

REDACTED VERSION

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

FINDINGS AND RECOMMENDATIONS

Matter: Protest of Camber Corporation

Pursuant to Solicitation DTFA01-96-R-11087

Docket: ODRA Docket 98-ODRA-00102

Appearances:

For the Protester, Camber Corporation: Allan M. Grayson, Esq. and Ira E. Hoffman, Esq., Grayson and Associates, P.C.

For Intervenor, Advanced Management Technology Inc.: L. James D'Agostino, and Leigh T. Hansson, Esq., Reed Smith Shaw & McClay LLP

For the FAA Integrated Product Team: Emmett Fenlon, Esq., and Robert Zuckerman, Esq.

I. Introduction

This protest, which was filed with the FAA's Office of Dispute Resolution for Acquisition ("ODRA") on October 6, 1998, relates to a Recompensation ("Recompensation") currently being conducted by the FAA Global Positioning System Integrated Product Team, AND-730 ("Product Team") for a GPS Technical Assistance Contract (hereinafter the "GPS TAC" contract). The Recompensation was required by the Final Order issued by the FAA Administrator on September 3, 1998 in the Protests of Camber Corporation and Information Systems & Networks Corporation, 98-ODRA-00079 and 98-ODRA-00080 (Consolidated) (hereinafter the "Original Protests").

The Final Order, which adopted the Findings of Recommendations of this Office, had sustained the Original Protests on the basis that the contract award was tainted by an impermissible "bait and switch" involving the awardee, Advanced Management

Technology, Inc. ("AMTI"). The Final Order required, *inter alia*, that the Product Team conduct the Recompensation at the Best And Final Offer ("BAFO") stage, so as to alleviate the effects of the "bait and switch."

Protester, Camber Corporation ("Camber") now challenges a provision of a September 28, 1998, letter and Request for Revised Offers ("RRO") that had been issued by the Contracting Officer to commence the Recompensation. In its protest, Camber initially alleged that the conditions set forth in the RRO, were overly restrictive in that offerors are prohibited from proposing team members or subcontractors different from those they had included in their January, 1998 proposals. Camber expressly identified Overlook Systems Technologies, Inc. ("Overlook"), as a company that the RRO effectively excluded from further participation in the resumed GPS TAC procurement. Camber indicated that it is interested in teaming with Overlook in the Recompensation.

Camber also alleged that the Product Team improperly tailored the Recompensation for the benefit of the awardee, AMTI, by eliminating one of the five key personnel positions originally sought under the GPS TAC contract. The position was eliminated when the Product Team filled it with an available Government employee transferred from another program. Camber claimed that the position was one that AMTI had been having difficulty filling. Camber subsequently withdrew this second ground of protest.

For the reasons set forth herein, the ODRA recommends that the protest be sustained in part. As is more fully discussed below, to the extent the terms for the Recompensation have the effect of prohibiting the further participation of Overlook in the GPS TAC procurement, they lack a rational basis and are inconsistent with the Final Order in the Original Protests.

II. Findings of Fact

1. In her September 3, 1998 Final Order for the Original Protests, the FAA Administrator stated:

For the reasons set forth therein, I adopt the attached Findings and Recommendations of the Office of Dispute Resolution for Acquisition ("ODRA"); and sustain the Protest on the single basis of an alleged "bait and switch." I further direct: (1) that the procurement be reopened and recompeted in accordance with the recommendations of the ODRA; (2) that the current GPS TAC contract with AMTI be maintained pending completion of the recompensation; and (3) if the Program Office determines that the GPS TAC contract should be awarded to a company other than AMTI, that the AMTI contract be terminated for the convenience of the FAA and award be made to the successful offeror.

2. The Order thus expressly adopted the Findings and Recommendations of the ODRA ("ODRA Recommendations") which had been submitted to the FAA Administrator upon completion of the ODRA default adjudication process for the Original Protests under the FAA's Acquisition Management System ("AMS"). Those ODRA Recommendations are likewise adopted and incorporated herein.

3. The GPS TAC procurement involved an indefinite-delivery-indefinite quantity ("IDIQ") task order contract for technical assistance to the Product Team. Award of the GPS TAC contract was made to AMTI on June 2, 1998. The award was the subject of the Original Protests filed separately by Camber and another offeror, Information Systems & Networks Corporation ("ISN").

4. Although a number of grounds were raised by Camber and ISN in the Original Protests, the sole ground on which the Original Protests were sustained was that the awardee, AMTI, had been involved in an impermissible "bait and switch". The ODRA found in this regard:

. . . AMTI falsely represented with the January 30, 1998 proposal that it had entered into teaming agreements with Overlook and each of the other AMTI Team members, whereby the members had agreed on the allocation of the work effort under the GPS TAC contract and had established participation "goals" for each prospective subcontractor (Finding 53). Further, it falsely represented with the May 8, 1998 BAFO that it had "successfully negotiated revised rates using a [Deleted] multiplier," and that "no other changes in any other portion of the original proposal have been made," implying that (1) the rate revisions and work allocation changes among team members had been authorized, and (2) that the Program Office could count on the participation of all the members of the AMTI Team identified in the "original proposal" (Findings 57 and 58).

The ODRA went on to find that:

In fact, there were no teaming agreements with all the identified AMTI Team members. There was only a long superseded May 1996 Teaming Agreement, an agreement which envisioned Overlook as the Team's prime. That agreement, which was not executed by all of the companies on the later formed AMTI Team, did not allocate the work effort or establish participation "goals" for those companies. Further, AMTI failed to disclose to the Program Office the express condition which Overlook had placed on the use of its revised (April 16, 1998) rates and proceeded to utilize those rates without authority and with no assurance whatsoever that, once Overlook discovered what AMTI had done, Overlook would still make its key personnel available for the GPS TAC effort. (Finding 63). It was certainly "foreseeable" that Overlook key personnel would not be available to AMTI under the circumstances, *see Ann Riley, supra.*, and, in truth, there was little, if any, likelihood that Overlook would agree to

make those personnel available, once it became aware that AMTI intended to utilize Overlook for only [Deleted]% of the overall contract, not "approximately 33%" as had been Overlook's stated intention. The subsequent post-award "walk-out" by Overlook confirms as much.

See ODR A Recommendations at 66, 67.

5. The ODR A also specifically found that there was no question that the participation of Overlook's key personnel was critical to AMTI's chances for success in obtaining the award of the GPS TAC contract. In other words, the misrepresentation regarding Overlook's availability for this contract was material. ODR A Recommendations at 69. "The participation of Overlook's Messrs. [Deleted] and [Deleted] in preparing and presenting AMTI's solution to two of three sample tasks and their involvement in the "pop quiz" activity clearly had a pervasive impact on the product team's evaluation, not only of the AMTI's proposal, but the proposal of all of its competitors." *Id.*

6. The ODR A recommended, and the Administrator decided, that AMTI would be permitted to participate in the Recompensation and that the AMTI contract would remain in place pending the results of the Recompensation. The FAA Administrator ordered the Recompensation, accepting the ODR A's recommendation that:

in order to preserve the integrity of and confidence in the FAA procurement system, it is necessary that the procurement be reopened with the request for new BAFOs, so as to rectify the "bait and switch" impropriety that occurred, since it is uncertain how the source selection would have proceeded in the absence of that impropriety.

ODR A Recommendations at 70. The ODR A recommended further that:

the resumed procurement can properly be limited to those prime contractors and subcontractors who had responded to the RFO in January 1998.

and that:

It would not be inappropriate or inconsistent with the AMS for the Program Office to opt to allow further team reconfiguration and realignment, in recognition of the passage of time since January 1998.

Id. at 71.

7. By letters dated September 28, 1998 to each of the five prime contractors which had submitted offers in response to the RFO in January 1998, including Camber, Ms. Sandra Harrelson, the Product Team Contracting Officer notified such companies that "the GPS Product Teams intends to release a request for revised offers ('BAFOs') within the next

two to three weeks." The letter went on to detail the following conditions for the revised offers:

- Only four key persons will be required and evaluated. The need for a key person in the Senior Communication Systems Engineer (Terrestrial) category has been eliminated by the addition of a federal employee to the Product Team.
- In order to enable the re-evaluation to proceed as quickly as possible, team changes will not be permitted unless a teammate is no longer available, in which case offerors may continue without that company. ***New team members/subcontractors or realigned teams will not be evaluated.***
- In accordance with the ODRA's decision, revised offers must include certifications from all teammates/subcontractors that they have reviewed the proposal and concur with its contents.

Product Team Report (hereinafter "Report"), Exhibit 1 (Emphasis added)

8. By letter dated October 6, 1998, Camber filed the instant protest of the Recompensation conditions enumerated in the Contracting Officer's September 28, 1998 letter. Camber alleged in its protest that the limitation precluding substitution of team members was unduly restrictive. In particular, Camber complained that, by reason of the limitation, Overlook, "the company whose experience and expertise were responsible for the original award to AMTI," was being prevented from "competing on any team." Further, it posited that, without the availability of Overlook, "the FAA will suffer, because it will not have the opportunity to select from among the best possible proposals."

9. In its October 6, 1998 protest, Camber also argued that the Recompensation had been tailored for AMTI's benefit through the Agency's hiring of a key person that AMTI had been having difficulty supplying. Finally, Camber sought reconsideration of the decision to include AMTI in the Recompensation and alleged the FAA Program Office was resisting the performance of the corrective action required in the September 3, 1998 Administrator's Final Order.

10. An initial status conference was conducted by the ODRA in this matter on October 8, 1998. At that time it was confirmed that AMTI, as awardee of the GPS TAC contract, would be permitted to intervene as an interested party, pursuant to the AMS. It was further confirmed that the ODRA would not consider Camber's repeated demand that AMTI be excluded from the Recompensation in the context of the current protest.

11. During the initial status conference, representatives of the Product Team indicated to the ODRA that the Product Team intended to proceed with the Recompensation, notwithstanding the current protest. Subsequently, by letter to the prospective offerors dated October 8, 1998, the Contracting Officer issued the RRO for the GPS TAC

procurement. The RRO, *inter alia*, restated the limitation regarding team arrangements that had been included in the Product Team's September 28, 1998 letter:

1. TEAM ARRANGEMENTS

New team members will not be evaluated. Realignment of existing teams (prime/subcontractor relationships) shall not be proposed. Realigned teams will not be considered for award.

Report, Exhibit 3.

12. Overlook was not proposed by AMTI as a member of its current team. Under the terms of the RRO, Overlook is presently ineligible to subcontract or team with any other offeror in the Recompensation.

13. During the initial status conference of October 8, 1998, and in an ODRA Memorandum regarding that conference, the parties were directed to address their subsequent filings to the issues of whether: (1) the limitation on substitutions of new team members or subcontractors that was set forth in the Contracting Officer's letter of September 28, 1998 (the "Limitation"), is inconsistent with the FAA Administrator's Final Order; and (2) if the Limitation is not inconsistent with the Final Order, whether the Limitation has a rational basis and is not arbitrary or capricious or an abuse of discretion.

14. The Product Team submitted its Report on the current protest on October 19, 1998. Comments were received from AMTI on October 22, 1998 and from Camber on October 23, 1998. At the time of submitting its comments, Camber withdrew its protest ground related to the Agency's hiring of key personnel.

III. Discussion

In its Report regarding the current protest, the Product Team cites to this Office's recommendation that "the resumed procurement properly can be limited to those prime contractors and subcontractors who had responded to the original request for offers in January 1988." Report at 2, citing ODRA Recommendations at 71. The Product Team argues that the ODRA's terms "those prime contractors and subcontractors" meant "teams." Accordingly, the Product Team interpreted such terms as permitting the Recompensation to be limited to the identical teams that had provided proposals for the GPS TAC procurement in January, 1998 -- with the exception that teams with subcontractors no longer "available" would be allowed to proceed without those subcontractors. The Product Team urges that its interpretation was "not inconsistent with the Administrator's order because ODRA's recommendation required reopening the procurement at the BAFO stage, not earlier, for the sole purpose of proceeding to source selection without the impropriety the Administrator determined had tainted the earlier award." Report at 2.

The Product Team Report goes on to assert that "the alternate interpretation proffered by protester Camber that Prime and subcontractors could align into new teams would allow for new prime contractors, who would be required to submit new initial proposals." Report at 2-3. According to the Product Team, such an interpretation would be inconsistent with the ODRA Recommendations, which required reopening the performance at the BAFO stage as a "resumed" procurement. Intervenor AMTI's submission urges that the Product Team's position with regard to the Limitation is rationally based and consistent with the ODRA Recommendations and Final Order.

The Product Team's interpretation of the ODRA's recommendation that the Recompetition "be limited to those prime contractors and subcontractors who had responded to the RFO in January 1998, " ignores the plain meaning of those terms. The ODRA's expressed intent was that all of those interested entities which had participated in the original procurement would have an opportunity to participate in the Recompetition. When viewed in the context of the Final Order, there is no basis for interpreting the ODRA language as allowing any of those interested companies to be excluded from the Recompetition.

It is significant in this regard that AMTI was allowed to participate in the Recompetition, notwithstanding its "bait and switch." This was done expressly in order to afford the Agency the opportunity to maximize competition. ODRA Recommendations at 71. The remedy was designed to assure the availability to the Agency of all of the highly qualified firms and individuals who had expressed interest in and who had previously participated in the GPS TAC procurement. The unmistakable effect of the Product Team's RRO Limitation in this case is to exclude one entity, namely Overlook, from the Recompetition, and thus to vitiate the ODRA's recommended remedy, by eliminating a firm and personnel that had received high technical rankings in the earlier evaluation. *See* ODRA Recommendations, Findings 41-48.

The Product Team Report also asserts that the Limitation was necessary to enable the re-evaluation to proceed as quickly as possible. The Report notes in that regard that "the Program Office recognized it was critical to proceed with the reevaluation quickly because the Office has been in a period of uncertainty regarding support services since the protests were filed in June. The support services are particularly critical because of the small number of federal employees assigned to this complex program. " Report at 3. Finally, the Product Team asserts that realignment "would require the release [by the Agency] of sensitive proprietary information among the offerors regarding each teammate's role." Report at 4.

In its Comments on the Product Team's Report (hereinafter "Comments"), protester asserts that the Product Team's decision to prohibit team realignment is " grossly unfair and bears no rational relationship to the stated reason, *i.e.*, enabling the recompetition to proceed as quickly as possible " Comments at 1. The protester urges that the stated basis for a limitation does not withstand scrutiny, because a realignment using a contractor that was "already vetted" in the original evaluation would not delay the reevaluation, while the use of newly proposed key personnel, which is permitted, would.

Comments at 13. Essentially, the protester argues that the method chosen by the Product Team for completing the Recompetition is not related to the justification given for the Limitation.

The Product Team's concern that the Recompetition be conducted expeditiously is consistent with the Final Order. However, it must be remembered that the awardee's contract was not terminated by the Final Order. Presumably, absent some other development, the contract awarded to AMTI will remain in place until the Recompetition is completed. In any event, the record contains no evidence that the Product Team's needs are not currently being met. Thus, while expeditious Recompetition is understandably important to the Product Team, it does not override all other considerations.

There is a rational basis for the Product Team's conclusion that allowing wholesale team realignments may cause substantial delay to the process. For example, permitting the inclusion, as major subcontractors, of firms which have never been evaluated previously would certainly require the Product Team to expend significant extra effort and time to assess the technical capabilities and prior performance record of such entities. Similarly, permitting former subcontractors to substitute as team primes might necessitate a new evaluation of those entities to establish the extent and quality of their management abilities and experience. There is also a rational basis, under the circumstances presented here, supporting the more general Limitation of the RRO, at least as it applies to realignment/re-affiliation of companies who were not excluded from participating previously in the GPS TAC procurement as the direct result of the "bait and switch."

However, the Product Team's argument regarding undue delay does not support excluding a firm such as Overlook, which has participated in the GPS TAC procurement for more than two years, has already undergone extensive evaluation during the earlier stages of the procurement, and, most significantly, is currently unaffiliated with an offeror team only as a result of the "bait and switch." Indeed, it would be patently unjust and entirely inconsistent with the ODRA Recommendations and with the remedy embodied in the Administrator's Final Order for the Limitation to be applied so as to effectively exclude Overlook from further participation in the GPS TAC procurement.

The Product Team Report also asserts that allowing team realignments would require disclosure -- by the Product Team to potential offerors -- of sensitive proprietary information on prior team membership and configuration. There is no reason why such a release would be necessitated by allowing Overlook's continued involvement at this stage. Overlook's involvement in this procurement, and its current non-alignment with AMTI, are already matters of public record. Permitting it to join any of the existing teams would not require release by the Product Team of any proprietary information.

The ODRA Recommendations in the Original Protests establish that the Product Team had, earlier in the procurement, taken steps, which assured Overlook the opportunity to continue to participate in the GPS TAC procurement. The Product Team did not reject Overlook as a prospective prime contractor offeror, notwithstanding initial reservations about Overlook's lack of prior experience with managing contracts having the magnitude

of the GPS TAC contract. Instead, Overlook was permitted to proceed on to the next stage of the GPS TAC procurement. *Id.*, Findings 13 and 14. Additionally, when Boeing Information Services, Inc. ("Boeing") -- which had taken over leadership as prime of the Overlook Team -- decided to withdraw from the procurement just prior to the due date for proposals, the Program Office permitted AMTI to assume the role as the Team's prime contractor and allowed an extension of three days, so that the Team could "re-group."

Both of these earlier actions by the Product Team were challenged in the Original Protests. In both instances, the ODRA endorsed the Product Team's actions as rationally based. With respect, to the so-called "last minute switch" of prime contractors in January 1998, the ODRA found that the Product Team may well have had no rational basis whatsoever for its action, had it decided instead to preclude the Overlook/Boeing Team from "regrouping" under AMTI, since to have taken that stance would have meant sacrificing the availability to the GPS Product Team of very highly qualified technical personnel:

This decision [*i.e.*, to allow Overlook to continue as a participant in the GPS TAC procurement], in our view, was rational, appropriate, within the ambit of a CO's authority under the AMS, and was done in order to provide those firms which had already expressed "interest" in the procurement with "reasonable access to competition," pursuant to the fundamental policy guidance as set forth in the AMS. *See* AMS §3.2.2.2. Likewise, the IPT's action in January 1998, to allow the Overlook/Boeing Team to "regroup" and to submit a proposal under AMTI as its new prime contractor was rational and appropriate and in furtherance of the AMS policy for fostering competition. In this instance, it might not have been rational, appropriate, or in the best interests of the FAA to have excluded from the GPS TAC competition a "regrouped" team consisting of Overlook, AMTI, ISI and Zeta, inasmuch as those firms appeared to have had, among them, a wealth of experience and expertise in the GPS arena.

ODRA Recommendations, page 61.

Thus, the recent Product Team Limitation is inconsistent, not only with the ODRA Recommendations and the Administrator's Final Order, but with the Product Team's own previous decisions and actions. In the ODRA's view, it simply does not make sense to permit AMTI to participate in the Recompetition, while at the same time excluding Overlook, a victim of AMTI's "bait and switch" and the firm which, played a decisive role in securing the earlier award for AMTI. *See* Finding 5 above and ODRA Recommendations, Findings 41 through 48. In other words, the effective exclusion of Overlook by the RRO is devoid of a rational basis.

IV. Conclusion and Recommendation

For the reasons set forth above, the ODRA recommends that the protest be sustained on the limited basis that the exclusion of Overlook from the Recompensation lacks a rational basis and is inconsistent with the Final Order. The ODRA recommends that the Product Team be directed to issue an amended request for revised offers that includes a limited exception to the "no realignment" Limitation. The amended RRO would permit any of the offerors who timely submitted revised BAFOs in response to the RRO, to submit amended BAFOs, within a reasonable time to be decided by the Product Team, for the limited purpose of proposing Overlook as a team member or prospective subcontractor.

_____/s/_____

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