. designated an ODRA Dispute Resolution Officer ("DRO"), Marie A. Collins to explore alternative dispute resolution ("ADR") possibilities with the parties. Subsequently, however, by letter dated October 1, 1999, IAI advised the ODRA that it would not employ ADR in this case. The Director, as part of the Initial Status Conference Memorandum, issued in conjunction with the ODRA's telephone status conference of September 30, 1999, also advised the parties that William R. Sheehan, Esq., a senior attorney with the Center's legal office who frequently serves as an ADR neutral in ODRA matters, had no first-hand knowledge of the facts of this case but was briefly consulted by the Center on a procedural matter relating to the protest and would not participate on behalf of the ODRA in this matter. The Memorandum advised that the ODRA would nevertheless consider designating a Special Master for any adjudication of the protest and sought input from the parties on this issue by October 4, 1999. By letter of October 4, 1999, IAI's counsel stated that IAI had "no comments, objections, or requests regarding appointment of a special master as the adjudicating DRO in this case" and noted that IAI would "abide by the decision of [the ODRA] as to the identity of the adjudicating DRO." Thereafter, the Director, by letter dated October 8, 1999, notified the parties that the ODRA's Richard C. Walters, Esq. had been designated as the Adjudicating DRO for the case.

35. The Center filed its Agency Report with the ODRA on October 15, 1999. On October 18, 1999, Mr. Walters, subsequent to a telephonic conference with the parties,

issued an Order regarding the Center's production of documents in response to IAI's discovery request. Thereafter, on October 29, 1999, both IAI and Multimax filed their Comments with respect to the Agency Report. The Center, by letter dated November 2, 1999, filed a one-page document entitled "One Final Agency Comment," which summarized the major arguments raised by the Agency Report, and requested that the document be included as part of the Agency Report. Mr. Walters, by letter to the parties dated November 2, 1999, noted that the submission did not appear to add anything to the record, but permitted IAI and Multimax to provide a responsive one-page document by close of business, November 3, 1999, if they wished to do so. Otherwise, Mr. Walters indicated, the record would be closed. IAI, by letter to the ODRA dated November 3, 1999, advised that it would not make a further submission.

36. By letter dated November 5, 1999, Mr. Walters advised the parties that his review of the record indicated that certain supplementation would be necessary. Accordingly, he stated, he was re-opening the record and seeking a Supplemental Agency Report to include, *inter alia*, affidavits from Mr. Steelman and the other TET members, to respond to the following items:

1. Mr. Steelman's Declaration (appended to the Agency Report) at paragraph 15 relates that IAI had submitted "three additional references on September 2, 1999," and that 2 of the 3 references "supported INFORMATICA's performance as a prime contractor . . . ." It is unclear what the third reference was, whether it was for work done by IAI as a subcontractor and whether that work was similar in scope and complexity to the work called for in the instant IT procurement.

2. Assuming that the Solicitation, as amended by Amendment No. 2, sought past performance information solely "of the prime" – *i.e.*, solely information for IAI – but not necessarily limited to information for IAI *as a prime*, each TET member (including Mr. Steelman), in his individual affidavit, should explain in his own words how, if at all, his scoring of Factor 5 would have been affected were this interpretation of Amendment No. 2 to have been used. In other words, the assumption should be that information for IAI's performance as a subcontractor would be appropriate for consideration, so long as the work performed by IAI

was similar in scope and complexity to that being undertaken in this case.

3. In IAI's comments on the Agency Report, the protester shows how language in the TET report and award evaluation documentation evolved over time. As part of Mr. Steelman's affidavit, I would like him to explain in detail what prompted him to make the various language changes that have been identified and whether knowledge of the price differential between IAI and Multimax was a factor.

4. Whether any assistance was rendered to Multimax in the recruitment of incumbent personnel: Were names, telephone numbers, current salaries, or other data furnished? What conversations were had with incumbent personnel – from IAI, FDC or others - to encourage them to remain at the Center? Were such incumbents encouraged by any TET member in any way to attend the "open house" session(s) arranged by Multimax?

5. Affidavits should state how, as part of his evaluation of the proposals, each TET member considered the Multimax statement regarding its intent to recruit incumbents. More specifically, the affidavits should explain how, if at all, this statement factored into the ultimate conclusion in the September 3, 1999 Technical Evaluation Report regarding there being "no offeror emerging as clearly superior to the others."

37. Center Counsel, by letter dated November 8, 1999 took exception to the above-quoted Paragraph 2, because, in his view, it was "highly speculative and not relevant to the issues raised in this protest." Center Counsel asked that the ODRA "withdraw" its "directive" with respect to that paragraph, stating that "the Agency believes that it is entitled to a decision on whether or not they [the TET members] misapplied the evaluation scheme before the TET is forced to convene and dedicate more time and effort to this exercise." Center Counsel also suggested, in light of the re-opening of the record, that the ODRA question protester regarding how IAI's "principals . . . came into possession of the source sensitive information that [IAI] used to draft its protest."

38. On November 9, 1999, the ODRA issued a Preliminary Finding and Interlocutory Order[3], in which it found that the TET had erred in its application of Solicitation Amendment No. 2, that the TET members had improperly restricted their consideration of past performance references for IAI to contracts on which it had served as the prime contractor, that the plain meaning of Amendment No. 2 would permit consideration of contract references, even where they involved IAI's work as a subcontractor, so long as they involved work or similar scope and complexity. In this regard, the ODRA stated:

> The Center's current position regarding this language, interpreting "capability of the prime" to mean the prime's capability in terms of prior contracts on which it performed *as a prime contractor*, lacks a rational basis. The language simply does not support such a restricted reading. The protester's suggested interpretation, which would equate the "capability of the prime" to the "capability of the offeror team," including the past contract experience of its proposed subcontractor, FDC, is likewise improper. An objective interpretation of the Factor 5 language, based on the plain meaning of the amendment, is that the offeror was to provide a total of 2 separate contract references for contracts that involved work of similar scope and complexity "performed" by "the prime" – *i.e.*, the proposed prime contractor of the offeror team - and that such past performance information was to be taken into consideration, regardless of whether it related to the prime's experience as a prime contractor or as a subcontractor. Both types of experience would "indicat[e] the capability of the prime" to "***perform***" "work of similar scope and complexity."
>
> The ODRA does not question that the drafters of Amendment No. 2 may have had a different intent (*see* Agency Report, Declaration of Dennis A. Steelman, ¶6 – "Our intent was to verify the ability of the prime contractor to ***manage*** a contract of similar scope and complexity to that anticipated by the SIR . . ."). However, the language of the amendment does not reflect this subjective intent. The TET erred in limiting its consideration to information on prior contracts performed by the prime *as a prime contractor*. The TET did indeed correct its initial error (of including past performance information relating to FDC, the protester's proposed subcontractor), but then it proceeded to commit a second error, by restricting its evaluation of the protester's past performance solely to contracts on which it had performed as a prime contractor.

[3] As explained in that decision, the ODRA has been delegated broad authority by the FAA Administrator to issue such interlocutory orders and to take other measures as may be necessary in the interest of efficient case management for bid protests and contract disputes filed with the ODRA. *See* Delegation of the Administrator dated July 29, 1998 (published on the Internet at http://www.faa.gov/agc/deleg2.htm).

> In light of the above, it follows that the ODRA must determine whether and to what extent the ultimate source selection may have been prejudiced by this erroneous application of Amendment No. 2. *See A&T Systems, Inc.*, 98-ODRA-00097. The current record does not indicate, nor will the ODRA "speculate" about what the TET might have done given a proper application of the Amendment No. 2 language pertaining to Factor 5. It therefore is necessary that the record be supplemented by way of sworn affidavits of each individual TET member (including Mr. Steelman) that address and explain – in their own words and in detail -- how each would have handled his evaluation of Factor 5 based on a proper interpretation of Amendment No. 2, *i.e.*, the interpretation as set forth above.

On the basis of this finding, which is incorporated herein, the ODRA ordered that the Center respond to the aforesaid Paragraph 2 as part of its Supplemental Agency Report.

39. The Center submitted the Supplemental Agency Report to the ODRA on November 16, 1999. In it, the Center provided affidavits from Mr. Steelman and all of the individual TET members. Mr. Steelman, in a Fourth Declaration, advised that the third additional past performance reference provided by IAI had been for a second subcontract that it had performed for EDS. That subcontract, Mr. Steelman concluded was "definitely not of similar scope to the IT segment of the protested procurement." This was so, he said, because it involved only approximately 1.5 Full Time Employees (FTEs) throughout the life of the subcontract. This, he said, was on an "order of magnitude less [than] the FAA procurement." In this regard, he asserted: "it is inconceivable that it is of similar complexity." The EDS subcontract was, he stated, "to support Immigration & Naturalization Service (INS) in the Information Technology (IT) arena." SAR, Fourth Declaration of Dennis A. Steelman, p. 1. Mr. Steelman appears in this instance to confuse "complexity" with "size." Certainly, even a very small IT contract could have been of equal or even greater technical complexity than the work contemplated for the Center here. On the other hand, Mr. Steelman argues that "subcontractor management expertise" is "extremely relevant to the issue of complexity." To the extent IAI's past performance did not include significant experience as a prime

contractor, including experience with subcontractor management, he indicates, that past experience should be regarded as not comparable in terms of "complexity." *Id.*, p.2.

40. As to the re-scoring of Factor 5, Mr. Steelman and each of the other TET members confirmed that they would not have rated IAI's proposal for that factor much differently, even if the rating had been based on the ODRA's Preliminary Finding that past performance evaluation under Solicitation Amendment No. 2 was to include not only IAI's experience as a prime contractor, but also its prior experience as a subcontractor. The TET's "Poor" rating for that factor would not have changed, even including consideration of such subcontract experience, because IAI's past experience was, in their view, not on projects of similar scope and complexity. SAR, Declarations of Robert D. Gross, Patrick S. Hyle, J. Stewart Searight, Andrew H. Stewart, and Fourth Declaration of Dennis A. Steelman.

41. Mr. Steelman, in a Fifth Declaration, provides a substantial amount of new information regarding how the language changes in the various TET report drafts came into being. He explains that he served in two capacities for the instant procurement. Not only was he the Chair of the TET, but he also was Co-Chair of the Integrated Product Team ("IPT") and, in that latter capacity, was responsible for working with Ms. Ternay (the other Co-Chair) to develop a recommendation for the SSO in terms of which offer constituted the "best value" to the Government. SAR, Fifth Declaration of Dennis A. Steelman, ¶¶1 and 2. Mr. Steelman states that he prepared the final TET report, so as to reflect "the result" of a debate among himself and the other IPT members -- Ms. Ternay, Ms. Yak, and Mr. Dennis Filler (Ms. Yak's "superior" and the "Information Technology Coordinator for the entire Tech Center") and the "decision" which he and Ms. Ternay, the Contracting Specialist, reached "that there was insufficient technical superiority to warrant almost a million dollars over the life of the contract." *Id.*, ¶¶6 and 7.

42. In response to the ODRA's questions, all of the TET members disclaimed having factored into their evaluation of Multimax the statement that Multimax would attempt to recruit qualified incumbent personnel. SAR, Declarations of Robert D. Gross, Patrick S.

Hyle, J. Stewart Searight, Andrew H. Stewart, and Fourth Declaration of Dennis A. Steelman. Further, all of them disclaimed having taken any role in Multimax's recruitment of incumbent personnel. *Id.* Mr. Steelman acknowledged only (1) that he and Ms. Yak had introduced Multimax's Drs. Chan and Leung to Mr. Robert Linn, the FDC Site Manager, on September 16, 1999, "in order to begin the transition of operational responsibility"; and (2) that he and Ms. Yak, "as a matter of professional courtesy," "informed the affected contractors that Multimax had been awarded the IT contract." SAR, Fourth Declaration of Dennis A. Steelman, p. 3. Mr. Steelman further states, in response to the ODRA questions: "I did not provide Multimax with any of the names of IAI/FDC employees, with the exception of the above"; "I did not provide Multimax with any salary information regarding the existing IAI/FDC contractors, nor do I know these salaries"; and "I did not encourage any incumbents to attend the Multimax Open House."

43. Comments from both IAI and counsel for Multimax were submitted with respect to the Supplemental Agency Report on November 22, 1999, whereupon the record in this matter was closed. In its comments, IAI asserts, *inter alia,* that, even if the individual TET members did not render assistance in the recruitment of incumbent personnel, the Center did, in fact, render such assistance: "[T]he Agency never denied that it permitted Multimax to hold recruitment meetings on FAA time, and that the incumbent employees were allowed to charge the time spent in attending the recruitment meeting to the incumbent FAA contract." This allegation had not been made earlier, in either the IAI protest or in IAI's Comments on the Agency Report.

II. Discussion

Failure to Adhere to Solicitation Criteria

The FAA's Acquisition Management System ("AMS") requires that an FAA Product Team, when evaluating competing proposals, must adhere to the evaluation criteria called out in the FAA's Solicitation. *Protest of Information Systems & Networks Corporation, Inc.*, 98-ODRA-00095. Although an IPT is "expected to apply sound judgment in determining appropriate variations and adaptations necessary for individual situations," it

is not authorized to "depart" from "the basic concepts and intent of the evaluation plan" and the Solicitation. AMS §3.2.2.3.1.2.3. In the present case, the evaluation scheme set forth in the Solicitation clearly contemplated that the instant procurement was to be evaluated on the basis of "best value" to the agency, with technical capability being afforded heavier weight than price. Finding 3, above. The record here indicates that the Center improperly "departed" from the Solicitation's evaluation criteria, abandoning the "best value" scheme and effectively making an award to the lowest price/technically acceptable offeror.

The activities of September 8, 1999, as related in the above findings, are particularly instructive in this regard. The Contracting Specialist and IPT Co-Chair, Ms. Ternay, on that date drafted an award recommendation in which she recommended that award be made to IAI. Notwithstanding the reduction in IAI's score produced by the re-scoring of Factor 5, and notwithstanding the nearly $1 million price differential between the IAI and Multimax proposals, Ms. Ternay apparently believed that an award to IAI was compelled by the "best value" evaluation criteria of the Solicitation. Her draft award recommendation states:

> Price/Technical Trade-off: The solicitation made it abundantly clear that this is a "best value" acquisition in which the combined technical factors were more important than price. Since INFORMATICA was the highest technically rated vendor by a significant margin, the team compared the relative merits of INFORMATICA's and Multimax's who was the lowest priced offer at $22.9M and tied third overall technically. As demonstrated above, the team [*i.e.*, the IPT] believes that given the solicitation's emphasis on technical superiority over price, the qualitative differences between the two companies fully justifies paying a 4% premium for INFORMATICA over Multimax.

IAI Comments, Tab 8, Anne Marie Ternay e-mail of 9/8/99 at 2:27 P.M., Federal Aviation Administration Information Technology (IT) Contract Award Recommendation and Determination, at page 4. Essentially, Ms. Ternay had concluded that, under the Solicitation's "best value" evaluation criteria, with the requirement that technical merit be given greater weight than price, a technical quality "margin" of only 2%[4] (an "excellent"

[4] This determination by Ms. Ternay would assume the propriety of the TET's re-scoring of Factor 5, even after the TET members had been notified that IAI's price was higher, an approach potentially at odds with

score of 90 versus a "good" score of 88) was still sufficiently "significant" that it would have to outweigh a 4% differential in price. Mr. Steelman, Ms. Ternay's IPT Co-Chair, did not suggest that her interpretation of the Solicitation's evaluation criteria was incorrect. Rather, he unilaterally, and without a rational basis, re-worded the TET report, systematically eradicating the previous conclusion that IAI's proposal was technically superior to that of Multimax. The ODRA concludes that Mr. Steelman's actions, which were taken "with the result in mind," SAR, Fifth Declaration of Dennis A. Steelman, ¶7, leveled the technical field completely (at least on paper[5]), allowing low price to determine the award decision. *See* Finding 26, above. However well intentioned, this action constituted an inappropriate "departure" from the "basic concept and intent of the evaluation plan" and the Solicitation, contrary to the AMS. *See* AMS §3.2.2.3.1.2.3.

To maintain the integrity of procurements under the AMS, FAA Product Teams must adhere to the evaluation schemes specified in their solicitations throughout the course of the procurement process. Had the IPT intended price to be the overriding factor in this instance, it should have structured this procurement from the outset as a low price/technically acceptable procurement, rather than switching evaluation methodologies during the evaluation process without notice to the offerors and opportunity to formulate their offers accordingly.[6]

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the notion that price would play no role in the technical scoring. Further, the re-scoring was based solely on past performance information for contracts performed "as a prime contractor," something the ODRA has found specifically was not appropriate.

[5] The ODRA notes that, at least one other TET member, Stuart Searight, had raised a question regarding the ultimate award decision and had stated: "I must say, I don't believe the contract went to the team who was best qualified for the job." IAI Comments on Agency Report, Tab 2, e-mail message from Stuart Searight to Dennis Steelman, dated September 15, 1999, 9:21 A.M.

[6] In light of the above determination, the ODRA does not need to reach the alternative grounds of protest. The ODRA notes, however, that no "bait and switch" took place in the instant case. The facts here are clearly distinguishable from those in the *Protests of Camber Corporation and Information Systems & Networks Corporation*, 98-ODRA-00079 and 98-ODRA-00080 (Consolidated), where the ODRA had found that the awardee had misrepresented the availability of certain key personnel whom it knew were not likely to be available for contract performance. Here, the evidence advanced by Multimax supports its contention that the personnel it had offered would have been available for the instant contract had they been needed. *See* Multimax Comments on Supplemental Agency Report, Declaration of Dr. Aldrin Leung. Also, the Multimax proposal clearly stated an intention to recruit and use qualified incumbents if they were available. Finding 30, above. Notwithstanding the significant degree to which incumbents may have been substituted for proposed Multimax personnel in this case (*see* IAI Comments on Agency Report, pp. 20-24), there was no misrepresentation and hence no "bait and switch."

The Appropriate Remedy

The AMS and the ODRA's final procedural rule both afford the ODRA wide latitude in terms of the remedies it may recommend. AMS §3.9.3.2.3.4; 14 C.F.R. §17.21. Under the express provisions of Section 348 of Public Law 104-50, the FAA's new Acquisition Management System is not subject to the Competition in Contracting Act ("CICA"). In this regard, the ODRA has observed:

> Unlike similar situations involving procurements of other federal agencies, where the CICA explicitly requires the Comptroller General to make its recommendation for corrective action "without regard to any cost or disruption from terminating, recompeting or re-awarding the contract," *GIC Agricultural Group*, Comp. Gen. Dec. B-249065, 92-2 CPD 263 (October 21, 1992), neither the FAA nor the ODRA is similarly constrained. Indeed, as noted above, the CICA is not applicable to acquisitions under the AMS.

Protest of Haworth, Inc., 98-ODRA-00075. Indeed, under the ODRA's final procedural rule, it must take into account:

> the circumstances surrounding the procurement or proposed procurement including, but not limited to: the nature of the procurement deficiency; the degree of prejudice to other parties or to the integrity of the acquisition system; the good faith of the parties; the extent of performance completed; the cost of any proposed remedy to the FAA; the urgency of the procurement; and the impact of the recommendation on the FAA

14 C.F.R. §17.21(b). In *Haworth*, *supra*, even though the protest was sustained, the ODRA refused to recommend a termination of the contract for the convenience of the Government, and limited the protester to recovery of its bid and proposal costs. It did so, because termination of the computer systems furniture contract in that case would have had an enormous impact on the agency, in terms of delay to the completion of a significant ongoing FAA construction project. It also refrained from recommending such "equitable" relief in that case, because it determined that the protester had itself contributed to the creation of the situation in which the parties had found themselves:

> Moreover, for the Administrator to direct a termination and re-competition would be in the nature of providing an "equitable" remedy, *i.e.*, not merely an award of legal damages. The protester itself invoked the notion of

> "equitable" remedies, when, in the protest letter, its counsel spoke of the doctrine of "equitable estoppel." *See* Protest at page 8. It is well established that one who seeks an "equitable" remedy must approach the forum with "clean hands." *Instrument Manufacturing Co. v. Automotive Maintenance Machinery Co.*, 324 U.S. 806 (1945); *Keystone Driller Co. v. General Excavator Co.*, 290 U.S. 240 (1933); *Southwest Products Co. v. United States*, 882 F.2d 113 (4th Cir. 1989); *see also Computer Network Corporation, et al., requests for reconsideration*, B-186858, 56 Comp. Gen. 694, 77-1 CPD ¶422 (June 13, 1977).
>
> In this case, even though we find the protest to be valid, we also find that Haworth contributed to the creation of the current situation. * * * In our view, sound business practice mandated a higher degree of care on Haworth's part than was exercised here.

Unlike the situation in *Haworth*, the ODRA cannot in any way attribute the current situation to acts or omissions of IAI. Furthermore, the contract in question is significantly different than the one involved in *Haworth*. In the present case, as the ODRA has already indicated in its ruling on the protester's request for a stay, "there is nothing about the nature of the services work to be performed under this Contract that would render the ODRA unable to recommend effective relief should the Protest be successful." Here, it is clear that IAI should have been awarded the contract, had the Solicitation's evaluation criteria been followed, and there is nothing that would render impracticable an IAI takeover at this stage.

As the protester has noted, the Center has already placed the work under two tasks, tasks 5 and 6, elsewhere, by exercising options under two previously existing contracts, one with IAI. Although IAI has argued (in its supplemental protest) that such action should be viewed as confirming that the award decision on this procurement was "price-driven," IAI has not shown where the exercise of those options was in any way illegal or improper. Moreover, the ODRA does not ordinarily involve itself in such matters of post-award contract administration in the context of a bid protest proceeding. *See Protest of Washington Consulting Group*, 97-ODRA-00057 (Decision of the ODRA on Motion to Dismiss, n. 2; http://www.faa.gov/agc/98_57dec.htm). In any event, because of these option exercises, the remedy in this case cannot include re-directing the work under tasks

5 and 6 to IAI under the instant procurement. With that exception, however, a termination for convenience and directed award is the appropriate remedy here.

III. Conclusion and Recommendations

For all of the above reasons, the ODRA finds that the award to Multimax lacked a rational basis and was contrary to the evaluation criteria of the Solicitation. Accordingly, the ODRA recommends that the Multimax contract immediately be terminated for the Government's convenience and that an award be directed to IAI for all but tasks 5 and 6.

_____/s/_____
Richard C. Walters
Dispute Resolution Officer
FAA Office of Dispute Resolution for Acquisition

APPROVED:

_____/s/_____
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