

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-00109

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 Program Office: Emmett Fenlon, Esq., and

Robert Zuckerman, Esq.

I. Introduction

This protest of Camber Corporation ("Camber") is the third Camber protest filed with the FAA's Office of Dispute Resolution for Acquisition ("ODRA") relating to a procurement being conducted by the FAA Global Positioning System Integrated Product Team, AND-730 (the "Product Team" or "Program Office") for a GPS Technical Assistance Contract (hereinafter the "GPS TAC" contract). By Final Order dated September 3, 1998 in the Protests of Camber Corporation and Information Systems & Networks Corporation, 98-ODRA-00079 and 98-ODRA-00080 (Consolidated) (hereinafter "Camber I"), the FAA Administrator sustained the Camber I protests and determined that an impermissible "bait

and switch" had been perpetrated by the awardee, Advanced Management Technology, Inc. ("AMTI"). In that Order, the Administrator directed a recompetition of the GPS TAC procurement (hereinafter the "Recompetition") at the Best And Final Offer ("BAFO") stage, so as to alleviate the effects of the "bait and switch." In this connection, the Administrator adopted the ODRA's recommendations that the AMTI contract be left in place during the Recompetition and that AMTI be permitted to participate.

In its second protest ("Camber II"), filed with the ODRA on October 6, 1998, Camber challenged a Program Office decision (announced in a letter to potential offerors dated September 28, 1998) to preclude offeror team realignments in conjunction with the Recompetition. Notwithstanding Camber's second protest, the Program Office proceeded on October 8, 1998 to issue a Request for Revised Offers ("RRO") that prohibited such team realignments. The Administrator, in her Order dated November 16, 1998, adopted the ODRA's Findings and Recommendations for Camber II. The ODRA Findings and Recommendations had recognized that the Program Office could properly prohibit wholesale team realignments. Nevertheless, the ODRA found that the Program Office decision to prohibit all team realignments lacked a rational basis, to the extent the prohibition served to prevent further participation in the GPS TAC procurement of Overlook Systems Technologies, Inc. ("Overlook"). Overlook, a highly rated former teammate of AMTI which had been instrumental in helping to secure the award for AMTI, was no longer on the AMTI offeror team, only by reason of the earlier "bait and switch." Accordingly, the Administrator's November 16, 1998 Order sustained the Camber II protest and directed the Program Office to permit Overlook to be added to any of the offeror teams which had previously submitted BAFOs in response to the RRO, including the Camber offeror team and that of AMTI.

By letter dated December 10, 1998, the Program Office requested potential offerors to extend their prior BAFOs until March 31, 1999, notified them that instructions regarding changes would be provided at some indefinite time in the future, and that new BAFOs, including any changes, would be evaluated during the first quarter of 1999. In its third protest, filed with the ODRA on December 21, 1998 ("Camber III"), Camber complains that the Program Office's allegedly dilatory actions regarding the Recompetition are arbitrary and capricious, inconsistent with the ODRA's prior Findings and Recommendations and the Administrator's Orders in Camber I and Camber II, and thus lack a rational basis. In this third protest, Camber specifically requests that the Administrator direct the Program Office to conduct the Recompetition "in accordance with a set timetable that will afford the FAA genuine competition." Subsequently, acting on request of the ODRA, the Program Office, on February 2, 1999, furnished a proposed working schedule for the completion of the mandated Recompetition. The ODRA considers this schedule to be reasonable under the circumstances presented.

In the ODRA's view, the establishment of a such a reasonable schedule effectively renders moot the Camber protest and requires its dismissal. Nevertheless, in order to insure that the Administrator's prior Orders in Camber I and Camber II are promptly implemented, the ODRA recommends that the Administrator adopt this schedule and order the Program Office: (1) on or before March 7, 1999, to issue instructions for the

submission of new BAFOs for the GPS TAC contract; (2) on or before May 5, 1999, to conduct oral presentations; (3) on or before June 29, 1999, to complete their evaluation of offers under the Recompensation; and (4) on or before June 30, 1998, to award a new GPS TAC contract, unless AMTI has again been selected as the successful offeror. If AMTI has not again been selected, the AMTI contract would be terminated upon expiration of a reasonable transition period. In addition, the ODRA recommends that the Program Office be directed to report to the ODRA on a monthly basis regarding the progress being made towards achieving these milestone dates; and to file an appropriate motion with the ODRA, should any modification to the solicitation and evaluation schedule become necessary.

II. Findings of Fact

1. On June 2, 1998, the Program Office awarded a GPS TAC contract to AMTI for a base contract period of three years, with four additional one year option periods.

2. By letter dated June 18, 1998, Camber, through its counsel, filed a protest with the ODRA, challenging the award to AMTI. On June 22, 1998, Information Systems & Networks Corporation ("ISN") filed its own protest against the award to AMTI. Subsequently, the ODRA consolidated the Camber I protests (ODRA Docket Nos. 98-ODRA-00079 and 98-ODRA-00080), for purposes of adjudication.

3. On September 3, 1998, the Administrator issued a final FAA Order, which sustained the Camber I protests, based on a single ground, that AMTI had perpetrated a "bait and switch," improperly misrepresenting the availability for the GPS TAC contract of certain key personnel of Overlook, its teammate. The Administrator's September 3, 1998 Order incorporated by reference the ODRA's Findings and Recommendations for the Camber I protests, and those Findings and Recommendations are incorporated herein by reference.

4. Pursuant to the Administrator's September 3, 1998 Order and the ODRA Recommendations, the Program Office was to conduct a Recompensation, to re-open the procurement with a request for new Best and Final Offers (BAFOs), so as to rectify the "bait and switch" impropriety that occurred. In this regard, the ODRA recognized that it would have been "uncertain how the source selection would have proceeded in the absence of that impropriety," and that the Recompensation would be needed, "in order to preserve the integrity of and confidence in the FAA procurement system." The ODRA had further recommended that the AMTI contract be left in place "in the interim," "so as not to disrupt the Product Team's operations."¹ Because the Program Office had no involvement in the "bait and switch," and in order to afford the Agency with maximum competition, the Program Office was permitted to include AMTI as part of the Recompensation.

5. The ODRA found that the Recompensation could properly be limited to "those prime contractors and subcontractors who had responded" to a Request for Offers ("RFO") for

the GPS TAC contract in January 1998. In its Findings and Recommendations in the Camber I protests, the ODRA had further suggested 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.

6. On September 15, 1998, Camber sought reconsideration of the ODRA's recommended remedy for the Camber I protests. In particular, Camber requested that the ODRA reconsider its recommendation that AMTI be permitted to participate in the Recompensation. Further, it questioned the Program Office's commitment to taking timely corrective action in accordance with the Administrator's directive and asked that the ODRA impose a timetable on the Program Office for implementation of the September 3 Order. The ODRA, by decision dated September 16, 1998, declined to reconsider its recommendation regarding the inclusion of AMTI, since Camber had failed to provide the ODRA with either: (1) evidence that the ODRA had committed clear errors of fact or law in the underlying decision; or (2) previously unavailable information warranting reversal or modification of that decision. In response to the contention regarding Program Office "resistance" to taking timely corrective action, the ODRA rejected that request as well, making the following observations:

Camber also requests that the ODRA direct the Program Office to establish a timetable for reconducting the competition. Essentially, Camber suggests that the ODRA's adopted remedy affords the Program Office too much discretion; and that in the absence of a directed timetable, the Program Office will not act promptly. Camber baldly alleges that "the Program Office apparently still resists taking timely corrective action." See Camber letter at 2. We note in this regard that the Administrator's Final Decision in this case was issued only 7 business days ago, on September 3, 1998. Moreover, Camber has failed to identify any facts, as opposed to suspicions or predictions, that suggest bad faith on the part of the Program Office. Absent such facts, we presume that the Program Office will act promptly and in good faith to carry out the Administrator's Decision, *i.e.*, in a timeframe that does not ignore the mandated corrective action or render it meaningless.

September 16, 1998 ODRA Decision on Camber Request for Reconsideration on Recommended Remedy (hereinafter the "September 16 Decision") at 2.

7. The Program Office, by letter to the prospective offeror teams dated September 28, 1998, indicated that it would not adopt the ODRA suggestion regarding team realignments, stating that no further team reconfigurations or realignments would be permitted, except that teams could provide offers, even though certain previous team members were no longer included as part of their teams.

8. On October 6, 1998, Camber submitted the Camber II protest to the ODRA, challenging this Program Office decision. In particular, Camber protested the effect of the

decision regarding team realignment, in terms of excluding Overlook from further participation in the GPS TAC procurement. Notwithstanding the protest, the Program Office proceeded to issue a Revised Request for Offers ("RRO") on October 8, 1998 that contained the restriction concerning team realignment.

9. Subsequently, the ODRA issued Findings and a Recommendation with respect to the Camber II protest, which had been docketed as 98-ODRA-00102. The Findings and Recommendation are incorporated herein by reference. The ODRA concluded that exclusion of Overlook from such further participation was "devoid of a rational basis," since (1) the ODRA had previously found the inclusion of Overlook's key personnel as part of the "AMTI Team" to have been decisive in AMTI's having secured its June 2, 1998 GPS TAC contract award, and (2) it had found Overlook's departure from the AMTI Team to have been only as a result of AMTI's perpetration of a "bait and switch." Accordingly, the ODRA recommended to the Administrator that the Camber II protest be sustained.

10. The Administrator, in a final FAA Order dated November 16, 1998, adopted the ODRA's Findings and Recommendation, sustained the Camber II protest, and per the ODRA's recommendation, directed that the Program Office issue an amendment to the RRO, allowing prospective offerors who had earlier submitted BAFO proposals in response to the October 8, 1998 RRO to submit revised BAFOs to include Overlook as a new team member. Under that Order, Overlook could be added to any of the participating offeror teams, including that of AMTI as well as the Camber Team.

11. The Contracting Officer, by letter dated December 10, 1998 wrote to potential offerors as follows:

Pursuant to the direction by the FAA Office of Dispute Resolution for Acquisition (ODRA), the procurement for a technical assistance contract in support of the GPS Product Team was resumed with the submission of revised proposals (BAFOs) on October 22, 1998. Subsequently, the ODRA determined that BAFOs could be further revised to allow a limited change to existing teams. The Product Team intends to evaluate BAFOs, including permissible changes if submitted, during the first quarter of 1999.

This letter does not solicit changes at this time. You will be provided with instructions at a later date. However, the acceptance period for your proposal will expire on December 21. If you wish to continue participation in this procurement, please submit a letter extension of your proposal for a period through March 31, 1999, before its expiration.

12. By letter of its counsel dated December 21, 1998, Camber submitted the Camber III protest to the ODRA, challenging the Program Office actions regarding the GPS TAC acquisition as lacking a rational basis and as being arbitrary, capricious, and inconsistent with the ODRA's earlier presumption that the Program Office would act "promptly and in

good faith to carry out the Administrator's Decision, *i.e.*, in a timeframe that does not ignore the mandated corrective action or render it meaningless." In its protest letter, Camber observes that the Program Office's delays have had the effect of discouraging competition, by failing to provide any sort of commitment to proceed expeditiously with the GPS TAC acquisition. The remedy sought by Camber in its third protest is that the Administrator direct the Program Office to conduct the Recompetition "in accordance with a set timetable that will afford the FAA genuine competition."

13. Upon docketing the Camber III protest, the ODRA scheduled and conducted a telephonic status conference with the parties on December 23, 1998. Participating in that status conference were representatives of the Program Office, Camber and AMTI, which had sought and been granted intervenor status as the contract awardee. During that conference, Camber's counsel requested that the Contracting Officer provide a schedule for issuing the Revised Request for Offers (RRO). The Contracting Officer stated that, because of an unanticipated funding shortfall, major decisions would have to be made concerning the continued operations of the GPS Program Office, and those decisions would have to be made at a very high level, perhaps by the FAA Administrator. As a result, the Contracting Officer stated, she was unable to furnish a schedule for the Recompetition. ODRA Status Conference Memorandum of December 23, 1998 Teleconference.

14. In its Status Conference Memorandum for that December 23, 1998 teleconference, the ODRA established dates for the submission of the Program Office Agency Response as well as for the submission by Camber and AMTI of comments on that Response. In addition, in light of an indication from Program Office counsel that a motion seeking summary dismissal of the protest was likely, the ODRA, in its Status Conference Memorandum, requested, in the event of such a motion, that the Program Office "provide specific information as to the steps being taken to resolve outstanding GPS program-related issues and issues regarding the scope of the GPS TAC contract, so that the Program Office is able to promptly implement the Administrator's Orders of September 3, 1998 and November 16, 1998." *Id.*

15. No motion for summary dismissal was submitted by the Program Office. Instead, by letter dated January 11, 1999, the Program Office submitted its Agency Response to the Camber protest. In the Response, the Program Office provided additional information regarding the funding situation and its reasons for delaying the Recompetition:

By early December, the Product Team was wrestling with the implications of Congress' fiscal 1999 appropriations, which contained a significant funding reduction for the program and which specifically prohibited spending for Wide Area Augmentation System phases 2 and 3. The team realized that the funding shortfall and prohibition would affect the conduct of the prime development contract with Raytheon and overall program strategy, including the level of support the Program Office required, and could afford, under the TAC. Decisions to restructure the development contract and resequence tasks would directly affect the skill mix and levels

of effort required of the support contractor in both near and option years. Since the TAC is an IDIQ vehicle, it relies upon a price model containing the government's best estimates of its annual requirements for each labor category to produce a sound price evaluation. Materially unbalanced proposals could result from the Government's failure to provide realistic estimates. The Product Team no longer had confidence in the estimates contained in the RRO, but did not know to what extent they would be changed. The Contracting Officer believed that the responsible course for the agency was to delay solicitation of new BAFOs for the TAC until the requirements and strategy for the prime development contract could reasonably be re-established and their effect on support requirements under the TAC could be determined.

In addition, in this changed environment, questions had been raised regarding [Deleted] must also be resolved before offers can fairly be evaluated.

Agency Response ("AR"), page 2.

16. The Agency Response went on to explain why the December 10, 1998 letter envisioned BAFOs being evaluated during the first quarter of 1999:

Despite the significant changes brought about by the appropriations bill, the Contracting Officer anticipated that requirements might be established by the end of December [1998] and that evaluations could be conducted sometime within the first quarter of 1999. Therefore, on December 10, 1998, she requested offerors to extend their proposals through this period.

AR, page 3.

17. After the Program Office sent its December 10, 1998 letter, the situation did not develop as the Contracting Officer had anticipated. More specifically, as related in the Agency Response, the FAA's Associate Administrators were briefed that renegotiations with the GPS development prime contractor, Raytheon Corporation ("Raytheon") would [Deleted]. Further, on January 5, 1999, the FAA announced a proposed 14 month delay in the Wide Area Augmentation System ("WAAS") development schedule.

18. By letter dated January 8, 1999, the Contracting Officer advised the offerors of the status of the GPS TAC procurement, stating that the Product Team anticipated issuance of a request for revised BAFOs in March 1999, with completion of evaluations by June 1999. AR, Attachment D, Contracting Officer letter dated January 8, 1999. That letter also advised potential offerors that Overlook would be eligible to participate as a subcontractor on any team, in accordance with the Administrator's Order of November 16, 1998. *Id.*

19. Both Camber and AMTI, by their respective letters of January 19, 1999, submitted comments with respect to the Agency Response. In its comments, Camber asserted that, notwithstanding the purported uncertainty within the GPS Program Office, work volume under AMTI's TAC contract had, in fact, increased and was approaching \$1 million on a monthly basis. Thereafter, the ODRA, by letter dated January 29, 1999, asked the Program Office to respond to this contention and to provide detailed information about (1) the volume of work under task orders issued to AMTI since contract award on June 2, 1998, as well as (2) the anticipated work volume from February 1, 1999 through June 30, 1999. The DRO further asked that the Program Office furnish more precise information as to the anticipated dates for the Recompetition:

In order to insure that all possible efforts are being made to implement the Administrator's Orders, please also provide the following information:

1. the date when a request for revised BAFOs will be issued for the GPS TAC contract;
2. the date when revised BAFOs will be due;
3. the date when a source selection decision for the GPS TAC contract will be made;
4. the date when any necessary award will occur.

If the above dates have not yet been established, please advise of a date certain by which such dates will be established.

20. By letter dated February 2, 1999, the Program Office furnished an affidavit of the Product Team Contracting Officer. The affidavit addressed the Camber contentions regarding work volume under the AMTI contract and provided a detailed working schedule for the solicitation and evaluation of BAFOs for the GPS TAC contract. As to work volume, the affidavit states as follows:

2. Five task orders have been issued to AMTI under Contract No. DTFA01-98-C-00048:

Task Order No. 1-001 (PM/BM), dated 6/19/98 -- Amount is \$1,575,261 for estimated requirements through June 1, 1999. However, a revision is pending to increase the amount by \$15,984.

Task Order No. 1-002 (LAAS), dated 6/23/98 -- Amount is \$873,154 for estimated requirements through June 1, 1999.

Task Order No. 1-003 (NAS), dated 6/19/98 -- Amount is \$3,139,246 for estimated requirements through April 1,

1999, pending execution of modification to extend through that period.

Task Order No. 1-004 (WAAS), dated 6/19/98 -- Amount is \$4,185,780 for estimated requirements through May 1999, pending execution of modification to extend through that period.

Task Order No. 1-005 (IPA), dated 6/19/98 -- Amount is \$466,948 for estimated requirements through May 1999, pending execution of modification to extend through that period.

3. The projected work volume between February 1, 1999, through June 30, 1999, is [Deleted] hours. Hours actually used during June - December 1998 were approximately 30% fewer than estimated at award. The projection continues that trend.

21. Using the above estimated dollar figures for the five task orders in question and dividing by the numbers of months stated for each task order, the cumulative monthly dollar total would appear to be somewhere above \$900,000 per month. Based on actual figures running 30% below estimates, it would seem that actual work volume is running at a rate of less than \$700,000 per month. The Contracting Officer's affidavit does not address directly Camber's assertion that the rate has been increased recently. However, the Contracting Officer's statement that "the projection [through June 1999] continues that trend" would indicate that no increase is being sustained in the volume of work being performed by AMTI under its contract.

22. The Contracting Officer attaches to her affidavit as Exhibit 1 the Product Team's "detailed working schedule for revised BAFOs." That schedule calls for the release of the amended RRO during the period March 1-7, 1999, a proposal due date of April 7, 1999, oral presentations during the period April 26-May 5, 1999, and completion of evaluations and a Public Affairs award notice by June 28-29, 1999. The affidavit explains that a 60-day evaluation period after oral presentations -- as allowed in the working schedule -- amounts to "half the time that was needed by the Product Team to complete and document the evaluation to award the present [AMTI] contract." The 60-day period is further justified by the Contracting Officer in her affidavit, on the basis that earlier past performance and financial analyses will require updating, due to the passage of time, and on the basis that the evaluation team's "reasoning, conclusions, and validation of those conclusions" must be "meticulously documented." Under these circumstances, the ODRA cannot say that the proposed working schedule is unreasonable or that it will delay the acquisition unduly. Further, there is no reason to suspect that, if the schedule is followed, the FAA will not be afforded genuine competition for the GPS TAC contract.

23. The affidavit also identifies two factors that may pose "some risk to achieving a June 30 completion date," namely:

a. If negotiations with Raytheon [for the prime development contract] are extended, qualified team members may not be available for the TAC [evaluation and award] as scheduled; and

b. If the Raytheon negotiation outcome varies too greatly from the expectations and assumptions that will underlie the new RRO, it may be necessary to amend the RRO. An amendment for this or other reasons, particularly near or after the revised BAFO submission date, would probably extend the award schedule.

24. With the submission of the Program Office letter of February 2, 1999 and the Contracting Officer's affidavit, the record in this protest was closed, and the matter proceeded to decision.

III. Discussion

At the outset, the ODRA recognizes that Agency procurement officials ordinarily have a great deal of discretion in terms of how they choose to structure and conduct an acquisition. However, once the ODRA has found Agency action relating to an acquisition to have been improper, and once the Administrator has adopted the ODRA's findings and its recommendations for corrective action and has issued Orders directing the implementation of such corrective action, Agency procurement officials must take all reasonable, necessary steps to implement the Administrator's Orders as promptly as possible.

In the present case, the Program Office believed that subsequent developments rendered immediate implementation of the Administrator's Orders of September 3, 1998 and November 16, 1998 impracticable.² As reflected in the above findings of fact, there have been a number of intervening factors beyond the control of the Program Office which have adversely impacted its ability to timely implement the Orders in Camber I and Camber II.

As noted above, the only remedy Camber sought in this third protest was to have the Program Office complete the Recompetition in accordance with a "set timetable that would afford the FAA genuine competition." At present, such a timetable has been established by the Program Office at the ODRA's request. The ODRA finds the proposed working schedule to be reasonable and to afford the FAA genuine competition. Finding 22. Accordingly, the Camber III protest has been rendered moot and should be dismissed summarily, in accordance with AMS §3.9.3.2.3.3. However, in order to insure that the Administrator's Orders in Camber I and Camber II are implemented as soon as is practicable, the ODRA recommends that the Administrator adopt the Program Office's proposed working schedule and order that the Recompetition be carried out in conformance with that schedule.

IV. Conclusion and Recommendations

For the reasons set forth above, the ODRA recommends that the Administrator adopt the proposed working schedule submitted by the Program Office on February 2, 1999 and direct the Program Office: (1) on or before March 7, 1999, to issue instructions for the submission of new BAFOs; (2) on or before May 5, 1999 to conduct oral presentations; (3) on or before June 29, 1999, to complete the evaluation of offers under the Recompetition; (4) on or before June 30, 1999, to award a new GPS TAC contract, unless AMTI has again been selected as the successful offeror; and (5) if AMTI has not been selected as the awarded, to provide for an expeditious transition to the new contractor and to terminate the AMTI contract for the convenience of the FAA. The ODRA further recommends that the Program Office be directed to report to the ODRA on a monthly basis regarding the progress being made towards achieving these milestone dates and to file an appropriate motion with the ODRA, seeking further recommendations to the Administrator, should any modification to the solicitation and evaluation schedule become necessary.

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

APPROVED:

_____/s/_____
Anthony N. Palladino
Associate Chief Counsel and Director
Office of Dispute Resolution for Acquisition

¹ The ODRA, taking into account the fact that the Program Office had issued AMTI a "cure notice" on July 2, 1998, for failure to furnish promised key personnel of Overlook, couched its recommendation regarding

continuing the AMTI contract on the assumption "that the Program Office does not itself decide to terminate that contract for default, in furtherance of the earlier cure notice of for other reasons consistent with its contract administration authority." *Protests of Camber Corporation and Information Systems & Networks Corporation*, 98-ODRA-00079 and 98-ODRA-00080 (Consolidated), Findings and Recommendations of the Dispute Resolution Officer at pages 70-71.

² Under such circumstances, the proper course of action would have been for the Program Office to have filed a motion with the ODRA, seeking reconsideration and further recommendations to the Administrator, to revise the Orders or to stay them.