

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

**PUBLIC VERSION OF FINDINGS AND
RECOMMENDATIONS**

**Matter: Protest of Communication Technologies, Inc. (COMTek)
 Pursuant to Request for Quote No. DTFA01-03-R-00007**

Docket No.: 03-ODRA-00257

Appearances:

For the Protester, COMTek: Lee P. Curtis, Esq., Perkins Coie LLP

For the FAA Headquarters Product Team: Victoria Kauffman, Esq.

For the Intervenor, Computer Data Source, Inc.: David M. Nadler, Esq., Dickstein Shapiro
Morin & Oshinsky LLP

I. Introduction

This protest (“Protest”), filed by Communication Technologies, Inc. (“COMTek”) with the Office of Dispute Resolution for Acquisition (“ODRA”), challenges corrective action taken by an FAA Headquarters Product Team (“Product Team”) pursuant to an Alternative Dispute Resolution (“ADR”) process undertaken in conjunction with an earlier protest filed with the ODRA by the intervenor herein, Computer Data Source, Inc. (“CDS”) under Request for Quote No. DTFA01-03-R-00007 (the “RFQ”), a protest docketed under Docket No. 02-ODRA-00253 (the “CDS Protest”). The CDS Protest had challenged a previous contract award to COMTek on the basis that COMTek had not been eligible for award under the RFQ’s small business set-aside provisions. In accordance with the terms of an ADR Settlement Agreement executed between CDS and the Product Team, the Product Team Contracting Officer terminated the COMTek

contract and awarded a replacement contract to CDS under the RFQ. COMTek, in this Protest, challenges the settlement and corrective action as lacking a rational basis. For the reasons set forth herein, the ODRA denies a motion to dismiss the Protest and recommends that the Protest be denied.

II. Findings of Fact

1. The Product Team issued the instant RFQ on August 15, 2002, seeking quotations from four General Services Administration (GSA) Federal Supply Schedule (“GSA Schedule”) vendors for the maintenance and support of the FAA’s Tandem K-2000 Maintenance Processor Subsystem (MPS) equipment located at thirty (30) FAA Air Route Traffic Control Centers (ARTCCs) and other FAA facilities across the United States. *See* Agency Response (“AR”), Tab A, Section B1.0. The RFQ provided that the contract award would be in the form of a Firm-Fixed Price delivery order under the GSA Schedule. *Id.* The procurement was to be a small business set-aside – *i.e.*, any contract award under the RFQ would have to be made to a “small business concern” (*see* AR, Tab A, Section L.3.0(b)(2)), and the RFQ defined “small business concern” for that purpose as follows:

Small business concern as used in this clause means a concern, **including its affiliates**, that is independently owned and operated, not dominant in the field of operation in which it is bidding on Government contracts, and qualified as a small business under the standard industrial classification size standards in this RFQ.

AR, Tab A, Section L.3.0(a)(emphasis added).

2. The standard industrial classification called out in the RFQ was North American Industry Classification System (NAICS) Code 811212, “computer equipment repair and maintenance services without retailing new computers.” The business size standard for NAICS Code 811212 was specified as “\$21 million in annual average gross revenue of the concern over the last three fiscal years.” AR, Tab A, Section L3.1.
3. Contract award was to be made to the contractor offering the “best value” to the Agency. In this regard, the RFQ called for offers to be evaluated based on: (1) the

- offerors' Technical Ability (including two equally weighted sub-factors, *i.e.*, Technical Approach and Past Performance); and (2) their Cost/Price proposals. Technical Ability was to be the more important factor. Cost/Price would gain in importance as evaluated differences in the technical area became less significant. AR, Tab A, Section M2.2.
4. Section C.1.3 of the RFQ provided: "The Contractor shall ensure that all service technicians used to maintain the MPS are fully trained and certified on the Tandem K2000 processor system." AR, Tab A, Section C.1.3. Along these lines, in defining the Technical Approach sub-factor, the RFQ mandated, as one of four specified technical sub-elements, that offerors "must have maintained the Tandem K-2000 computer system and all components down to the LRU level." AR, Tab A, Section M3.1.
 5. On September 6, 2002, the Product Team received quotes in response to the RFQ from COMTek and from CDS, who had been the incumbent FAA contractor. As part of its proposal, COMTek indicated that it would plan to use System Connections, Inc. ("SCI") as a subcontractor in connection with this procurement. AR, Tabs T and U.
 6. On September 13, 2002, the Product Team Contracting Officer sent COMTek an e-mail message, requesting that COMTek [Deleted] and also provide a [Deleted] The message sought responses to these requests by September 18, 2002. AR, Tab X.
 7. On September 17, 2002, COMTek provided a response to these requests. As to the request for employee certifications, it furnished [Deleted] AR, Tab Y, pages 2-3.
 8. By letter dated September 24, 2002, the Product Team notified COMTek that these invoices were [Deleted] and asked COMTek by the next day to provide

“training certificates for each employee who will be performing Statement of Work requirements.” AR, Tab Z.

9. On September 25, 2002, the Product Team received from COMTek training certificates for COMTek and SCI employees whom COMTek indicated “will work on the contract if awarded to COMTek.” Other than for the name of the employee, these certificates [Deleted] was dated September 24, 2002, the date of the letter requesting the certificates. AR, Tab AA¹

10. By letter to COMTek dated October 17, 2002, the Product Team posed several questions regarding COMTek’s proposal, including questions relating to the certificates:

[Deleted]

The letter further inquired about the status of SCI – more specifically, whether SCI was COMTek’s “teaming partner” (as SCI had been referred to in the September 6, 2002 letter forwarding COMTek’s proposal, AR, Tab T) or its “subcontractor.” AR, Tab BB.

11. By facsimile to the Product Team dated October 28, 2002, COMTek addressed the questions pertaining to employee certificates as follows:

[Deleted]

AR, Tab CC at p. 5.

12. As to the question regarding the status of SCI, COMTek stated: “System Connections is a subcontractor to Communication Technologies, Inc.” *Id.*, at p. 4, top.

¹ The Agency Response, though speaking of a total of [Deleted] certificates (AR, Statement of Facts, Paragraph 36), only includes as exhibits 30 certificates, purportedly those of the COMTek employees. AR, Tab AA.

13. In terms of the Technical Approach, Vendor A's (COMTek's) proposal was evaluated by the Product Team technical evaluator as "Fair" for one sub-element of the Technical Approach sub-factor (the one pertaining to Tandem K-2000 system maintenance experience – *see* FF4 above) and "Good" for the remaining three sub-elements, whereas Vendor B's (CDS's) proposal received ratings of "Good" for all four sub-elements. AR, Tab FF. As to Cost/Price proposals, Vendor A's (COMTek's) proposal was evaluated at a price of \$3,425,100 and Vendor B's (CDS's) proposal was evaluated at a price of \$5,054,219. AR, Tab EE.

14. On November 20, 2002, in response to an inquiry by the Product Team Contracting Officer, COMTek provided the Product Team with its corporate annual receipts for the preceding three fiscal years. This information had been requested in order to verify COMTek's small business size in accordance with the above-described RFQ requirement (AR, Tab A, Section L3.1). The total annual receipts for the three years were:

1999: \$13,227,608.39

2000: \$17,156,722.79

2001: \$26,329,518.29

AR, Tab GG, page 1. The figure for average annual receipts, derived based on such information, was \$18,904,616.49 – which would be below the \$21 million size standard limitation for the specified NAICS Code 811212 (FF2 above).

15. The Product Team states that, after receipt of this information, it had the FAA Cost and Pricing Branch help to verify that both CDS and COMTek qualified as small businesses under the specified NAICS Code. In this regard, the Product Team indicates, it was particularly concerned about COMTek's status as a small business, "because its website showed contracts currently worth \$430 million." AR, Statement of Facts ¶44; AR, Tab GG, page 2.

16. The Cost and Pricing Branch verified CDS's average annual sales for the three year period to have been well below the specified \$21 million size standard and, based on financial statements provided by COMTek, were able to confirm that it too qualified under the size standard. AR, Statement of Facts, ¶¶45-46; AR, Tab GG, pages 4-5.
17. In terms of the Past Performance sub-factor of Technical Ability, the Product Team evaluators rated both CDS and COMTek as "Good." AR, Tab JJ.
18. On December 4, 2002, the Product Team's Source Selection Official ("SSO") determined to award the contract to Vendor A (COMTek) as representing the "best value" to the Government. AR, Tab JJ. The contract was awarded to COMTek on December 6, 2002. AR, Tab KK.
19. On December 6, 2002, just prior to making the award, the Product Team Contracting Officer telephoned CDS and advised CDS that it had not been selected for award. CDS, by e-mail message dated December 6, 2002, submitted an informal protest to the Contracting Officer, claiming that COMTek was not a small business. AR, Tab LL.
20. On December 12, 2002, the Product Team provided CDS with a post-award debriefing. CDS Protest, page 5.
21. By letter dated December 13, 2002, counsel for CDS provided the Contracting Officer with the following in regard to its informal protest:

On information and belief, COMTek's proposal includes SCI as a proposed subcontractor. COMTek and SCI must be considered affiliates and the average annual receipts of both companies must be combined for purposes of determining COMTek's size. If the average annual receipts of COMTek and SCI are combined, COMTek exceeds the \$21 million size standard. According to information provided by FAA to CDS on December 12, 2002,

COMTek's average annual receipts are \$18,904,616.49 SCI's sales receipts for its fiscal year 1999 were \$3,577,775; \$3,601,759 for its fiscal year 2000, and \$3,601,759 for its fiscal year 2001.² (Exhibit 4.) Thus, the three year average for SCI was \$3,593,746.30. SCI's average annual receipts combined with those of COMTek totals \$22,498,380, which exceeds the \$21 million threshold.

AR, Tab MM, Page 3. CDS's counsel's letter cited to the affiliation rules relating to "ostensible subcontractors" under the regulations of the Small Business Administration ("SBA"), 13 C.F.R. §121.103(f)(4), and asserted that SCI must be considered an "affiliate" of COMTek's, because it would be "performing all the critical technical tasks required by the RFQ. [Citations Omitted]" In this regard, CDS's counsel furnished the following analysis based on the seven factors for determining affiliation of "ostensible subcontractors" enunciated in a decision of the SBA Office of Hearings and Appeals in *Analytical & Research Technology, Inc.*, No. SIZ-91-8-2-96, 1991 SBA LEXIS 177 (December 19, 1991):

1. "Which party possesses the requisite background and expertise to carry out the contract?"

Only SCI has the requisite technical expertise to perform the contract. The contract is for a contractor maintenance program for the Tandem Maintenance Processor Subsystems ("MPS") at FAA locations across the country. RFQ § C.2.0. The contractor is required to utilize for all MPS maintenance work only service technicians that are "fully trained and certified on the Tandem K2000 processor system." RFQ § C. 3.1.3. On information and belief, COMTek's proposal did not include any COMTek technicians on its staff with the required expertise in Tandem systems. COMTek intends to meet this critical and fundamental requirement of the RFQ through SCI, whose company specializes in supporting Tandem computer systems. (See Exhibit 5). Indeed, SCI's webpage advertises its company as "Your One Stop Tandem Solution," and states that SCI "Specialize[s] in the sale of used and refurbished Tandem hardware, as well as providing third-party maintenance, lease options, trade-in allowances and software support."

² It is inconceivable that the annual receipts dollar figures for both fiscal years 2000 and 2001 were actually identical. It seems that these same figures appeared on a Dun & Bradstreet report obtained by the FAA subsequently in early January 2003. See AR, Tab RR, E-mail Message from [Deleted] dated January 6, 2003. In any event, COMTek has not challenged the premise that, were its average annual receipts to be added together with those of SCI, the resultant total would exceed the \$21 million size standard limitation.

By contrast, COMTek offers primarily software development and software related services (“Network Conversion/Upgrades, Email Conversion, Database Design and Development, Interoperability and Testing, and Software Development.”) COMTek’s main product is “No Trace” which it describes as “The World’s leading data removal software.” (Exhibit 6.) By its own admission, to the extent that COMTek has any hardware experience, it is limited to IBM, Amdahl and Digilog computers, and does not include Tandem. (See Slide 14 from COMTek’s webpage presentation, Exhibit 6). Upon information and belief, all past performance references provided in the COMTek proposal were for SCI jobs.

Thus, COMTek is unduly reliant on SCI, as this contract is solely for the maintenance of Tandem systems and SCI will be performing virtually all of the primary and vital staffing requirements of the contract.³

2. “Which party ‘chased the contract’?”

It was SCI, not COMTek, that “chased” this FAA contract opportunity as it was directly in line with SCI’s core competency in supporting Tandem systems. However, as of the September 6, 2002 due date for proposals, SCI did not have a GSA Schedule and, thus, was ineligible to compete for this contract.⁴ This explains why SCI teamed with COMTek for this opportunity: SCI had the required experience in maintaining Tandem computers, but did not have a GSA Schedule; COMTek had a GSA Schedule, but did not have experience in maintaining Tandem computers.

3. “Who will manage the contract?”

SCI will manage the performance of the contract as it is virtually impossible for a company without Tandem maintenance expertise to do so. The maintenance work will be managed through a National Trouble Desk that must be staffed by employees that can properly assess the reported Tandem systems problem so that proper action can be taken to service the FAA customer.

³ **CDS Footnote:** “Even if COMTek claims that it will comply with the limitation on subcontracting rule, FAR 2.219-14, in terms of who will bear the majority of the costs of performance, that is not relevant to the affiliation issue where the majority of the vital technical expertise will be provided by the subcontractor. See Analytical & Research Technology, *supra*.”

⁴ **CDS Footnote:** “SCI’s GSA Schedule was not awarded until October 6, 2002. (Exhibit 2.)”

4. “What degree of collaboration was there on the bid or proposal?”

Upon information and belief, SCI provided the entirety of the critical technical portion of the proposal as it was based on SCI’s experience with Tandem computers. CDS specifically requests that the Contracting Officer (and SBA) review the COMTek/SCI Teaming Agreement, and COMTek’s technical proposal, including past performance references, which CDS asserts will verify that SCI will actually be performing virtually all of the work.

5. “Are there discrete tasks to be performed by each or is there a commingling of personnel and materials?”

SCI and COMTek personnel likely will be commingled. This is because SCI will have to be involved in every facet of contract performance since only SCI has the necessary technical expertise and certification in Tandem systems.

6. “What is the amount of work to be performed by each?”

As SCI will perform all of the Tandem maintenance, virtually all of the volume of hours chargeable to the contract will be performed by SCI.

7. “Which party performs the more complex and costly contract functions?”

The most complex and costly functions will be performed by SCI, as all of the experienced and certified technicians will be from SCI.

For the above reasons, COMTek and SCI must be treated as affiliates or joint venture[r]s, and their average annual receipts must be combined when determining COMTek’s size. If the receipts are combined, COMTek exceeds the \$21 million size standard.⁵

AR, Tab MM, pages 3-5.

⁵ **CDS Footnote:** “FAA has advised that it relied on an October 29, 2002 SBA size determination under the same NAICS code that found that COMTek was a small business. That size determination, however, related to a different procurement for the Department of Agriculture, did not involve SCI as a subcontractor, and did not involve CDS. Thus, that size determination has no precedential value with respect to the FAA procurement. See SIZE APPEAL of: Agrigold Juice Products, No. SIZ-95-7-19-72, SBA No. 4136, 1996 SBA LEXIS 7 (January 24, 1996) (res judicata and collateral estoppel do not apply where the protest relates to a different procurement and involves a different protestor).”

22. The Product Team advises that the Contracting Officer, upon receipt of this letter, “contacted COMTek and explained to them that issues had been raised with respect to COMTek’s size status; in particular, whether or not an affiliation existed between COMTek and SCI.” AR, Statement of Facts, ¶53. In response, COMTek, by e-mail message dated December 16, 2002, provided the Contracting Officer with a point-by-point analysis of the SBA regulations pertaining to affiliation and, in this regard, addressed the CDS contentions, furnishing the following comments with respect to the provisions of 13 C.F.R. §121.103(f)(4):

[Regulation Quote]

(4) A contractor and subcontractor are treated as joint venturers if the ostensible subcontractor will perform primary and vital requirements of a contract or if the prime contractor is unusually reliant upon the ostensible subcontractor. All requirements of the contract are considered in reviewing such relationship, including contract management, technical responsibilities, and the percentage of subcontracted work.

[COMTek Comment]

Not applicable. Communication Technologies, Inc., the prime contractor, is solely responsible for contract performance, provides the Program and Contract management oversight, the 24/7 Help Desk and tool-free phone number, assigns all maintenance calls received to either prime contractor personnel or System Connections, and performs a majority of the on-sight [sic] work (51% minimum).

AR, Tab NN, page 6 (emphasis in original).

23. By another e-mail message dated December 16, 2002, COMTek, in response to an inquiry from the Contracting Officer, advised that the two “sites/contracts/locations” (of the [Deleted] past performance contract references cited by its proposal) where COMTek states that it had itself performed Tandem K-2000 maintenance were [Deleted]. *Id.*, page 8; AR, Statement of Facts ¶54.

24. On December 17, 2002, CDS filed a bid protest (the “CDS Protest”) with the ODRA. The CDS Protest, docketed as 02-ODRA-00253, challenged the award to

COMTek based, among other things, on the allegations regarding COMTek's "affiliation" with SCI and resultant non-small business status. AR, Tab OO. The CO notified COMTek of the CDS Protest in writing on December 19, 2002. (AR, Tab PP) COMTek did not seek to intervene as an interested party.⁶

25. The Product Team and CDS, on December 23, 2002, entered into an ADR Agreement under which they agreed to utilize Marie A. Collins, Esq., an ODRA Dispute Resolution Officer, as their ADR Neutral, for purposes of providing early neutral evaluation and facilitative mediation in an attempt to resolve the CDS Protest amicably by means of ADR.
26. On December 23, 2002, COMTek, at the Contracting Officer's request, forwarded her a copy of the COMTek/SCI Teaming Agreement by facsimile. The document that was forwarded consisted of nine (9) pages, including the Teaming Agreement itself, bearing page numbers 1 of 8 through 7 of 8, an "Exhibit A" – labeled page 8 of 8 – and the facsimile cover sheet. "Exhibit A," entitled "SCOPE OF WORK," begins:

This Exhibit **in conjunction with Attachment 1 to the TEAMING AGREEMENT** defines the agreement between the parties hereto with respect to the share of the prime contract work, which shall be allotted under the subcontract to Syscon, Inc. by COMTek. This effort is a small business set aside, and as such, COMTek must perform over 51% of the work. It is COMTek's intent to award 45%-49% (no greater than 49%) of this effort to Syscon, Inc. over the life of the contract.

AR, Tab QQ, Teaming Agreement, page 8 of 8 (emphasis added). Attachment 1 to the Teaming Agreement, although referenced in this manner by "Exhibit A," was not included as part of COMTek's 9-page December 23, 2002 transmission to the Contracting Officer. *See* AR, Tab QQ.

⁶ As the awardee of the protested contract, COMTek had a right to intervene as an interested party under the ODRA Procedural Rules, 14 C.F.R. §17.15(g).

27. The Product Team and CDS entered into an ADR Settlement Agreement dated January 10, 2003. Under that Agreement, the Product Team agreed to take “immediate corrective action” consisting of: (1) terminating COMTek’s contract for the Government’s convenience; and (2) awarding a contract to CDS for “five (5) years (base year plus four (4) option years commencing not later than January 21, 2003).” In exchange, CDS agreed to withdraw the CDS Protest. AR, Tab SS.

28. The Product Team Contracting Officer describes the process by which she determined to take such “corrective action”:

13. Prior to the receipt of CDS’ protest, I was unaware of the SBA’s ostensible subcontractor rule and its application. Upon receipt of CDS’s first protest and in consultation with Agency Counsel, I engaged in my first analysis regarding the rule and its seven-part test. Using the seven-part test applicable to the ostensible subcontractor rule and by analyzing the facts that I was aware of at the time, I concluded that an ostensible subcontractor relationship existed between COMTek and SCI.

14. Once the determination had been made that an ostensible subcontractor relationship existed, under SBA’s affiliation regulations, I was required to add the annual receipts of both COMTek and SCI for the last three fiscal years and divide them by three. The average added annual receipts were \$22,498,380, exceeding [the size limitation for the] NAICS code 811212, which requires an annual average gross revenues over the last three fiscal years of \$21 million or less.

15. As the average gross revenues for the affiliated COMTek and SCI exceeded the NAICS code stated in the RFQ, I, as the Contracting Officer, and in consultation with Legal Counsel, determined that the litigative risk associated with the CDS protest was extremely high.

16. In making that determination, I considered the [CDS] protest, COMTek’s offer (technical and past performance); COMTek’s answers to FAA discussion questions during the competi[on]; information COMTek had sent me pre-award regarding the relationship between COMTek and SCI; information COMTek sent me post-award regarding affiliation and COMTek contracts for Tandem K-2000 work;

the teaming agreement (as produced during the CDS protest), as well as the SBA's Office of Hearings and Appeals (OHA) applicable case law involving ostensible subcontractor relationships.

17. After considering all of that information, it was my determination that the award to COMTek be terminated for the convenience of the government, as they were not eligible to receive the award. In the FAA's Contracts Organization (where I work), I am required to keep my management informed of significant contract actions, and as such, my first and second level managers are required to be notified before such action is taken. In early January 2003, I notified both my first and second level managers of the anticipated termination and the reasons for it. They agreed with my determination that termination was proper.
18. On January 17, 2003, I terminated the COMTek contract for the convenience of the Government. I sent COMTek notification via facsimile shortly after 4:00 pm on that date (although the fax reads that it was shortly after 5:00 pm, the clock on my fax machine has been an hour ahead for some time). [See AR, Tab TT] I also left a voicemail for COMTek that afternoon, but was not able to reach anyone live.
19. As CDS was the only other responsive and qualified offeror, I concluded that the award should appropriately be made to CDS. I made award to CDS on January 17, 2003, and performance began on January 21, 2003. [See AR, Tab UU]

AR, Tab E ¶¶13-19.

29. In accordance with the terms of the ADR Settlement Agreement, AR, Tab SS, CDS withdrew its protest, and the CDS Protest was dismissed by the ODRA Director acting under delegation of the FAA Administrator, by FAA Order No. ODRA-03-243 dated January 22, 2003. AR, Tab VV.
30. On January 28, 2003, COMTek filed the current Protest with the ODRA, challenging – as being without rational basis – the “corrective actions” taken by the Contracting Officer pursuant to the ADR Settlement Agreement and the underlying Product Team determination that COMTek and SCI were “de facto”

joint venturers under the aforesaid SBA “ostensible subcontractor” rule and hence not eligible for award under the instant small business set aside procurement. The Protest was docketed by the ODRA as Docket No. 03-ODRA-00257.

31. According to COMTek in its Protest, “the *full* record demonstrates that no ‘de facto’ joint venture existed between COMTek and SCI.” Protest at 2 (emphasis added). In this regard, the Protest asserts, upon request to COMTek, the Product Team had obtained from COMTek’s [Deleted] in late December 2002 “only part of the COMTek-SCI Teaming Agreement.” Protest, page 5. For the first time, as part of the Protest⁷, COMTek made available to the Product Team a document that it presents as Attachment 1 to the Teaming Agreement, *i.e.*, the document referenced in “Exhibit A” to the Teaming Agreement as in part defining the allocation of prime contract work to SCI (identified in the Teaming Agreement variously as “Syscon,” “Syscon, Inc.,” and “System Connections, Inc.”). The “Attachment 1” document, a 2-page document that appears to have been signed by representatives of COMTek and SCI on the second page and dated September 5, 2002, is appended within Exhibit 4 to the Protest, as part of a Teaming Agreement package – along with: (1) a copy of the Teaming Agreement document itself (what appears to be the same Pages 1 of 8 through 7 of 8 previously transmitted to the Contracting Officer in late December); (2) a copy of “Exhibit A” (appearing to be the same Page 8 of 8 that had been sent to the Contracting Officer); and (3) a 2-page letter purporting to be a “Teaming Agreement Addendum” that “clarifies and modifies” the Teaming Agreement. The letter appears to be from “[Deleted],” as President of “SCI” to “[Deleted]” at “Communications Technologies, Inc.” at an address in Norfolk, Virginia, is marked as “Via Facsimile and US Mail” and bears both a date on the first page of “September 6, 2002” as well as a facsimile transmission header from “System Connections, Inc.” dated “Sep 05 02.” The latter document also bears on its second page the signature block and what purports to be the signature of “[Deleted]” as “Senior Contracts Manager” for “Communication Technologies,

⁷ See Joint Motion, Affidavit of [Deleted] dated February 7, 2003 at ¶12.

Inc.” following the words “Agreed to and accepted, on behalf of COMTek, this 5 day of September, 2002,” the “5” in that date having been inserted by hand.

32. As the Protest indicates, the “Attachment 1” document includes substantially more detail on how the work under a COMTek prime contract was to have been allocated between COMTek and SCI, pursuant to the Teaming Agreement and under a post-award COMTek-SCI subcontract. More particularly, under the terms of the Attachment 1 document, each of the two firms was to be “responsible for the costs of all labor, expenses, and part related costs” and to “provide maintenance support” for Tandem K-2000 systems at [Deleted] of the 30 FAA locations under the contract. Consistent with “Exhibit A” to the Teaming Agreement, Attachment 1 calls for SCI to provide such “maintenance support” only “up to 49% of the program value” and for COMTek to provide such “maintenance support” “for a minimum of 51% of program value.” Attachment 1 specifies that COMTek was to be “responsible for 7/24/365 call center coverage for all 30 systems” and SCI was to “pay COMTek [Deleted] per month for FAA Call Center Support” for its [Deleted] locations. SCI, in turn, was to furnish “Technical Phone Support” for all 30 locations, with COMTek being billed by SCI for such “Technical Phone Support” for its [Deleted] locations “at a rate to be determined.” Further, SCI would provide COMTek with “spare/replacement parts at fair market value for the [Deleted] systems under COMTek’s responsibility” and COMTek agreed to purchase such parts from SCI “at fair market value (to be determined).” In addition, Attachment 1 reads: **“System Connections will provide COMTek with K2000 Training.”** Protest, Exhibit 4, Teaming Agreement, Attachment 1 (emphasis added).
33. The Protest sets forth COMTek’s own analysis of the seven factors under the SBA “ostensible subcontractor rule” and argues that “the FAA’s conclusions are factually insupportable and the FAA has misapplied applicable SBA precedent” – that, “as a matter of law, the contracting officer’s determination was arbitrary and legally incorrect.” Protest at 6-11.

34. CDS, by letter to the ODRA dated January 29, 2003, sought to intervene in the Protest as an interested party and was permitted, as the awardee, to intervene, pursuant to the ODRA Procedural Rules, 14 C.F.R. §.17.15 (g).
35. An initial status conference for the Protest was conducted by the ODRA by telephone on February 3, 2003. During that conference, as reflected in the Initial Status Conference Memorandum, the parties discussed the history related to the Protest, including the fact that the corrective actions being challenged had been taken pursuant to an ADR resolution of the CDS Protest that had been embodied in the aforesaid ADR Settlement Agreement. Counsel for COMTek indicated that, prior to the status conference, his client was not aware of the ADR Settlement Agreement. The ODRA Director at that time advised the parties of two earlier FAA decisions relating to ADR settlements – *Protest of Computer Associates, International, Inc.*, 00-ODRA-00173, FAA Order ODRA-00-165; and *Protest of Fisher-Cal Industries, Inc. and Contract Dispute of Art-Z Graphics, Inc.*, ODRA Docket Numbers 98-ODRA-00081 and 98-ODRA-00083 (Consolidated), FAA Order Number ODRA-98-80 – and directed them to the ODRA website (<http://www.faa.gov/agc/odra>) to locate copies of these decisions. Initial Status Conference Memorandum, pages 1-2. The ODRA Director also advised the parties that the ODRA’s Richard C. Walters, Esq. would serve as Dispute Resolution Officer (“DRO”) for purposes of adjudicating the Protest under the ODRA’s Default Adjudicative Procedure. Marie A. Collins, Esq., he said, would confer with the parties about their ADR options for the instant Protest and would be available as a potential ADR Neutral and to assist them with the establishment of a voluntary discovery plan and, in any event, would not participate in the adjudication of the matter. *Id.*, pages 2-3.
36. On February 10, 2003, the Product Team and CDS filed a Joint Motion to Dismiss For Lack of Standing Or, In the Alternative, Motion for Summary Relief (the “Joint Motion”). In that Joint Motion, the two parties contend that COMTek

is “technically non-compliant” and therefore is without standing to protest. In support of this argument, the two parties assert that the language of the Teaming Agreement “Attachment 1” document stating that “System Connections *will* provide COMTek with K2000 training” is inconsistent with COMTek’s prior assurances about its employees having already received Tandem training during the previous 4 to 10 year period and “shows that COMTek’s employees were not certified on the Tandem K-2000 systems when it submitted its proposal or when it submitted its certificates, and would not be trained until sometime after award (if at all).” Joint Motion at 9. Further, the two parties argue, even though the “Attachment 1” document calls for COMTek to be responsible for maintenance support for [Deleted] of the 30 sites, because of this purported indication regarding lack of prior K-2000 training, there would be “an insufficient ‘number of technical personnel geographically dispersed with sufficient qualifications to service and repair all FAA MPS systems’ (RFQ, Section M3.1).” *Id.*, page 10. In an affidavit of the Contracting Officer’s Technical Representative (“COTR”) appended to the Joint Motion, the COTR, who had been the sole technical evaluator for the instant procurement, ventured that if she had had “Attachment 1” during her technical evaluation, COMTek would have been downgraded on two of the four technical sub-elements, from ratings of “Good” to ratings of “Poor.” *See* Joint Motion, Affidavit of [Deleted].

37. The Joint Motion requested that the filing of the Agency’s Response to the Protest be stayed pending consideration of the motion. The ODRA had previously scheduled the Agency Response to be filed by February 18, 2003. By letter dated February 11, 2003, the DRO required that COMTek file with the ODRA (and serve on the moving parties) its opposition to the Joint Motion by close of business, February 18, 2003, and that the moving parties file and serve any reply thereto within three (3) days of their receipt of the opposition. The DRO further rejected the movants’ request that the Agency Response be deferred, noting that the Protest presented a “limited issue . . . which was addressed to some extent in the motion” and that all parties had previously expressed a desire for “expedited

handling” of the Protest – as documented in the Initial Status Conference Memorandum.

38. Both COMTek’s Opposition to the Joint Motion and the Agency Response were received by the ODRA on February 19, 2003. Because of a snow emergency that necessitated the closure of federal offices in Washington, D.C. on February 18, 2003, the one day delay in both cases was excusable, as noted to the parties by the DRO in a letter dated February 20, 2003. By that letter, the DRO established as the due date for receipt of the Reply to the Opposition the close of business, February 24, 2003, and as the due date for receipt of comments on the Agency Response the close of business, February 26, 2003. At that point, the letter advised, the record in the Protest would close, absent an ODRA requirement for further submissions, and the ODRA would proceed to “consider all of the parties’ filings and prepare appropriate findings and/or orders.” On February 24, 2003, the Product Team and CDS filed with the ODRA its joint Reply to the Opposition relating to its Joint Motion. On February 26, 2003, the ODRA received comments on the Agency Response from both COMTek and CDS, whereupon the record in this matter closed.
39. The Agency Response asserts that “the CO’s decision to take corrective action in the CDS protest had a rational basis . . . was thoughtful, deliberate and supported by substantial evidence” and that, “based on her assessment of the record and the litigation risk presented by the CDS protest, was a sound exercise of the CO’s discretion and in the best interests of the FAA.” AR, page 1. The Agency Response also addresses the “new information” that was “first presented by COMTek in connection with” its Protest, urging that such information – information that, in the Product Team’s view, “conflicts with the representations that COMTek made to the FAA to obtain the initial contract” – “validates the CO’s judgment and demonstrates that her decision to take corrective action was correct.” *Id.*, page 2. The Agency Response goes into great length about certain circumstances surrounding the procurement that preceded not only the instant

Protest, but the CDS Protest as well. More particularly, the Product Team, in the Agency Response, describes how SCI had itself filed a bid protest with the ODRA in late August 2002, as well as a Congressional inquiry, raising a complaint about its having been prevented from bidding, because the procurement had been structured as a GSA Schedule buy and because, at that time, SCI had yet to become a GSA Schedule contractor. The gravamen of SCI's complaint was that it had been in touch with the Product Team Contracting Officer and had "made its interest known in bidding on this contract as long ago as August 3, 2001." See AR, Tab D, page 4. The SCI protest was ultimately resolved when SCI joined forces with COMTek, interesting COMTek in the FAA contract opportunity and helping COMTek prepare and submit its proposal for the instant procurement.

40. The Agency Response relates that, "on September 4, 2002 (the same day that the FAA received the Congressional inquiry and two days before offers were due), the CO spoke with a representative from COMTek" and that "up until this point, COMTek had not at any time indicated any interest in the subject procurement, and was not known to the FAA as a company with Tandem K-2000 expertise." On that day, the Product Team states, "COMTek requested a copy of the subject RFQ." On that same day, upon confirming that COMTek had a GSA Schedule contract, the Product Team says, COMTek was sent a copy of the RFQ. AR, page 6; AR, Tab K, bottom of page. The Product Team, in its Agency Response, proceeds to describe the events of September 4-6, 2002⁸ that led up to the submission of the COMTek proposal and the ultimate withdrawal of the SCI bid protest:

21. After the FAA sent the RFQ to [Deleted], Senior Contracts Manager at COMTek, [Deleted] forwarded it to [Deleted], Director of Field Maintenance Operations for COMTek, in an e-mail asking, "I presume this is something you are aware of? It is due Friday." (Tab K).

22. On September 4th, [Deleted], an employee of System Connections (SCI) wrote to [Deleted] of COMTek:

⁸ This discussion appears to have been the result of obtaining information and documentation as part of a voluntary discovery process in connection with the Protest.

[Deleted] [President of SCI] and I have not received the email from you. I am sending you an e-mail so that you can reply back to me to ensure you have the correct address. Please forward the information [the RFQ] you received [from the FAA] as soon as possible (Tab L).

23. On September 4th, COMTek wrote back to SCI stating, “We need a copy of your [SCI’s] draft proposal to integrate it into our format for submission” (Tab M).
24. On September 4, COMTek asked SCI to forward to COMTek “any technical information in the form of a Draft proposal.” (Tab N).
25. The evening of September 4th, SCI wrote COMTek, attaching a breakdown of a proposed agreement between SCI and COMTek regarding FAA GSA award number DTFA01-03-R-00007. She [[Deleted]⁹] stated, “We would like to receive a drawn up agreement from you. We would like to have this signed by noon tomorrow at which time we will send pricing and other documentation via e-mail.” (Tab O).
26. Later in the evening of September 4th, COMTek wrote SCI stating: “We will need the pricing and proposal information at 0800 [tomorrow] or as soon as possible to put forth a compliant Proposal.” (Tab P).
27. The morning of September 5, 2002, SCI sent COMTek SCI’s Tandem K-2000 references (Tab Q). This information was included as part of COMTek’s past performance offer, as SCI’s Tandem K-2000 experience (Tab T, Section 3, Past Performance).
28. The evening of September 5th, SCI sent COMTek a completed Section B (base year of 12 months plus four (4) one year options) of the RFQ (Tab R). SCI submitted prices to COMTek for all 30 sites to be maintained under the contract. In comparing (a) the pricing SCI provided COMTek to (b) the pricing offer that COMTek submitted to the FAA (see below) (Tab T, Section B), for the base year of the contract COMTek’s price was [Deleted] higher than SCI’s. For option year one,

⁹ The insert of Ms. [Deleted] name is that of the ODRA. Other bracketed inserts are those of the Product Team within the Agency Response.

COMTek's price was [Deleted] higher than SCI's. For option year two, COMTek's price was [Deleted] to SCI's. For option year 3, COMTek's price was [Deleted] than SCI's by [Deleted], and for option year 4, COMTek's price was [Deleted] than SCI's by [Deleted]. Over the life of the contract (contract total), COMTek's pricing to the FAA was [Deleted] than the prices SCI provided COMTek.

	SCI to COMTek Pricing	COMTek to FAA Pricing	Difference (in dollars)	Difference (in percentage points)
Base Year	[Deleted]	[Deleted]	[Deleted]	[Deleted]
Option Year 1	[Deleted]	[Deleted]	[Deleted]	[Deleted]
Option Year 2	[Deleted]	[Deleted]	[Deleted]	[Deleted]
Option Year 3	[Deleted]	[Deleted]	[Deleted]	[Deleted]
Option Year 4	[Deleted]	[Deleted]	[Deleted]	[Deleted]
Contract Total	\$3,424,380.00	\$3,425,100.00	+\$720.00	+0.02%

29. During September 4 and 5, COMTek and SCI were also working on and finalizing their teaming agreement. The entire teaming agreement included the text of the teaming agreement (7 pages), Exhibit A (1 page), an Attachment 1 (2 pages, written by SCI, see Tab O), and a letter clarifying and modifying the Teaming Agreement (2 pages, Tab S). All documents were signed September 5, 2002, one day before offers were due to the FAA. * * *

30. On September 6, 2002, the FAA received two quotes (including technical past performance, and price/cost) in response to the subject RFQ. The quotes were from COMTek (Tab T) and CDS (the incumbent) (Tab U). COMTek proposed using SCI as a subcontractor. CDS did not propose the use of any subcontractor.

31. Also on September 6, 2002, the ODRA informed the FAA that SCI had withdrawn its bid protest. Accordingly, the protest was dismissed (Tab V).

AR, pages 6-7, Statement of Facts, ¶¶21-31.

41. The Agency Response asserts that the Product Team’s determination regarding the “affiliation” of COMTek and SCI was “rationally based and factually correct.” AR, page 14. To support this assertion, the Product Team includes its own analysis of the SBA “seven factor test” for determining “whether a joint venture exists between a prime contractor and its ostensible subcontractor.” In this regard, the Product Team presents its analysis on two bases: (1) the information available to it during the CDS Protest, *i.e.*, at the time its determination to take corrective action was made; and (2) “evidence provided with COMTek’s Protest.” AR, pages 17-28. Among other things, the Product Team points to: (1) its knowledge of SCI’s long interest in the procurement – as well as of its protest to the ODRA and Congressional inquiry – as clear evidence that SCI and not COMTek was the party who had “chased the contract” (SBA Factor 3) (*Id.*, page 22); and (2) its knowledge that COMTek only had the RFQ for a 2-day period and the language of the Teaming Agreement (which had been furnished to the Product Team) regarding SCI providing guidance to COMTek in terms of proposal development, as reasonable bases for the Product Team’s conclusion at the time the aforesaid “corrective action” was taken that there had to be a “high degree of collaboration” between SCI and COMTek in terms of the “bid or proposal” on the instant procurement (SBA Factor 4) (*Id.*, page 23). In terms of “which party possesses the requisite background and experience to carry out the contract?” (SBA Factor 2), the Product Team, which had not previously been aware of any Tandem K-2000 expertise on the part of COMTek (AR, Statement of Facts, ¶20), indicates that it had before it at the time it took such “corrective action” [Deleted] Tandem K-2000 contract references furnished by COMTek that represented SCI contracts. (AR, page 21). The Product Team concludes its discussion as follows and with a request that the COMTek protest be denied “in its entirety”:

Based on the “totality of the circumstances” above, the CO determined that COMTek was affiliated with SCI under the ostensible subcontractor rule for this procurement. As a result, the CO determined that the revenues of COMTek and SCI should be

added, and thus, COMTek was other than small for the instant procurement (Statement of Facts, paras. 58 and 61). This determination was rationally based at the time, and only has been confirmed as proper and reasonable based on the evidence the Agency has obtained as a result of COMTek's protest.

AR, pages 27-28.

42. In its Comments on the Agency Response, CDS places great emphasis on the Joint Motion, urging that COMTek had made material misrepresentations to secure its earlier contract award and that it had no standing to protest the ADR settlement, because it would not be eligible for award under the instant Solicitation. In this regard, CDS relies heavily on a 1995 decision of the General Services Administration Board of Contract Appeals (GSBCA), *Concept Automation, Inc. v. Department of the Army*, GSBCA No. 13104-P, 95-2 BCA ¶27,656 (January 25, 1995), in which the GSBCA dismissed a protest for lack of jurisdiction and which involved "misleading statements" and concealment of "material facts." CDS Comments at 1.

43. In its own Comments on the Agency Response, COMTek again goes through a seven factor "ostensible subcontractor" analysis. With respect to analyzing Factor 1 ("Who will *manage* the contract?"), COMTek asserts, the Product Team disregarded provisions of the Solicitation that defined "management" and from which it should have been clear that COMTek would be "managing" the contract. COMTek Comments, pages 4-7. As to Factor 2 ("Which party possesses the requisite background and expertise?"), COMTek argues that the Product Team disregarded the Solicitation language regarding past performance that did not limit the Agency's focus to background and expertise with Tandem K2000 system maintenance, but rather to the "same or *similar* work," and, in that regard, explained how it not only had performed [Deleted] Tandem K2000 maintenance service contracts, but several larger contracts involving maintenance of even more complex systems. *Id.*, pages 8-11. As to Factor 3 ("Which party *chased* the contract?"), COMTek cites to SBA caselaw allegedly standing for the proposition

that this factor is not “particularly significant” or “controlling.” *Id.*, pages 11-12. In terms of Factor 4 (“What degree of collaboration was there on the bid or proposal?”), COMTek urges that SCI’s contribution was, in fact, minimal (“SCI supplied virtually no input . . . to the technical volume of the proposal”) and that the degree of “collaboration” was “routine” and “not unusually high” for the “team members.” Regarding Factor 5 (“Are there discrete tasks to be performed by each or is there a commingling of personnel and materials?”), COMTek argues that the Product Team Contracting Officer had available to her information that would have demonstrated a clear division of work. More particularly in this connection, it is COMTek’s position that the Contracting Officer was “required” as part of “a reasonable fact investigation” to ask COMTek for the two-page “Attachment 1” document referenced in Teaming Agreement Exhibit A. *Id.*, pages 13-15. Regarding Factor 6 (“What is the amount of work to be performed by each?”), COMTek notes that the Product Team recognized that SCI was to receive a *maximum* of 49% of the work, urges that nothing in the Teaming Agreement specified a *minimum* (or “lower range”) for SCI, and distinguishes the current situation from that present in *Infotech*, 1999 SBA LEXIS 19, an SBA case cited by the Product Team. Unlike *Infotech*, COMTek says, the instant Teaming Agreement did not contain language mandating that COMTek assure SCI’s share be “as close as possible to 49% of the level of effort.” COMTek Comments, pages 15-16. As to Factor 7 (“Which party performs the more complex and costly contract functions?”), COMTek argues that it, not SCI, was to perform the more complex and costly contract work. In this regard, COMTek again points to, among other things, its plan to perform maintenance on the Tandem K2000 systems at [Deleted] of 30 sites, a plan that was “available” to the Product Team from Teaming Agreement Attachment 1. COMTek Comments, pages 16-17. Finally, in terms of the “totality of the circumstances,” COMTek argues, the Product Team Contracting Officer lacked a rational basis in concluding that SCI was “affiliated” with COMTek under the SBA’s “ostensible subcontractor” principles, based on the information that was “available” to her at the time of the challenged ADR settlement. *Id.*, pages 17-19.

44. In its Comments, COMTek also rejects the Product Team's attempt to justify its actions after the fact based, among other things, on the provision of Teaming Agreement Attachment 1 that called for SCI to provide K2000 training. In its Opposition to the Joint Motion, COMTek had explained that this provision was intended to apply not to the individuals whom it had certified were already trained on K2000 maintenance, but rather to any *new* employees who might be engaged or "for later refresher training" and noted that such an intent had been communicated to the Product Team as part of the COMTek proposal. COMTek Opposition at page 3. COMTek's Comments stress that it had adequately explained to the Product Team how and when the various individuals on the COMTek and SCI staffs had received K2000 training. In this regard, it states, it "did not represent to FAA that none of the training was recently completed." Rather, it says, "COMTek merely asserted that its training was performed at various times over the past four years and that SCI's training was performed over the past ten years." COMTek Comments, pages 21-22. Thus, COMTek indicates, it cannot be found to have misrepresented the facts in any way.

45. With the submission of COMTek's Comments, the record closed.

III. Discussion

A. The Joint Motion

In terms of their Joint Motion, the Product Team and CDS have failed to establish that COMTek lacks standing to protest. The ODR Procedural Rules provide that only an "interested party" may file a protest. The Rules define the term "interested party" as "one whose direct economic interest has been or would be affected by the award or failure to award an FAA contract." 14 C.F.R. §17.3(k). The movants urge that, because of COMTek's "affiliation" with SCI under the SBA "ostensible subcontractor" principles, it would not, in any event, be eligible for an award under the small business set aside Solicitation. Hence, they argue, COMTek could not qualify as an "interested party," since it would have no "direct economic interest" in the award to CDS, and thus would

have no standing to pursue its current Protest. The Product Team's finding of "affiliation," they say is supported by the language of Attachment 1 to the COMTek-SCI Teaming Agreement calling for SCI to provide K2000 training to COMTek:

. . . Attachment 1, which was first provided with COMTek's protest, provides the "System Connections *will* provide COMTek with Tandem K-2000 training." Ex. 7 (emphasis added); [Deleted] Aff. At 12. What the Source Selection Official charitably refers to as an "inconsistency" in COMTek's statements shows that COMTek's employees were not certified on the Tandem K-2000 systems when it submitted its proposal or when it submitted its certificates, and would not be trained until sometime after award (if at all). [Deleted] Aff. At 15.

Joint Motion at 9. The contention that COMTek misrepresented the K2000 training provided to its employees and those of SCI, and the related implication that the training certificates tendered to the Government were false and fraudulent, are unsupported by credible, convincing evidence. The movants attempt to read far too much into the language of Attachment 1 of the Teaming Agreement regarding SCI providing K2000 training. COMTek's explanation that the training provision relates to new recruits and possible refresher training is both plausible and consistent with the COMTek proposal. Accordingly, the ODRA denies the Joint Motion.

B. The Merits of the Protest

As to the merits of the COMTek Protest, the ODRA finds that the protester has failed to sustain its burden of proof. The ODRA has stated repeatedly that, in reviewing Agency procurement actions, it will not recommend that the actions be overturned, so long as such actions do not constitute an abuse of discretion, are not arbitrary or capricious, are supported by a rational basis and are founded upon substantial evidence. *Protest of Computer Associates, Inc.*, 00-ODRA-00173, citing *Protest of Information Systems and Networks Corporation*, 98-ODRA-00095 and 99-ODRA-00116, *affirmed* 203 F.3d 52 (DC Cir. 1999). Moreover, the ODRA will not substitute its judgment for that of an FAA Product Team where the Team's award decision is rationally based and consistent with the FAA's Acquisition Management System ("AMS"), as well as the specified Solicitation evaluation and award criteria. *See Protest of Information Systems and Networks Corporation*, 99-ODRA-00116. The protester bears the burden of

demonstrating that a Product Team's actions fail to satisfy the above standards. *Id.* When a protest challenges the decision of a Product Team to enter into an ADR settlement, the burden imposed on a protester is even higher, and the scope of the ODRA's review is even narrower. In this regard, the ODRA, in the *Protest of Computer Associates International, Inc.*, 00-ODRA-00173, observed:

[T]he 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 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.

As noted above (FF 35), the ODRA, in the instant protest, directed the parties to the decisions previously issued in *Computer Associates* and the *Protest of Fisher-Cal Industries, Inc. and Contract Dispute of Art-Z Graphics*, 98-ODRA-00081 and 98-ODRA-00083 (Consolidated). In light of such precedent, the issue in this protest is *not* whether the ODRA ultimately would have upheld the earlier award to COMTek and found SCI not an "affiliate" under the SBA "ostensible subcontractor" regulations and case law; but rather whether, in deciding to settle, the Product Team was without rational basis in perceiving a litigation risk. Once a matter is settled by means of alternative

dispute resolution, absent extraordinary circumstances not present here, the ODRA will not adjudicate the settled matter – conducting a “trial within a trial.” As was noted in *Computer Associates*, to do so would have a “chilling effect” on ADR and the potential for ADR-related settlements and would be contrary to the aforesaid guidance within the AMS for seeking settlements at the lowest level as well as FAA policy to utilize ADR to provide “early and effective resolution of contract related disputes and issues in controversy.” See Alternative Dispute Resolution Pledge of FAA Acquisition Executive, dated June 17, 1999.¹⁰

To prevail here, COMTek would have to demonstrate that, based on the information the Product Team had at the time it decided to resolve the earlier protest through ADR, there was no rational basis for it to perceive a litigation risk and that the Product Team therefore abused its discretion when it chose to enter into the ADR Settlement Agreement to effect the settlement. COMTek has not borne its very heavy burden in this instance.

The Product Team’s decision to settle, it says, was founded upon its application of the seven factor test for determining whether a *de facto* joint venture relationship exists, notwithstanding the “ostensible subcontractor” relationship of two entities. At the time it decided to settle the initial protest with CDS, the Product Team was clearly aware that it was SCI that had interested COMTek in the procurement – and not the other way around – and further that it was SCI, and not COMTek, that had a reputation with the FAA as being expert in K2000 system maintenance. In the ODRA’s view, just from these two undisputed facts, the Product Team had a rational basis for perceiving a litigation risk in terms of: (1) Factor 2 (“Which party possesses the requisite background and expertise?”); (2) Factor 3 (“Which party chased the contract?”); and (3) Factor 4 (“What degree of collaboration was there on the bid or proposal?”).

In terms of the other factors, although the Teaming Agreement reflected a general commitment to keep SCI’s participation to 49% or less, there was no indication from the document provided to the Product Team as to: (1) how the technical end of the work would be divided and performed; (2) how the commitment to a 49% maximum would be

¹⁰ See <http://www1.faa.gov/agc/odra/PLEDGE.HTM>.

carried out; and (3) whether and to what extent employees of the two firms would be commingled in the performance of the contract. The ODRA rejects COMTek's contention that the Contracting Officer was "required" to ask for Teaming Agreement Attachment 1, that the specific information about the division of work was thus "available" to the Product Team. There were two opportunities for COMTek to make sure that the Product Team had complete information about its relationship with SCI. First, there is no dispute that COMTek was notified of the CDS protest and afforded the opportunity to participate as an interested party intervenor and that, for unexplained reasons, it did not do so. Second, when asked for a copy of the COMTek-SCI Teaming Agreement, there is no dispute that COMTek did not furnish what it now contends was the complete document. There is no indication in the record and no contention by COMTek that the Product Team did anything to prevent COMTek from furnishing Attachment 1 to it at that time. COMTek's attempt to shift responsibility for its own failure to the Contracting Officer, simply because the document in question was referenced within an exhibit to the Teaming Agreement, defies logic and fairness.

Based on its review of the information available to the Product Team at the time it decided to settle, the ODRA finds that there was a rational basis for the Product Team's perception of litigative risk and that its decision to settle constituted a justifiable exercise of its discretion. Moreover, the ODRA finds that the protested "corrective action" – termination of the COMTek contract and award to the only offeror whom the Product Team considered eligible under the small business set aside – likewise had a rational basis, was not arbitrary or capricious, and did not constitute an abuse of discretion. *Protest of Information Systems and Networks Corporation, supra.*

IV. Recommendation

Based on the foregoing, the ODRA recommends that the protest be denied.

Signed

Richard C. Walters
Dispute Resolution Officer
Office of Dispute Resolution for Acquisition

APPROVED:

Signed

Anthony N. Palladino
Associate Chief Counsel and Director,
Office of Dispute Resolution for Acquisition