

# FINAL PUBLIC VERSION

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

### FINDINGS AND RECOMMENDATIONS

**Matter:** Protest of Computer Associates International, Inc.  
Under Solicitation No. DTFA01-00-RFO-NIMSEM

**Docket No.:** 00-ODRA-00173

#### *Appearances:*

For the Protester, Computer Associates International, Inc.: J. William Eshelman, Esq., Michael C. Poliner, Esq., and J. Michael Littlejohn, Esq., Feith & Zell, P.C.; and James M. Black, Esq., Associate Counsel, Computer Associates International, Inc.

For Intervenor, Tivoli Systems, Inc.: Jonathan D. Shaffer, Esq., John S. Pachter, Esq., Jennifer A. Mahar, Esq., and Nils R. Kessler, Esq., Smith, Pachter, McWhorter & D'Ambrosio, P.L.C.; and Carl T. Hahn, Esq., Staff Counsel, IBM Corporation

For the Agency Product Team: Victoria H. Kauffman, Esq., FAA Office of Chief Counsel

#### **I. Introduction**

This Protest involves a solicitation issued by the FAA Headquarters, Solicitation No. DTFA01-00-RFO-NIMSEM (“Solicitation”) for an Enterprise Management (EM) framework tool as a component of FAA’s National Airspace System (NAS) Infrastructure Management (NIM) implementation. The Solicitation contemplates a base contract period through September 30, 2001, and four subsequent one-year options. The Solicitation calls for award based on a determination of best value to the Agency.

The Protester, Computer Associates International, Inc. (“CA”), had previously been awarded a contract under the Solicitation on October 27, 2000. That award had been challenged by an earlier protest by Tivoli Systems, Inc. (“Tivoli”), an IBM company. The earlier protest (the “Original Protest”) was filed by Tivoli on November 9, 2000, and was docketed as 00-ODRA-00171. CA had intervened in the Original Protest, and had participated along with the FAA Product Team and Tivoli in alternative dispute resolution (“ADR”) proceedings conducted by Administrative Judge Catherine Hyatt of the General Services Administration Board of Contract Appeals (“GSBCA”), pursuant to an ADR Agreement, which all three parties executed. By agreement, the ADR proceedings were conducted concurrently with ongoing adjudication under the ODRA’s default adjudicative process.

The Original Protest alleged that the Product Team had failed to “rationally or properly (a) conduct a price/cost realism analysis; (b) conduct a proper best value determination; (c) evaluate technical proposals; and (d) evaluate past performance.” The Product Team filed its Agency Report with regard to the Original Protest, by letter dated November 27, 2000. A supplemental protest letter dated November 28, 2000 was then filed by Tivoli with the ODRA on November 29, 2000 (“Supplemental Protest”). In that Supplemental Protest, Tivoli, *inter alia*, challenged the propriety of the evaluation process, because the Product Team had failed to evaluate “security-related technical and cost elements” in accordance with the Solicitation’s stated evaluation criteria.

As a result of the ADR proceedings before GSBCA Judge Hyatt, which involved Judge Hyatt’s provision of early neutral evaluation of the merits of the parties’ respective positions, and prior to any response by the Product Team to Tivoli’s Supplemental Protest, Tivoli and the Product Team entered into a settlement agreement dated November 30, 2000 (the “Settlement Agreement”). Subsequently, the two parties entered into a revised settlement agreement dated December 5, 2000 (the “Revised Settlement Agreement”). Under the Revised Settlement Agreement, the Product Team agreed to terminate the earlier contract award and to issue an amendment to the Solicitation to delete Functional Characteristic 15, “Security Management,” one of 18 Functional

Characteristics specified, and to substitute a new Functional Characteristic 15, “Security Interface.”

The Solicitation Amendment was to call for the Product Team to evaluate “the ability of each proposer’s product to interface with security software products that the FAA owns.” As originally formulated, the Solicitation contemplated that offerors were themselves to furnish security software products. The Revised Settlement Agreement provided that, upon issuance of the Solicitation Amendment, CA and Tivoli would have a reasonable time – “no less than four business days” – within which to respond to the Solicitation Amendment. Although not spelled out in the Revised Settlement Agreement, the parties have advised that the responses were to take the form of technical proposals regarding the new Functional Characteristic 15, “Security Interface,” and revised price proposals reflecting the amended solicitation criteria. In terms of the Original Protest and Supplemental Protest, the Revised Settlement Agreement required Tivoli to withdraw those protests upon its receipt of the Solicitation Amendment.

On December 6, 2000, after its contract award had been terminated for the Government’s convenience, pursuant to the Revised Settlement Agreement, but prior to the issuance of the Solicitation Amendment<sup>1</sup> and before any withdrawal by Tivoli of the Original Protest and Supplemental Protest, CA filed the instant Protest with the ODRA. In the Protest, CA takes issue with the proposed “corrective action” under the Revised Settlement Agreement. In particular, CA asks that no new price proposals be obtained and evaluated and that only technical proposals on the new Functional Characteristic 15, “Security Interface”, be evaluated, “to confirm compatibility of the [offeror’s proposed] EM tool with FAA’s existing security software.” CA argues that it will be prejudiced by the requirement of revised price proposals, that the prior release of its contract price will result in an impermissible “auction” in this case, contrary to the FAA’s Acquisition Management System (“AMS”). The Product Team agreed to a voluntary stay of any

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<sup>1</sup> On December 12, 2000, the Product Team issued the promised Solicitation Amendment (Amendment 004).

award pending the Administrator's decision of this Protest and, on that basis, CA agreed to withdraw a request set forth in its Protest letter that the Administrator order a stay of the submission of new price proposals as well as of any contract award.

For the reasons set forth herein, the ODRA recommends that CA's Protest be denied.

## **II. Findings of Fact**

1. The Product Team issued the instant Solicitation (AR1<sup>2</sup>, Tab 3) on September 11, 2000, seeking proposals for an Enterprise Management (EM) framework tool as a component of FAA's National Airspace System (NAS) Infrastructure Management (NIM) implementation. According to the Product Team's initial Agency Report in ODRA Docket No. 00-ODRA-00171:

Future FAA NIM implementation is based on the fielding of a modern operations support system titled NIMS (NAS Infrastructure Management System). NIMS will provide automated support for both new centralized operations centers and field specialists. It will be based on the use of Commercial-Off-the-Shelf (COTS) products to provide the functionality to support NIM (AR1, Tab 3, Section 1.0).

The Solicitation announced that this acquisition would support the purchase of the EM tool suite along with upgrades and maintenance under the General Services Administration (GSA) Federal Supply Schedule (FSS). The contract type would be firm-fixed price delivery order, meeting the requirements of Standard Industrial Code (SIC) 7372, Prepackaged Software. The contract period of performance is one base year and four (4) one-year options (AR1, Tab 3, Section 2.1).

2. Award under this Solicitation was to be made to the offer that provided the "greatest overall value to the Government, price and other factors considered." Technical

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<sup>2</sup> The designation "AR1" signifies the initial Product Team Agency Report filed with the ODRA by letter dated November 27, 2000 relating to the Original Protest of Tivoli under ODRA Docket No. 00-ODRA-00171. References to AR1 followed by tab numbers refers to tabbed documents within a binder marked "Volume 1" accompanying that initial Agency Report. Although the Product Team was to submit a separate written response to Tivoli's Supplemental Protest on Friday, December 1, 2000, it settled the protest with Tivoli instead on November 30, 2000.

Capability, which included the evaluation of (1) Technical Literature Submission and (2) an Operational Capability Demonstration, was more important than Past Performance. Past Performance was to be more important than Price/Cost. The Solicitation also stated that the Cost/Price area would become more important should the difference among offerors' overall scores in other areas diminish. The submission due date for technical and price proposals was September 21, 2000.

3. The technical evaluation originally was to be based on fourteen evaluation criteria (AR1, Tab 3, pg. 7, ¶ 2.3(c)), which corresponded to fourteen areas of functionality – so-called “Functional Characteristics” – listed in the Statement of Work (AR1, Tab 3, pg. 2, ¶ 1.2). These fourteen Functional Characteristics were further broken down into a detailed requirements matrix (AR1, Tab 3, Attachment 1 NIMS Requirements Matrix).

4. On September 14, 2000, the FAA issued Amendment 001 to the Solicitation, adding four additional Functional Characteristics under the Technical Evaluation Criteria, changing the total number from fourteen (14) to eighteen (18) (AR1, Tab 3, Section 2.3(c) and Amendment 001). The Statement of Work (SOW) was amended to include these additional functional capability requirements (AR1, Tab 3, Amendment 001).

5. On September 18, 2000, the FAA issued Amendment 002 to the Solicitation (AR1, Tab 3). This amendment made changes to the Solicitation sections on the conduct of an Operational Capability Demonstration (AR1, Tab 3, Section 2.3(b)) and relating to the Price Evaluation (AR1, Tab 3, Section 2.5). Under Amendment 002, the FAA also issued a revised requirements matrix (AR1, Tab 3, Attachment 1 NIMS Requirement Matrix – Revision 2). On September 19, 2000, the FAA issued Amendment 003 (AR1, Tab 3), which extended the due date for price proposals only from September 21, 2000 to September 25, 2000. The due date for technical proposal literature remained unchanged at September 21, 2000.

6. By September 21, 2000, the FAA received technical proposals and past performance client information from three Offerors, including CA and Tivoli. On September 25, 2000, the FAA received price proposals from those offerors. AR1, p. 3.

7. The Product Team designated three subgroups (“teams”) of individuals to evaluate the technical and price proposals. The Past Performance Evaluation Team began an evaluation of past performance for the procurement on September 20, 2000, by soliciting customer surveys from clients of CA and Tivoli (AR1, Tabs 9 and 10). From September 25, 2000 to October 10, 2000, in accordance with an Evaluation Plan (AR1, Tab 5), the Technical Evaluation Team conducted its assessments of technical literature submissions and evaluated the offerors’ Operational Capability Demonstrations (AR1, Tab 11). During this same time period, the Price Evaluation Team conducted its price proposal evaluations for both CA (AR1, Tab 12) and Tivoli (AR1, Tab 13). Clarifications were obtained from the two offerors in both the technical and cost areas during this time period. (AR1, Tabs 7 and 8).

8. At the conclusion of the evaluation process, the proposal scores/findings for CA and Tivoli were as follows:

	<u>Computer Associates</u>	<u>Tivoli</u>
TECHNICAL (80% of overall score)	64.3	66.7
PAST PERFORMANCE (20% of overall score)	17.9	15.0
OVERALL SCORE (maximum score of 100)	82.2	81.7
EVALUATED PRICE	\$2,905K	\$4,445K

AR1, p. 3.

9. The three Evaluation Teams submitted their respective findings to the Source Selection Official (SSO) in a report dated October 26, 2000 (AR1, Tab 14). The Product Team has advised that the SSO was not told any of the names of the Offerors and that, accordingly, his ultimate award decision was made “in the blind”. (AR1, p. 3). The SSO report noted that the overall scores of “Offeror A” (CA) and “Offeror B” (Tivoli) were extremely close, and pointed out that Section 2.2 of the Solicitation states that the cost area will become more important as the differences among offerors’ overall scores in other areas diminish (AR1, Tab 3). Since it appeared that CA’s product could be acquired for 35% less than Tivoli’s, the evaluators recommended award to CA. The SSO adopted this award recommendation on October 27, 2000 (AR1, Tab 15), and award was made to CA on that date via delivery order DTFA01-01-F-50002 (AR1, Tab 16). Also on that date, the FAA notified the other offerors, including Tivoli, of the award decision. At Tivoli’s request, a debriefing was held on November 2, 2000. (AR1, p. 3).

10. Tivoli timely filed a protest with the ODRA, *i.e.*, within five business days of that debriefing, on November 9, 2000. *See* 14 C.F.R. §17.15(a)(3)(ii). The Tivoli protest was docketed as 00-ODRA-00171. On November 14, 2000, the FAA agreed voluntarily to stay delivery of Computer Associates’ product until December 15, 2000. AR1, p. 4.

11. The ODRA’s Richard C. Walters, Esq., acting on behalf of the ODRA Director<sup>3</sup>, designated himself as the Dispute Resolution Officer (“DRO”) for purposes of any adjudication in 00-ODRA-00171. CA intervened in Tivoli’s protest and along with the Product Team and Tivoli, executed an ADR Agreement, which called for neutral evaluation to be provided by GSBCA Judge Catherine Hyatt as an ADR Neutral. The ADR Agreement was reviewed and executed by Mr. Walters, acting for the ODRA

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<sup>3</sup> For purposes of Tivoli’s Original Protest and Supplemental Protest as well as the instant CA Protest, the Director of the Office of Dispute Resolution for Acquisition recused himself completely, because of certain conflicts, and delegated to Mr. Walters full authority to act on his behalf. The ODRA’s Marie A. Collins, Esq., similarly could not participate in either matter, due to ownership of stock in one of the competing companies.

Director. By agreement, the ADR proceedings were to proceed before Judge Hyatt concurrently with the DRO's adjudication under the default adjudicative process.

12. Tivoli, by letter of its counsel dated November 28, 2000, filed with the ODRA a Supplemental Protest contending, *inter alia*, that the Product Team had failed to adhere to the Solicitation's evaluation criteria, in that, without a further Solicitation amendment, it chose to evaluate the technical and price proposals without reference to one of the 18 specified Functional Characteristics, "Security Management." According to the Supplemental Protest, this fact was not disclosed during the November 2, 2000 debriefing and was only discovered in connection with the review of documents provided to Tivoli on November 22, 2000 through the discovery process in the Original Protest. This Supplemental Protest was forwarded to Judge Hyatt for her use in conjunction with the ADR proceedings. Because the Product Team had determined that it no longer needed security software to be furnished as part of this acquisition, the FAA already having procured such software elsewhere, it had decided not to include an evaluation of this Functional Characteristic as part of the evaluation of technical and price proposals. The record in 00-ODRA-00171 (with which the instant Protest was subsequently consolidated) indicates that, although some partial evaluation efforts regarding "Security Management" had been undertaken, the Product Team discounted the factor completely in computing the above technical scores and in the evaluation of price proposals.

13. Shortly after Judge Hyatt provided the parties with her neutral evaluation of the case, the Product Team and Tivoli entered into the aforesaid Settlement Agreement of November 30, 2000. (AR2, Tab A). Thereafter, the Product Team, by letter to CA dated December 4, 2000 (AR2, Tab B), cancelled the earlier contract award, advising that it found such "corrective action" to be in the FAA's best interest. The Product Team and Tivoli executed a Revised Settlement Agreement in the form of a letter to the ODRA's Mr. Walters dated December 5, 2000 (AR2, Tab C). In that letter, which both parties signed, they notified Mr. Walters that they had "settled the pending protest [00-ODRA-00171]" based on the following terms:

1. The Computer Associates International contract (DTFA01-01-F-50002) under the referenced solicitation will be terminated. [As indicated above, that event had already transpired by December 5, 2000.]
2. The Product Team will issue an amendment to the SIR<sup>4</sup> on or about the week of December 4, 2000. The amendment will revise the SIR to state that Functional Characteristic 15, Security Management, is deleted and that Security Management will not be considered for evaluation and award purposes in an offeror's technical solution and proposed costs. In its place, Functional Characteristic 15 will be renamed "Security Interface", and the FAA will evaluate for award purposes the ability of each offeror's product to interface with security software products that the FAA owns. Tivoli and the awardee, Computer Associates, will be invited to submit final proposal revisions. Tivoli and Computer Associates will be given a reasonable time (no less than four business days) in which to respond to the amendment. The Product Team will evaluate the proposals and make award in accordance with the SIR, as amended.
3. Upon receipt of the amendment, Tivoli will withdraw its pending protests (dated November 9, 2000 and November 28, 2000) with prejudice, to be reinstated only in the event this settlement is not consummated.

AR2, Tab C.

14. CA, on December 6, 2000, submitted to the ODRA the instant Protest, which was docketed as 00-ODRA-00173. Mr. Walters again designated himself as the DRO for the case, and consolidated it with the earlier Tivoli protests under 00-ODRA-00171. CA, in its Protest, states that "Computer Associates is not seeking additional discovery" in connection with the Protest. None of the parties has requested that a hearing on the record be convened.

15. The CA Protest acknowledges that the Product Team had committed error in performing its earlier evaluation, when it had chosen to ignore one of the 18 specified Functional Characteristics, but contends that the proposed "corrective action" under the Revised Settlement Agreement will "cause prejudice, confusion and uncertainty that will

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<sup>4</sup> The term "SIR" refers to the instant Solicitation, an FAA Screening Information Request.

be much more damaging to the integrity of the procurement process than the prejudice to Tivoli (if any) caused by FAA's evaluation error." According to the Protest, the two offerors (CA and Tivoli) had "reacted" to the error "in precisely the same way – each submitted cost proposals segregating the cost of separately priced security software, but each continued to believe that security software remained part of the evaluation." "Even if FAA had clarified that it was excluding security software from the evaluation," CA argues, "there is a high probability that the outcome would have been the same." Protest, p. 2.

16. In this regard, Tivoli, in its Supplemental Protest, had implied that all of the costs associated with security software were not separately priced and were not segregated when the Product Team evaluated [Deleted]: "[Deleted] – without any notice to the offeror's that the Price and Technical factors were being changed. . . . The SSOR recommended award to Computer Associates because their price was 35% less than Tivoli's. [AR1,] Tab 14 at 18. These numbers, however, are based on the improper removal of [Deleted] security costs." Supplemental Protest, p. 7 (emphasis added).

17. The CA Protest challenges the propriety of the Product Team's decision to enter into a settlement with Tivoli, since, in CA's view, Tivoli would have been unable to demonstrate prejudice in conjunction with its protest: "FAA's error does not necessarily mean that Tivoli's protest would have been sustained, as Tivoli must show prejudice." CA goes on to argue: "[E]ven if Tivoli can show prejudice, the corrective action currently contemplated is not appropriate." Protest, p. 7. In terms of Tivoli's alleged inability to demonstrate "prejudice," CA states: "Tivoli has no credible argument that it would have changed its proposal enough to have had a reasonable chance for award. Indeed, Tivoli most likely would not have changed its proposal at all." *Id.*, p.8.

18. As to the propriety of the proposed "corrective action," CA contends that, since the offerors' prices have already been exposed and since the upcoming competition will necessarily revolve solely around price proposals, seeking revised pricing will create an impermissible "auction":

Because the technical/past performance evaluations are essentially frozen, the resubmission of cost proposals amounts to an auction. Auctions are generally prohibited. See AMS §3.2.2.3.1.2.2 (“Technical leveling, and auctioning techniques are prohibited . . .”). . . . [T]he auction being proposed here would compromise, rather than protect, the integrity of this procurement. This is especially true because we are dealing with *commercial off-the-shelf software* (“COTS”). By its nature, COTS has virtually no production cost, so an auction for COTS will be random and undisciplined, with no rational standard for evaluation.

Indeed, Tivoli has already proven this point. Tivoli’s willingness to enter into the Settlement Agreement means that Tivoli has already decided to cut its price by a least 35 percent in order to erase Computer Associates’ now-disclosed price advantage. Otherwise Tivoli would have no chance for award. Such a price cut has no economic underpinning or any other rational basis. Tivoli is prepared to make it *only because Computer Associates’ price has been disclosed*. This cannot be the basis of a fair competition. Such an auction hurts the integrity of the procurement process far more than the harm caused by FAA’s honest, evenly-applied evaluation error.

CA Protest, p. 9 (emphasis in original).

19. On December 8, 2000, the Product Team transmitted to CA and Tivoli a draft Solicitation Amendment 004. (AR2, Tab D).

20. The Product Team filed its Agency Report for the CA Protest by letter to the ODRA dated December 11, 2000. (AR2<sup>5</sup>). In it, the Product Team maintains that it had a reasonable basis and acted within its authority under the AMS to settle the Tivoli protest. It further argues that it need not first establish a protester’s “prejudice” in order to justify having taken corrective action, that an agency may take corrective action, even if a protest could be denied. AR2, pp. 4-5. The Agency Report indicates that Amendment 004 makes yet further changes to the Solicitation than were contemplated by the Revised Settlement Agreement. In particular, in the Agency Report, the Product Team states:

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<sup>5</sup> The Agency Report of the Product Team in the instant Protest of CA will be referred to herein by the designation “AR2”.

During the period December 1-10, 2000, the FAA carefully reevaluated its actual needs and determined that, in addition to the SIR changes agreed to in the settlement agreement, other SIR changes were needed to ensure that the FAA purchased what it actually needed. Accordingly, draft Amendment 004 (Attachment D) to DTFA01-00-NIMSEM, issued on December 8, 2000, to both CA and Tivoli, requires restructuring of offerors' price proposals, including removal of Security Management as a functional capability, addition of Security Interfaces as a functional capability, addition of software maintenance and telephone support (five days a week/12 hours a day) as base (as opposed to optional) requirements, and requiring offerors to complete portions of the sample delivery order containing all the terms and conditions of the ensuing award.

21. The Agency Report also disputes the notion that its proposed "corrective action" will give rise to an impermissible "auction":

CA's concern that an auction will result is not well founded. While both offerors knew each other's bottom line prices and technical and past performance scores, both figures were based on the SIR before it was amended to remove Security Management as a functional capability, and replace it with Security Interface. In any event, Amendment 004 (Attachment E) requires restructuring of offerors' price proposals, which will include removal of security management as a functional capability, addition of security interfaces as a functional capability, addition of software maintenance and telephone support (5 days a week/12 hours a day) as base (as opposed to optional) requirements, and requiring offerors to complete portions of a sample delivery order containing all the terms and conditions of the ensuing award (Attachment D, page 3, paragraphs 5, 6, and 8). These changes, coupled with new technical submissions and new scores, mitigate any possibility of an auction.

Furthermore, GAO has held that the possibility that a contract may not have been awarded based on a determination of best value has a more harmful effect on the integrity of the competitive procurement system than the fear of an auction. *Patriot Contract Services, LLC*, supra; citing *Unisys Corp.*, supra; *Sperry Corp.*, B-222317, July 9, 1986, 86-2 CPD ¶ 48 at 4. Even CA acknowledges that the initial evaluation was conducted on a basis different from what was stated in the solicitation (CA Protest, pages 2, 6). FAA's AMS requires that this procurement error be cured. Barring the FAA from taking appropriate corrective action in cases such as this would compromise the integrity of the procurement system by preventing FAA from following the AMS, which is not challenged by CA. Accordingly, Count II of CA's protest should be denied.

22. In a letter to the Product Team dated December 11, 2000, CA took issue with certain references to the ADR proceedings contained within the Agency Report and requested that such references be deleted from the Agency Report. CA furnished a copy of that letter to the ODRA. The DRO, by letter dated December 12, 2000, advised the parties that he had reviewed the references along with the provisions of the ADR Agreement and had determined that no violation of ADR confidentiality had occurred and that, accordingly, the requested deletions were unnecessary. However, the DRO cautioned the parties to “avoid any advertent or inadvertent disclosures of dispute resolution communications in violation of the ADR Agreement or the Administrative Dispute Resolution Act of 1996, to which the Agreement is subject.”

23. By letter to the ODRA dated December 12, 2000, the Product Team supplemented its Agency Report with a copy of Amendment 004 to the Solicitation, which was issued to CA and Tivoli on December 12, 2000. (AR2, Tab E).

24. In accordance with the Revised Settlement Agreement, Tivoli, by letter to the ODRA dated December 13, 2000, formally withdrew its Original and Supplemental Protests with prejudice.

25. On December 14, 2000, CA and Tivoli both submitted to the ODRA written comments regarding the Agency Report, whereupon the record closed.

### **III. Discussion**

As the ODRA noted in *Protest of J.A. Jones Management Services, Inc*, 99-ODRA-00140, in making recommendations concerning substantive protest issues, the ODRA will apply the standard of review under the Administrative Procedure Act (“APA”), 5 U.S.C. §706, and will afford agency decision-makers broad discretion in terms of acquisition related decisions:

In accordance with the APA, the courts and the ODRA have consistently held that the review must concern itself with "whether the agency's decision was legally permissible, reasoned, and factually supported." *Protest of Information Systems & Networks Corporation*, 99-ODRA-00116, citing *Washington Consulting Group Inc.*, 97-ODRA-00059, citing *Delbert Wheeler Construction, Inc. v. United States*, 39 Fed. Cl. 239, 247 (1997). The reviewer may not substitute his or her judgment for that of the agency. *Id.*, citing *Wheeler Construction, supra*; *Latecoere International, Inc. v. United States*, 19 F.3d 1342, 1356 (11th Cir. 1994); *Board of County Commissioners of the County of Adams v. Isaac*, 18 F.3d 1492, 1496-97 (10th Cir. 1994).

Thus, in the context of resolving bid protests, the ODRA will not recommend that the Administrator overturn Agency actions, so long as they have a rational basis, are neither arbitrary, capricious, nor an abuse of discretion, and are supported by substantial evidence. *Protests of Information Systems & Networks Corporation*, 98-ODRA-00095 and 99-ODRA-00116, *aff'd* 203 F.3d 52 (D.C. Cir. 1999); *Protests of Camber Corporation and Information Systems & Networks, Inc.*, 98-ODRA-00079 and 98-ODRA-00080 (Consolidated).

#### **A. The Protest Grounds**

CA implies first that the Product Team acted improperly and without a rational basis in negotiating any settlement of the Original and Supplemental Protests, since Tivoli would have been unable to demonstrate prejudice by reason of the admitted impropriety in connection with the Product Team's failure to evaluate the Solicitation's "Security Management" factor. Protest, pp. 7-8. Second, CA argues, "even if Tivoli can show prejudice, the corrective action currently contemplated is not appropriate." *Id.*, p. 7.

In this latter regard, CA states, "because the technical/past performance evaluations are essentially frozen, the resubmission of cost proposals amounts to an auction" that is "generally prohibited" by AMS §3.2.2.3.1.2.2. CA contends that an "auction" arises in this case, not only because its price "*has been disclosed*," but because of the very nature of the product being procured: "We are dealing with *commercial off-the-shelf software* ("COTS")." *Id.*, p. 9.

**1. Prejudice and Authority to Settle a Protest**

The ODRA has previously held that, for a protest to be sustained, the protester must demonstrate that it has been prejudiced by agency action. See *A&T Systems, Inc.*, 98-ODRA-00097. Nevertheless, the issue before the ODRA at this juncture is no longer whether it would have sustained the Original and Supplemental Protests, but rather whether the Product Team acted properly and in accordance with the AMS when it entered into a settlement agreement with Tivoli to resolve those protests.

As the Product Team correctly notes, the AMS vests considerable discretion in FAA Contracting Officers to settle procurement disputes. In this regard, in the *Protest of Fisher-Cal Industries, Inc. and Contract Dispute of Art-Z Graphics*, 98-ODRA-00081 and 98-ODRA-00083 (Consolidated), a case cited by the Product Team, the ODRA observed that settlement agreements are not only fully authorized, but that settlements are to be “encouraged and enforced,” especially when there is a reasonable perception of “litigative risk”:

The AMS<sup>6</sup> authorizes COs to enter into agreements to settle protest disputes. AMS § 3.9.2 provides that “[p]rotests concerning FAA Solicitations 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 Solicitations 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.

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<sup>6</sup> It should be noted that the AMS is continually revised and updated. In particular, much of AMS Part 3.9, Resolution of Protests and Contract Disputes, has been superseded by the ODRA Procedural Rules, 14 C.F.R. Part 17, which took effect on June 28, 1999. Accordingly, many of the sections of AMS Part 3.9 cited in the above quotation from *Fisher-Cal, supra*, many no longer exist within the AMS.

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<sup>7</sup> 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.

In the present case, as in *Fisher-Cal, supra*, a settlement agreement resulted from ADR proceedings where parties were provided "early neutral evaluation," including necessarily an appraisal of the "litigative risks" of their respective positions.<sup>8</sup> Indeed, in terms of litigative risk, the protester in the present instance, CA, itself concedes that the procurement was not conducted properly, that the Product Team failed to adhere to the

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<sup>7</sup> *Fisher-Cal, supra*, pre-dated the Administrator's March 27, 2000 delegation of authority to the ODRA Director to issue final decisions on her behalf for "bid protest concerning an acquisition having a value or potential value of not more than one million dollars (\$1,000,000.00)." Federal Register Vol. 65, No. 72, at p. 19958

<sup>8</sup> Appendix A to the ODRA Procedural Rules, 14 C.F.R. Part 17, defines "neutral evaluation" as encompassing an assessment of such risks:

Neutral Evaluation. At any stage during the ADR process, as the parties may agree, the Neutral or Compensated Neutral will provide a candid assessment and opinion of the strengths and weaknesses of the parties' positions as to the facts and law, so as to facilitate further discussion and resolution.

Solicitation's evaluation criteria when it chose not to evaluate "Security Management" as part of the overall evaluation of both technical and price proposals: "All agree that this was an error." Protest, p. 2.

It is undisputed that, had the Product Team adhered to the Solicitation's evaluation criteria and evaluated the price proposals for "Security Management," [Deleted]. Supplemental Protest, p. 7; AR2, p. 5. However, as CA correctly indicates in its Comments, the error in this case was not the Product Team's failure to follow its original Solicitation evaluation criteria, but rather its failure to issue an appropriate Solicitation Amendment to reflect its changed needs when those needs were identified. CA Comments, p. 2.

By the same token, in terms of gauging possible prejudice to Tivoli and the consequent "litigative risk" to the Product Team in connection with Tivoli's Supplemental Protest, it is not at all clear what the price proposals would have looked like had that Amendment been issued. [Deleted]<sup>9</sup> In its Comments, Tivoli provides further detail:

. . . [Deleted] . . . . Because Security Management constitutes a significant portion of each offeror's total price here, removing this item would have a substantial impact. Further, we understand that [Deleted]. Accordingly, the existing cost proposals do not enable the FAA to determine the actual cost impact.

Further, it is uncertain how other grounds of protest raised by Tivoli may have impacted on the evaluation of CA's price proposal and how the ultimate evaluated price for CA might have compared to that of Tivoli. In particular, Tivoli's Supplemental Protest also indicated that the Product Team's September 27, 2000 Quantitative and Qualitative price analysis ("Q&Q") report for CA's price proposal, included in the initial Agency Report (AR1, Tab 12), noted that CA's [Deleted]:

The Q&Q report, prepared September 27, 2000, states with regard to Computer Associates: "[Deleted]." Tab 12. [Deleted]. Tab 13. Hence, this candid comment confirms [Deleted] was not included or addressed in the SSOR. It is ignored in the best value decision.

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<sup>9</sup> Compare [CA's] Protest, page 8 with [Tivoli's] Supplemental Protest, page 7. See Finding 16, *supra*.

Supplemental Protest, p. 10 (emphasis added). This statement is found at “Technical Risks”, paragraph 3, within the Q&Q report, which is entitled “Q&Q for CA Software Cost Proposal” and which is appended to Tivoli’s Comments to the Agency Report in the CA Protest. The following related statement is found in the report section entitled “Computers/Software”:

[O]n page [Deleted] it is stated, “[Deleted].” This gives the appearance that the proposal is open ended and that costs could reasonably be assumed to escalate.

The record does not reflect what particular information may have been presented to the Product Team or was otherwise discussed as part of the ADR proceedings regarding any of the grounds of protest posed by Tivoli, and it would be inappropriate for the ODRA to inquire about such matters, absent fraud or bad faith, which CA concedes are not present here. CA Comments, p. 5 (“[W]e have no doubt that FAA has acted in good faith.”). Because of the confidentiality of the ADR proceedings before Judge Hyatt, and without a joint waiver of confidentiality, the ODRA cannot conclude one way or another as to what was considered by the Product Team officials. At the same time, the ODRA is not willing to assume, as CA apparently would have us do so, that “Tivoli made no demonstration that it was prejudiced” or that the Product Team made no inquiry or analysis whatsoever of the prejudice issue prior to determining that the Tivoli protests posed a “litigative risk” that would justify its settlement of those protests. Indeed, in the absence of evidence to the contrary, long-established precedent requires that a “presumption of regularity” attach to the “actions of Government employees” when they conduct Government business. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415 (1971); *Charles H. Tompkins Co. v. United States*, 43 Fed. Cl. 716, 719 (1999); *see also Appeal of Jelcon*, IBCA Nos. 2842, 2843, 92-2 BCA ¶24,986. In reviewing Government procurement decisions, “there is a strong presumption that Government officials act properly and in good faith.” *Aero Corp. SA v. United States*, 38 Fed. Cl. 739, 749 (1997), citing *Finley v. United States*, 31 Fed. Cl. 704, 706 (1994); and *Alaska Airlines, Inc. v. United States*, 8 F.3d 791, 795 (Fed. Cir. 1993) (noting that agency employees are presumed to do their jobs properly).

Contrary to the situation in *Hawaii International Movers, Inc.*, Comp. Gen. Dec. B-248131 (August 3, 1992), the record here does not “establish that [the Product Team’s admitted] impropriety did not result in prejudice” to Tivoli. And it cannot be said that there was “no indication” that Tivoli was prejudiced. *Compare Cenci Powder Products, Ind.*, Comp. Gen. Dec. B-234030 (April 17, 1989). Rather, in the ODRA’s view, there is

sufficient indication in the record to suggest the possibility of real prejudice to Tivoli as a result of the Product Team's acknowledged error and to justify the Product Team's decision to settle the matter. Moreover, as the Product Team aptly notes, the Comptroller General has upheld agency corrective action, even if the protest could be denied, in cases where the agency has reasonable concern that there were errors in the procurement. In *Federal Security Systems, Inc.*, Comp. Gen. Dec. B-281745.2 (April 29, 1999), the Comptroller General had the following to say:

Contracting officials in negotiated procurements have broad discretion to take corrective action where the agency determines that such action is necessary to ensure fair and impartial competition. *Patriot Contract Servs., LLC, et al.*, B-278276.11, et al., Sept. 22, 1998, 98-2 CPD ¶77 at 4. It is not necessary for an agency to conclude that the protest is certain to be sustained before it may take corrective action; where the agency has reasonable concern that there were errors in the procurement, even if the protest could be denied, we view it as within the agency's discretion to take corrective action.

Accordingly, we find the decision to settle to have had a rational basis, was not arbitrary, capricious, or an abuse of discretion, and was supported by substantial evidence. *Protests of Information Systems & Networks Corporation, supra.*

In its Comments, CA argues that *Fisher-Cal, supra*, an ODRA case relied upon by the Product Team, ought be interpreted as supporting CA's position that a protest may not be settled without proof of prejudice to the protester. In this regard, those Comments contain the following excerpt from the ODRA's Findings and Recommendations in *Fisher-Cal*:

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.*

....

Art-Z [the original protester] *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.

....

Had ODRA adjudicated the original Art-Z protest, *it would have recommended that the Administrator sustain the protest.*

CA misapprehends the nature of ADR proceedings in *Fisher-Cal, supra* and the status of the record when the matter was settled through mediation. There, the case had already been fully adjudicated under the default adjudicative process and was ready for decision by the time the ODRA's ADR neutral provided the Agency with neutral evaluation. An Agency Report had been filed as well as detailed comments by the protester. Although those comments demonstrated precisely how the protester would have bid had it been permitted the same consideration that had been afforded its competitor, in terms of relaxed specifications, the ODRA, in reporting that Art-Z, the original protester, had "demonstrated" its prejudice on the record, did not intend to suggest that a protester must, in all cases, effectively litigate its protest, providing record proof of prejudice, before a Product Team can even consider settling a protest. Indeed, the Findings and Recommendations in that case quite plainly emphasize that, under AMS policy, settlements are to be encouraged at the earliest stage possible and at the lowest level possible. In this regard, the current version of the AMS is even more emphatic in its statement of policy regarding the early use of alternative dispute resolution techniques in lieu of litigation to resolve protests and contract disputes:

The FAA is committed to the *early and expeditious resolution of controversy* using mediation, fact-finding and other techniques collectively known as "alternative dispute resolution" (ADR). The FAA has pledged to utilize ADR techniques to the maximum extent practicable when such voluntary techniques will produce a fair and expeditious disposition of a controversy.

AMS §3.9.3 (Revised September 1999), "Guidance" (emphasis added). In this connection, the ODRA agrees with the assessment of the Product Team and Tivoli that

overturning a settlement agreement entered into pursuant to the ODRA's ADR procedures could well have a "chilling effect on the willingness of future protesters and the FAA to engage in ADR" and would serve to "defeat the ODRA's policy favoring resolution of disputes through ADR." Tivoli Comments, p. 2; AR2, p. 5. Under the circumstances present in this case, the ODRA will not proceed to litigate the merits of any of the grounds set forth in the earlier settled and now withdrawn Tivoli protests – to conduct a "trial within a trial", in the words of Product Team's counsel (AR2, p.6) – nor will it recommend to the Administrator that the actions of the Product Team to settle those protests be overturned.

## 2. Impermissible Auction?

The only real question here is whether the proposed action undertaken by means of the Revised Settlement Agreement had a rational basis and was consistent with the AMS. In this regard, the only grounds for challenging such action is that it purportedly gives rise to an "auction" that is "prohibited" by the AMS. Thus, we must determine first, whether an "auction" – which CA now terms a "price shootout" (*See* CA Comments at 1) – will be created, and secondly, whether any such "auction" is to be considered impermissible under the provisions of the AMS.

AMS Appendix C defines "auctioning techniques" as follows:

**Auctioning techniques**, a method of screening vendors using commercial competition techniques, and includes such techniques as indicating to an offeror a cost or price that it must meet to obtain further considerations; advising an offeror of its price standing relative to another offeror; and otherwise furnishing information about other offerors' prices. This may only be used for commercially available products.

In the present case, the Product Team acknowledges that it has advised both offerors, CA and Tivoli, respectively, of the other's technical and past performance scores and of the other's "evaluated cost/price" – and hence of their standing relative to one another. AR2, p. 7, footnote 3. The potential for an "auction" could conceivably be present here, were everything save for price "frozen" for purposes of the re-competition, as CA seems to

believe. CA Protest, p. 8. However, as we note above, the Product Team has gone even beyond the Revised Settlement in terms of reviewing and redefining its needs, with Solicitation Amendment 004 calling for material changes to both technical and price proposals. Finding 20. Not only does the Amendment delete the “Security Management” capability and add “Security Interface,” and an evaluation of the compatibility of the offerors’ EM products with the FAA’s existing security software, as contemplated by the Revised Settlement Agreement, but it also seeks a “restructuring” of the price proposals to include the “addition of software maintenance and telephone support (five days a week/12 hours a day) as base (as opposed to optional) requirements”, and requires offerors to “complete portions of the sample delivery order containing all the terms and conditions of the ensuing award.” AR2, page 3.

A release of a competitor’s price in connection with a post-award debriefing, the Comptroller General has recently held, is not improper and does not create an improper competitive advantage during a re-competition. *Norvar Health Services – Protest and Reconsideration*, Comp. Gen. Dec. B-286253.2; B-286253.3; B-286253.4 (December 8, 2000). In this case, advising Tivoli of CA’s technical/past performance evaluation and cost/price information was done in the regular course, in conjunction with such a post-award debriefing.<sup>10</sup>

Furthermore, where an agency takes corrective action to rectify its own procurement mistake and calls for another round of offers, as is the case here, the mere fact that there has been a release of price rankings will not necessarily signify that the agency is “engaging in an impermissible auction.” *NavCom Defense Electronics, Inc.*, Comp. Gen. Dec. B-276163.3 (October 31, 1997); *Dictaphone Corporation*, Comp. Gen. Dec. B-254920.2 (February 7, 1994); *Three D Industrial Maintenance Corporation – Reconsideration*, Comp. Gen. Dec. B-245422.2 (“[W]here, as here, the cancellation after prices are exposed is in accord with the governing legal requirements, the agency does not create an impermissible auction on resolicitation.”). Indeed, as CA itself seems to

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<sup>10</sup> Release to CA of Tivoli’s technical/past performance evaluation and pricing information, the Product Team states, was done before it executed the Settlement Agreement, in the interest of helping to “equalize the competition prior to the submission of revised proposals.” AR2, p. 7, footnote 3.

acknowledge, the general rule is that “the risk of an auction gives way to the need to preserve the integrity of the procurement process. *See Logicon v. United States*, 22 Cl. Ct. 776, 788 (1991).” Protest, p. 8. *Accord, Ford Aerospace Corporation, et al.*, Comp. Gen. Dec. B-239676.2, et al. (March 8, 1991) (“The risk of an auction is secondary to the need to preserve the integrity of the competitive procurement system through appropriate corrective action.”) Thus, even if the current situation were said to give rise to an “auction,” it would not appear that the “auction” should be considered “impermissible.”

CA points to one case where this general rule was not applied. That case, *American Electronic Laboratories, Inc.*, Comp. Gen. Dec. B-219582 (November 13, 1985), is clearly distinguishable from the instant fact pattern, since it did not involve proposed “corrective action” to be taken by the Government agency to correct its own impropriety, but rather a protest seeking the correction of a purported **unilateral mistake in bid by the protester**. Because it was not clear in that case what the protester’s intended bid was from the face of the proposal itself,<sup>11</sup> the only way to rectify the situation theoretically would have been to reopen discussions in order to ascertain whether the protester had any other documentation to support the amount by which it wished to correct its bid. The GAO understandably was unwilling to recommend that competition be reopened in that instance, since the offerors’ prices had already been exposed and the re-competition would amount to an auction. Because *American Electronic Laboratories* did not involve a competing interest in obtaining “corrective action” for an agency procurement impropriety, the auction was deemed “impermissible.”

CA, in its Protest, places heavy emphasis on the nature of the procurement as one for “*commercial off-the-shelf software (“COTS”).*” In this regard, CA states:

By its nature, COTS has virtually no production cost, so an auction for COTS will be random and undisciplined, with no rational standard for evaluation.

Protest, p. 9.

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<sup>11</sup> Whereas, the protester sought to correct its bid by a reduction of \$15,000 in travel costs – which would have put its bid only \$5,283 below the price of the awardee – the cost and pricing data it had submitted with its original proposal (data it had never bothered to update) indicated that the intended bid might have included \$45,000 in travel costs.

As indicated by the above AMS definition, “auctioning techniques” are to be considered appropriate in the acquisition of “commercially available products.” Similarly AMS §3.2.2.3.1.2.2, the AMS section specifically cited by CA, although prohibiting the use of “auctioning techniques” generally, carves out an exception for such techniques when they are being used as “commercial competition techniques as described in Section 3.2.2.5.3.”

<sup>12</sup> AMS §3.2.2.5.3 provides in pertinent part:

For commercially available products, the CO is encouraged to use “commercial competition techniques” such as continuing market research throughout the process by using vendor proposals as the source of prices and commercially available capabilities and sharing that information with other vendors.

Thus, the AMS indicates that “commercial competition techniques” – which includes “auctioning techniques” – not only are not prohibited, but are to be “encouraged” for use in acquisition of “commercially available products.” AMS Appendix C defines “commercially available products” in the following manner:

**Commercially available** refers to products, commodities, equipment, material, or services available in existing commercial markets in which sources compete primarily on the basis of established catalog/market prices or for which specific costs/prices established within the industry have been determined to be fair and reasonable. See **Commercial Item**.

The term “Commercial Item” is defined by AMS Appendix C as being any one of a number of things, including:

Any item, other than real property, that is of a type customarily used by the general public or by nongovernmental entities for purposes other than governmental purposes and that has been sold, leased, licensed to the general public; or has been offered for sale, lease, or license to the general public.

The term “Commercial-off-the-shelf (COTS)” is, in turn, defined by AMS Appendix C as follows:

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<sup>12</sup> AMS §3.2.2.3.1.2.2 reads, in pertinent part, as follows: “Technical leveling, and auctioning techniques are prohibited, except in the use of commercial competition techniques as described in Section 3.2.2.5.3.”

**Commercial-off-the-shelf (COTS)** is a product or service that has been developed for sale, lease or license to the general public and is currently available at a fair market value. This is distinct from a commercial product in that it may not have already been sold at established catalog or market prices.

The EM software in question would appear to qualify both as a “commercial-off-the-shelf (COTS)” item as well as a “commercial item” and a “commercially available” item under these AMS definitions, since it is available in existing commercial markets and is primarily competed, as in the present instance, based upon established catalog prices. Here, both products were bid based upon the granting of discounts from established prices on the GSA Federal Supply Schedule. Protest, p. 8.

In *Martin Resnik Construction Company, Inc.*, ODRA No. 98-ODRA-00061, cited by CA (see Protest, pp. 9-10), the possibility of an impermissible auction due to the disclosure of the pricing of all five offerors does appear to have had some bearing on the ODRA’s formulation of an appropriate remedy. Nevertheless, that case is completely inapposite. In *Resnik*, the ODRA was dealing with a contract for construction services – certainly not a “commercial-off-the-shelf (COTS)” item or a “commercially available item” competed based primarily on catalog prices, *i.e.*, an item for which “auctioning techniques” is “encouraged” by the AMS. See AMS §3.2.2.5.3. Furthermore, in *Resnik*, unlike the situation here, the Product Team had not initiated a re-competition, and the ODRA was obviously hesitant to order one, in view of the urgent need for the construction involved in that case.

Moreover, it is not clear in the present instance how the Product Team’s release of prices will ultimately impact formulation of new price proposals, since, as noted above, the Product Team has reevaluated its actual needs and has redefined its technical requirements under the Solicitation Amendment. Thus, CA has not established that the instant case creates an “auction,” let alone an impermissible “auction.” In this light, it can hardly be said that the proposed “corrective action” proposed by the Product Team as part of its settlement with Tivoli is without a rational basis or is unsupported by substantial

