

FINAL REDACTED VERSION

(Note: Redactions are indicated by "[Deleted]")

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

FINDINGS AND RECOMMENDATIONS

Matter: Protests of Camber Corporation and Information Systems & Networks Corporation (Consolidated)

Under Solicitation No. DTFA01-98-R-11087

Docket Nos.: 98-ODRA-00079 and 98-ODRA-00080

Appearances:

For Protester, Camber Corporation: Alan M. Grayson, Esq., Ira E. Hoffman, Esq. and Michael A. Lewis, Esq., Grayson and Associates, P.C.

For Protester, Information Systems & Networks Corporation: Kenneth D. Brody, Esq., McMahon, David & Brody

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

For the Agency Program Office: Emmett Fenlon, Esq., Robert Zuckerman, Esq., Richard J. McCarthy, Esq., and Sybil Horowitz, Esq.

I. Introduction

Two protests have been submitted to the FAA Office of Dispute Resolution for Acquisition ("ODRA") under a procurement by the FAA Global Positioning System ("GPS") Product Team, AND-730 (the "Program Office"). The protests, submitted by Camber Corporation ("Camber") and Information Systems & Networks Corporation ("ISN"), both allege improprieties in a procurement of technical and program support services for the GPS and challenge the award of a GPS Technical Assistance Contract ("TAC") to Advanced Management Technology, Inc. ("AMTI"). The protests have been

consolidated for adjudication and AMTI has been permitted to intervene as an interested party in the consolidated protests. Each protest raises several grounds. For the reasons set forth herein, the ODR recommends that both protests be sustained, but only on a single ground, namely, an alleged "bait and switch." The remedy we are recommending is aimed at rectifying an impropriety not of the Agency's making and at protecting and maintaining confidence in the integrity of the FAA's procurement system.

II. Findings of Fact

A. The Facts Surrounding The Protests

1. On August 21, 1996, the Program Office issued a Screening Information Request ("SIR") to identify potential offerors capable of performing the GPS TAC. Agency Response ("AR"), Exh. 1. The GPS TAC was to be an indefinite delivery-indefinite quantity ("IDIQ"), task order contract. *See* AR, Exh. 9. The SIR explained that the GPS TAC was to "provide high quality technical engineering and program management assistance relative to current and future satellite and satellite augmentation systems for the FAA's Wide Area Augmentation System (WAAS), the National Satellite Test Bed (NSTB) and the Local Area Augmentation System (LAAS)." AR, Exh. 1. The SIR went on to state that the FAA estimated that "approximately 1.9M labor hours during a period of up to seven years" [1] would be required "to augment federal resources to accomplish these initiatives." *Id.* In terms of resource augmentation, the Program Office staff of federal employees only accounts for approximately 10% of the workforce for the GPS, the remaining 90% of the labor force being supplied by contractors. The requirements to be filled under the GPS TAC were previously satisfied through a number of smaller FAA contracts. An objective of the instant GPS TAC procurement "is to consolidate these contracts in order to ease administrative burden on the small federal staff and to improve oversight of, and coordination of effort among, the contracted staff." AR, page 1; AR, Exh. 9, Section M; AR, Exh. 38, ¶2.

2. The SIR stated that the GPS TAC procurement would be "conducted in accordance with the policy and guidance of the FAA Acquisition Management System (FAAAMS), effective April 1, 1996,"[2] that the SIR was for the purpose of enabling the FAA "to identify interested companies who are most likely to receive the contract award," and that the FAA was "seeking responsible companies, as defined in the FAAAMS 3.2.2.2,"[3] who were "interested in proposing as prime contractors" and who had the following enumerated qualifications:

- Ability to manage complex technical contracts similar to the GPS TAC
- Corporate knowledge and understanding of NAS implementation of satellite-based navigation technology and the operational use of this technology in civil aviation
- Personnel resources comprised of skilled individuals specifically knowledgeable of and expert in GPS, WAAS, LAAS and NTSB technical

and program management requirements as they relate to FAA program needs. AR, Exh. 1, pages 1-2.

3. The GPS TAC procurement was to be a two step process. The SIR made submission of qualification statements in response to the SIR a mandatory prerequisite to qualifying a company for submission of a later offer in response to a Request for Offers ("RFO"). More specifically, in the SIR, the Program Office stated its intent to "downselect to companies that are most likely to receive a contract award" by means of the SIR's screening process, consisting of prospective offerors submitting qualifications statements outlining their (1) "relevant corporate experience," (2) "personnel resources," (3) proposed means of "contract performance measurement" (*i.e.*, the kinds of cost and schedule controls and other management procedures that would be used for a GPS TAC contract), and finally, (4) a "conflict of interest statement," describing any potential organizational conflicts of interest issues that might be encountered by the prospective offeror. Thereafter, once companies were deemed "qualified" and "acceptable," the SIR advised, they would be provided copies of a "draft solicitation" for comment, and would be given the "opportunity to submit technical and price proposals in response to a request for offers." *Id.*, page 2 and encl. 1.

4. On September 11, 1996, eight companies submitted qualifications statements in response to the SIR: protester Camber; protester ISN; Intermetrics, Incorporated ("Intermetrics"); Overlook Systems Technology Incorporated ("Overlook"); Science Applications International Corporation ("SAIC"); Systems Research Corporation ("SRC"); TRW Government Information Services Division ("TRW"); and Vitro Corporation ("Vitro"). According to the Program Office, "all of the companies, except Intermetrics, presented a team approach with multiple subcontractors." AR, pages 1-2. Overlook's SIR response, consisted of a letter dated September 11, 1996 and accompanying qualifications statement. It identified an Overlook Team, consisting of Overlook as the prime contractor along with the following five firms identified as team members:

- Advanced Management Technology Incorporated (AMTI -- then known as "AMTECH")
- Innovative Solutions International ("ISI")
- Illgen Systems Technologies Incorporated ("Illgen")
- Rockwell Space Division ("Rockwell")
- Zeta Associates Incorporated ("Zeta")

Overlook represented that a "teaming agreement" had been "reached" with "these companies." AR, Exh.32, page 1. Overlook, in its qualifications statement/SIR response, stated that, initially, because of its "size" and "obvious GPS expertise," [Deleted] had been "viewed by the [Overlook] team members as a natural prime contractor for the

TAC." It went on to say, however, that the team, "upon further consideration of the type of specialized government and industry support required to ensure the continued success of the GPS Program Office," concluded that "Overlook, with its unique qualifications, would be the best team member" to serve as the team's prime contractor for the TAC procurement. *Id*

5. A Teaming Agreement dated May 27, 1996 (the "Overlook Teaming Agreement") was executed among only three members of the Overlook Team: Overlook, AMTI and ISI. Rockwell, Illgen and Zeta are not signatories to that agreement. Also, the agreement predates the issuance of the GPS TAC SIR on August 21, 1996 (*see* Finding 1). Nevertheless, AMTI has advised the ODRA that the May 27, 1996 Teaming Agreement was the only such agreement executed by members of the Overlook Team for the instant procurement. Reed Smith Shaw & McClay letter dated July 31, 1998. The agreement itself refers to a "SATELLITE NAVIGATION TECHNICAL ASSISTANCE CONTRACT (SATNAV TAC)" and states that the FAA "has issued a Screening Information Request" for the SATNAV TAC. In this regard, the Program Office advises that there was no earlier (pre-May 27, 1996) SIR for the SATNAV TAC and further that the SATNAV TAC and the GPS TAC are one and the same. It is apparent, therefore, that the Overlook Teaming Agreement, notwithstanding its reference to a previously issued SIR, was, in fact, executed in advance and in anticipation of the GPS TAC SIR.

6. Under the Overlook Teaming Agreement, Overlook would serve and be identified in a team proposal to the FAA as the team's Prime Contractor for the GPS TAC, and the other two Teammates (AMTI and ISI) would serve and be identified as Overlook's "principal prospective subcontractors." The Teaming Agreement preamble stated the intent of the three signatories (Overlook, AMTI and ISI) that, in the event of an award of a prime contract (for the GPS TAC) to Overlook, the work would be distributed among the three "equitably," "consistent with the terms and conditions of the SATNAV TAC." In this regard, "equitable distribution" was further explained as follows:

The work responsibilities and levels of effort to be equitably distributed among Teammates will be determined by taking the contract value awarded by the government, less the subcontracts awarded to companies other than the Teammates and less the Prime's subcontracting handling charges. The resulting net balance will then be equally distributed among the Teammates.

In other words, the understanding achieved among the three Teammates, Overlook, AMTI and ISI, was that they were to divide equally the remainder of work under the GPS TAC (SATNAV TAC), after deducting the amount to be performed by non-Teammate subcontractors and any Prime Contractor subcontract handling markup on such effort.

7. Under Article 2 of the Teaming Agreement, Overlook undertook responsibility for, among other things, submitting to the FAA for each other Teammate information regarding "[c]orporate experience, key personnel resumes, cost and/or pricing data and technical inputs appropriate to the Teammate's proposed portion of the project." Overlook

was to perform all contract negotiations with the FAA ("the customer") and agreed to "consult with and obtain the concurrence of the Teammate prior to making any proposal changes, which concern the Teammate's proposed portion of the project."

8. Article 3 of the Teaming Agreement prohibited the Teammates from participating with third parties in "parallel proposal activity" for the procurement. Article 4 called for Overlook as prime contractor to engage with the other Teammates in "good faith" negotiations of subcontracts upon award of the prime contract. Article 9 provided that the Teaming Agreement would "remain in effect" until the occurrence of any of a number of things, including, *inter alia*, (1) a decision by either "Overlook or Teammate" not to pursue the (GPS TAC) procurement; (2) the award of a subcontract "to Teammate"; (3) the failure of "Teammate and Overlook," within 90 days of Overlook's prime contract award, to "reach complete agreement on all subcontractor [sic] terms and conditions after good faith negotiations by both parties"; or (4) upon mutual agreement of the parties. Finally, under Article 17, "Entire Agreement," the parties to the Teaming Agreement agreed that the Agreement "contains the entire and final agreement between the parties" and that "changes" could be made "only in writing signed by authorized representatives of the parties."

9. We find that the September 1996 Overlook Team qualifications statement/SIR response for the GPS TAC procurement was submitted pursuant to this Teaming Agreement.

10. The Program Office evaluated qualifications statements in response to the GPS TAC SIR over an 8 month period from mid-September 1996 through the beginning of May 1997. The Program Office evaluation team, which consisted of two members and one advisor and which had input and advice from the Contracting Officer ("CO"), Ms. Sandra Harrelson, and the GPS Product Team counsel, Emmett Fenlon, Esq., conducted that evaluation using the following four "equally important" evaluation factors, as had been specified in the SIR:

Factor 1 -- Demonstrated ability to manage complex technical contracts similar to the GPS TAC, as indicated by information provided in Sections 1 and 3 of the qualification statement/SIR response.

Factor 2 -- Corporate knowledge and understanding of NAS implementation of satellite-based navigation technology and the operational use of this technology in civil aviation, as indicated by information provided in Section 1 of the qualification statement/SIR response.

Factor 3 -- Personnel resources comprised of skilled individuals specifically knowledgeable of and expert in GPS, WAAS, LAAS and NSTB technical and program management requirements, as indicated by information provided in Section 2 of the qualification statement/SIR response.

Factor 4 -- A record of past performance showing no deficiencies in performance within the last 5 years that were not beyond the vendor's control and that would increase risk of failure, as indicated by information provided in Section 1 of the qualification statement/SIR response or as obtained and verified independently by the FAA.

AR, Exh. 1, encl. 1, pages 4-5; AR, Exh. 34.

11. Evaluators were to assign one of the following two adjectival ratings for each of these four factors, for each prospective offeror:

Acceptable -- Probability of success. The prospective offeror's response does not indicate any shortcoming(s) or deficiency(ies) that would make performance of the contract unlikely. Evaluation of capabilities/experience in this area indicates low risk to the Government. There are no deficiencies in past performance that would increase risk to the Government.

Unacceptable -- Low probability of success. The prospective offeror's response indicates one or more shortcomings or deficiencies that would make performance of the contract difficult or unlikely. There is high risk that the offeror would not perform satisfactorily. There are deficiencies in past performance that would increase risk to the Government.

AR, Exh. 34.

12. Of the eight prospective offerors who had submitted SIR responses, the evaluation team ultimately did not find any to be "unacceptable." *Id.* Although one of two evaluators had rated Overlook initially as "unacceptable" for three of the four evaluation factors, those ratings were revised to "acceptable," based on "consensus discussions" with the other team member and their advisor. AR, Exh. 33.

13. In terms of Factor 1 (Demonstrated ability to manage complex technical contracts similar to the GPS TAC), the SIR called for prospective offerors to "list 5 contracts" that the prospective offeror had "undertaken or completed in the past 5 years as prime contractor that represent corporate experience in activities most similar in scope and complexity to the GPS TAC." AR, Exh. 1, encl. 1, page 1. Overlook had only provided details for two such contracts, one having a level of effort ("LOE") of [Deleted] person years, with "no subcontracts," AR, Exh. 32, page 6, and the second having an LOE of [Deleted] person years, and "no subcontracts." *Id.*, page 8. As noted above, the SIR stated that the LOE for the GPS TAC was expected to involve 1.9 million labor hours. Based on roughly 2,000 hours per person year, the 1.9M hours projected by the Program Office would translate to approximately 950 person years over the 7 year GPS TAC contract period. The evaluator in question found that the "LOE for the 2 cited contracts [was] [Deleted] less than required for the TAC." He also found that although the "complexity of many of the tasks [was] comparable," this was not true "in every case." He did, however,

find the "type of contract[s]" that Overlook had performed to have been "comparable." In his summary of findings, that evaluator stated:

Overlook adequately addresses nearly all of the above considerations. The illustrations and explanations of tools and processes are clear and unambiguous. There is some reliance on knowledge of existing practices that Overlook and some of its subs employ as incumbents. ***The single deficiency resides in examples of Overlook contracts that approximate this TAC.*** Both examples are [Deleted] less than the LOE for the TAC [Deleted]. AR, Exh. 33, page 2 (emphasis added).

14. The evaluator's revised rating for Overlook, that of "acceptable," was explained by him in his evaluation notes as follows:

"In consensus discussions, it became obvious that Overlook had not performed contracts before w/ similar LOE, but they had performed contracts that were equivalent in scope and complexity. Since this was the real intent of the SIR, determining technical competence and maturity, this factor was revised to reflect an acceptable [rating]." *Id.*

15. A similar explanation was provided in the official Evaluation Team report:

"Overlook intends to team with Amtech, ISI, Illgen, Rockwell and Zeta. The [evaluation] team considered Overlook's response to factors 1 and 2 to be weak, but not unacceptable. Only two examples of prior work experience as a prime contractor were provided. At consensus [sic], the team concluded that the examples given were equivalent in scope and complexity, if not in level of effort, to the TAC requirements. Since the Government is principally interested in respondents' abilities to handle discrete technical tasks, Overlook's prior technical efforts clearly satisfy the intent of the SIR." AR, Exh. 34, page 2.

16. By letter dated May 2, 1997, the CO, Ms. Harrelson, notified all of the eight companies which had responded to the SIR that their responses had been rated "acceptable" and that such a rating "qualifie[d]" their companies "for participation in the next phase of this procurement, evaluation of proposals to be submitted under a Request for Offers (RFO)." [4] AR, Exh. 40. The letter further advised that a draft RFO was not expected to be issued for comment until late June 1997. *Id.*

17. In fact, it was much longer before a draft RFO was issued. By letter of October 16, 1997, the CO notified each of these prospective offerors that a draft RFO was about to be issued within the next 2 weeks "to the companies and teams qualified under the Screening Information Request . . ." AR, Exh. 2. The letter went on to advise that, in light of the substantial time hiatus since the issuance of the SIR, and in recognition that the time lapse may have impacted significantly both "vendor business relationships and teaming arrangements," prospective offerors would be "permitted to make team changes,

including realignment of their team (prime/sub) relationships." Substitution of subcontractors likewise would be permitted. *Id.* However, the letter expressly conditioned these changes and substitutions on notification being provided to the CO regarding "any change in team arrangements affecting a team member who will provide 20% or more effort under the contract," stating further that such notification must be provided "not later than November 7 [1997]." *Id.* (emphasis in original).

18. The record reflects several responses to the CO's October 16, 1997 letter. ISN, by letter dated November 7, 1997, advised the CO of [Deleted], which it believed would likely provide 20% or more of the effort for ISN under the GPS TAC contract. AR, Exh. 5. [Deleted] sent letters dated November 7, 1997, both of which advised the CO that, whereas [Deleted] intended to participate in the procurement as a team member of the [Deleted] team, it reserved [Deleted]. Camber, in a letter dated November 7, 1997, reserved the right to submit its proposal through a wholly owned Camber subsidiary. This step, Camber indicated, might be taken, if it were determined to be the "most cost effective solution" for the FAA. [Deleted]. In any event, the letter assured the Program Office that, even should that option be availed, the "current Camber FAA workforce" would be utilized to perform the GPS TAC contract. AR, Exh. 4.

19. As to the Overlook Team, the Program Office received a letter dated November 6, 1997 from Boeing Information Services, Inc. ("Boeing"). AR, Exh. 3. In that letter, Boeing notified the CO that, in December 1996, it had acquired the Rockwell component that had been part of the Overlook Team. In the November 6, 1997 letter, Boeing further advised that it would become the prime contractor for the team and referred to an accompanying letter from Overlook, which purportedly explained further the realignment of the team. The Overlook letter was not included within the record of this proceeding. Although Boeing's November 6 letter itself was not clear on this point, the only identifiable change in teaming arrangements impacting a team member who would perform 20% or more of the work would appear to be the switch of prime contractors, from Overlook to Boeing. The letter, in speaking of the Overlook Team, mentions both AMTI and ISI. Notably, Boeing's letter failed to mention either Illgen or Zeta, both of which companies been presented to the Program Office as members of the Overlook Team in September 1996. *See* AR, Exh. 32.

20. By letter dated October 27, 1997, the CO issued the draft RFO (AR, Exh. 41) to the prospective offerors for comments. In that letter, the CO also referred to her October 16, 1997 letter and its description of the "need to update experience and past performance information." She directed prospective offerors to Enclosure 1, paragraph B of the SIR (which dealt with presentation of information on "relevant corporate experience"), asked that they review their SIR responses "for currency," and requested further that they submit to her the following information on or before November 17, 1997:

1. For the team member who will be the prime contractor, a description of any experience since the September 11, 1996, SIR response that is similar in scope and complexity to the GPS TAC. The description must be in accordance with the SIR instructions.

2. For the team member who will be the prime contractor, a description of transition experience during the last 5 years. Provide contract numbers, dates of performance, name and phone numbers of administrative and technical contacts and a description of size and length of transition and problems encountered and resolved.

3. Identity of any subcontractors/team members who will provide 20% or more effort under the TAC.

4. For subcontractors/team members who will provide 20% or more effort under the TAC, the information requested in the SIR Enclosure 1, paragraph B, or, if already included in the September 1996 submission, a description of any new relevant experience.

5. For the prime and significant subcontractors/team members, a list of contracts terminated for convenience or default since the September 1996 submission, with names and telephone numbers of the terminating COs.

AR, Exh. 45.

21. Camber, by letter dated November 17, 1997, provided the Program Office with the information requested in the CO's letter of October 27, 1997. Among other things, Camber advised of its "belief" that two of its team members, [Deleted] "may provide 20% or more of the effort." In accordance with the Program Office's instructions, Camber submitted, with its November 17, 1997 letter, updated "relevant experience" for [Deleted]. AR, Exh. 46. Both ISN and Boeing submitted similar letters. In Attachment 4 to its November 17, 1997 letter, ISN stated that [Deleted] would provide more than 20% of the effort under the TAC. Boeing's November 17, 1997 "Team Update" letter indicated that there were to be four significant members of its team, Boeing as prime, with Overlook, ISI and AMTI as subcontractors. It stated that each of these four companies would provide 20% or more of the effort expended under the GPS TAC contract. Boeing provided updated information on AMTI regarding "relevant experience," in accordance with the CO's October 27, 1997 letter.

22. The prospective offerors submitted comments on the draft RFO, and, by letter dated December 8, 1997, the Program Office provided them with responses to those comments. AR, Exh. 8.

23. By letter dated January 6, 1998, the CO forwarded the RFO to the prospective offerors, which included ISN, Camber, and Boeing, for the team formerly headed by Overlook. AR, Exh. 9. In Section H.2 of the RFO, the Program Office notified prospective offerors that personnel listed within five key personnel labor categories were considered "essential to the work to be performed" under the GPS TAC. Section H.2 expressly provided that no substitutions for identified key personnel would be permitted during the first 12 months of the contract, except as necessitated by the individual's

illness, death or termination of employment. The five categories of key personnel specified in RFO Section H.2 were:

Senior Systems Engineer

Senior Communication Systems Engineer (Terrestrial)

Senior Communication Systems Engineer (Satellite)

Senior Software Engineer

Project Manager

24. RFO Section H.2 further required that a single Project Manager be designated, who would serve as the "single focal point within the contractor's organization or team for all tasks". It also required that those identified for the Senior Communication Systems Engineer and Senior Software Engineer positions have "extensive GPS expertise." After the first 12 months, substitutions for key personnel could be made with the CO's consent, upon 30 days' advance written notice, provided that the proposed substitute personnel possess qualifications that are equal to or higher than the individuals to be replaced. AR, Exh. 9, Section H.2. Attachment J-4 to the RFO provided detailed "minimum qualifications" for each of the key and non-key labor categories. *Id.*, Attachment J-4. In terms of key personnel, RFO Section L, "Instructions, Conditions and Notices to Offerors," paragraph L.13.1.3, required the following to be included in Part 3 of Volume 1 of any proposal:

Part 3 -- Key Personnel: Provide names of key personnel for each category listed in Section H.2 of the RFO. With the exception of Project Manager, more than one person may be specified for each category. Offerors may also propose key personnel for other categories not listed. Keep in mind that only persons designated as key may brief the oral presentations.

25. RFO Section M set forth the criteria for contract award. Under Section M, the technical merit of each proposal was to be evaluated based on an analysis of four factors:

Factor 1 -- Technical Knowledge and Understanding

Factor 2 -- Management Knowledge and Understanding

Factor 3 -- Qualifications of Key Personnel

Factor 4 -- Risk

26. For Factor 1, Technical Knowledge and Understanding, the merit of a proposal would be judged by means of conducting oral presentations, both by an offeror's oral responses to three Sample Tasks outlined in the RFO as well as by the answers provided by offeror

personnel to "pop quiz" questions posed during the oral presentations. Factor 2, Management Knowledge and Understanding, would be judged by an offeror's written responses to a management questionnaire (RFO, Exh. L-2). In terms of Factor 3, Qualifications of Key Personnel, in addition to reviewing the resumes submitted, the Program Office indicated that key personnel qualifications would be gauged by the quality of oral presentations and the ability of an offeror's personnel to articulate and discuss technical or management issues in response to "pop quiz" questions. Factors 1, 2 and 3 were to be valued equally, and proposals were to be assigned numerical scores for those three factors.

27. For Factor 4, Risk, the Program Office was to "develop a numeric rating" to "represent the Government's degree of confidence" regarding the likelihood of its being satisfied with the prospective offeror's performance." The rating or numeric risk factor would then be applied to the total of the offeror's numeric scores for Factors 1, 2 and 3. In establishing a risk rating for each prospective offeror, the RFO required that a number of items be considered, including, *without limitation*: (1) previous transition experience and performance; (2) the "extent and difficulty of the transition effort required" on the GPS TAC; (3) the offeror's "previous experience and record for timeliness and quality of work products, including administrative reports and cost control"; (4) the offeror's, record for retention of key personnel; (5) the offeror's program management history; (6) the experience and past performance of both the offeror and proposed significant subcontractors contributing 20% or more effort; (7) the realism of proposed compensation, in terms of an offeror's "expected ability . . . to attract, hire and retain a well qualified work force." The RFO emphasized that other, unlisted elements might also be considered, and that "a single element may pose such a threat as to significantly undermine the Government's confidence in the promised value of the proposal." *Id.*, Section M.

28. Regarding price, Section M of the RFO made clear that the GPS TAC was to be a "best value" procurement, rather than one that would be awarded to the lowest responsive and responsible offeror: "An award will be made to the responsible offeror whose offer, conforming to the solicitation, represents the best overall expected value, price and other factors considered." AR, Exh. 9, Section M, ¶M.1.1. In terms of how price would be treated in relationship to technical merit, Section M went on to state:

The Government has not established relative fixed weights for price and technical merit. Although an award will be made only on the basis of a fair and reasonable price, the Government is willing to pay a higher price for technical merit that is greater than other competitors' as long as the margin of quality is, in the Government's judgment, worth the additional margin in price. That judgment will be made in the context of a comparison of each offer with competing offers. The relative importance of price will increase as the difference in technical merit among offers decreases. Conversely, the relative importance of price will decrease as the difference in technical merit increases.

Id., ¶M.2.3.

29. Price proposals were to be based on the submission of "loaded" hourly rates [5], which were to be multiplied by specified estimates of hours for each of the 7 years of the GPS TAC as set forth in RFO Table L-1, Price Matrix. The estimates shown in the RFO Price Matrix were provided by the Program Office strictly for purposes of comparative evaluation of proposals. Offerors were to insert their proposed rates into the spaces provided within the Price Matrix. RFO Table B-1 provided estimated minimums and maximums of labor hours for each of the 7 years. In terms of guaranteed minimums of hours to be ordered and ceiling prices under the ultimate IDIQ contract, such minimums and ceiling prices were provided within RFO Section B for the 3 year base contract period and for each of the four 1 year option periods. AR, Exh. 9, Section B.

30. The RFO called for proposals to be submitted by no later than 3 P.M. on January 27, 1998. AR, Exh. 9, cover letter.

31. On January 22, 1998, a Boeing representative telephoned the CO and advised that Boeing had decided to withdraw from the Boeing/Overlook/ISI/AMTI Team. AR, Exh. 39, ¶2. The reason given for this withdrawal was [Deleted]. This withdrawal was confirmed in a letter from Overlook to the CO dated January 23, 1998:

[Deleted]

AR, Exh. 51.

32. The January 23 Overlook letter went on to advise that, with Boeing's withdrawal, the remaining team members were "actively involved in reconstituting" the team and to request a 1 week extension of the proposal due date to allow for the remaining team members to submit a proposal for the GPS TAC. The letter concluded by reminding the Program Office of the significance of those remaining team members, in terms of their current support of the GPS as incumbent contractors:

We regret the unfortunate circumstances that have necessitated this letter. However, since our team members currently fill the majority of the key support positions within the FAA's GPS Product Team, we believe that your favorable consideration of this letter is very much in the FAA's best interests. If our team is precluded from bidding, the government stands to lose the services of over 60 qualified personnel currently providing vital day to day services in support of the PT. *Id.*

33. The news that Boeing had withdrawn had been made known to at least one other prospective offeror, Camber, on January 22, 1998. In a letter to the CO dated June 5, 1998, Camber relates (1) that, on January 23, 1998, it had offered Overlook a position on

the Camber team but was rebuffed, and (2) that it also learned of Overlook's request for a time extension for the submission of a reformulated proposal:

On January 22, 1998, Camber received information that Boeing had decided not to bid on the GPS TAC. This information was confirmed through both Boeing and Overlook sources. On 23 January, Camber contacted Overlook and offered them a position on Camber's team and was told that Overlook was going to go it on their own. We learned at this time that Overlook was requesting an extension for the proposal submittal.

AR, Exh. 35, Attachment 1, page 1 of 3, ¶3.

34. On January 23, 1998, Mr. Michael Sorrentino, Overlook's president, and Mr. Ray Roddy, Overlook's chief financial officer, met with the CO and the Product Team to discuss the Boeing withdrawal and Overlook's request for an extension of the proposal due date. At that meeting, they advised the CO that the remaining team members might choose to "regroup" under AMTI as prime. AR, Exh. 10, ¶8. Later that day, the Product Team agreed to permit a 3 day extension from 3:00 p.m. on January 27 until 2:00 p.m. on January 30. AR, Exh. 10, ¶3; AR, Exh. 38, ¶6. Thereafter on January 23, 1998, the CO telephoned her contacts at each of the prospective offerors (including Ms. Stephanie Jattuso, Camber's Contracts Manager) to advise "that the prime on one of the teams participating on the SIR had withdrawn from the competition, that the remaining team members wished to continue in the competition, and that FAA would extend the due date until 2:00 P.M. on January 30 to enable them to regroup and submit a proposal." All of these telephone calls, the CO states, were completed by 5:00 P.M. on January 23, 1998. Following such telephone calls, the CO "telexed written confirmation of the new closing date." AR, Exh. 10, ¶3. The fax letter in question contained a single sentence: "The date and time for receipt of offers under RFO DTFA01-96-R-11087 has been extended to 2:00 p.m. e.s.t., on January 30, 1998." AR, Exh. 11. There is no evidence that the CO advised other prospective offerors in late January that they would be afforded a similar, further opportunity to realign or "regroup" their teams.

35. By letter dated January 28, 1998, AMTI advised the CO that, with the Boeing withdrawal, AMTI would serve as prime contractor for a reconstituted team consisting of AMTI, Overlook, ISI and Zeta. AR, Exh. 42. This was the first mention of Zeta since the September 1996 SIR response from Overlook. AMTI made no mention of Illgen in this January 28, 1998 letter.

36. On January 30, 1998, ISN, Camber and AMTI submitted their proposals to the Program. AR, Exhs. 12, 13 and 14. Proposals were also received from SAIC and SRC. See AR, Exh. 18, Technical Evaluation Report, page 4. ISN's proposal indicated one significant change in team alignment, namely, another major prospective subcontractor, [Deleted], was added to ISN's team. Under ISN's proposal, [Deleted] was to perform approximately [Deleted]% of the total GPS TAC effort. Also, the percentage of participation for [Deleted] was reduced [Deleted] from "20% or more" to [Deleted]% in

Total Score	300	*	*	*	*	*	*	*	*
Factor 4 Risk	1.0	*	*	*	*	*	*	*	*
Adjusted Total	300	*	*	*	*	*	*	*	*

* [Deleted]

AR, Exh. 15, Advisory Report; AR, Exh. 18, Technical Evaluation Report, page 4.

40. In terms of technical merit, ISN ranked [Deleted], with an overall numeric score of [Deleted] out of a possible 300. AR, Exh. 18, page 4. Camber [Deleted], with an overall score of [Deleted] scored [Deleted] lower than AMTI, with its overall score of [Deleted]. *Id.* From a review of the Evaluation Report (AR, Exh. 18), the principal reason for the [Deleted] difference was the difference in quality of the key personnel on the AMTI team. Obviously, this personnel quality difference explains the [Deleted] divergence in scores between AMTI and the others for Factor 3, Key Personnel. Perhaps of equal significance, the difference between AMTI and the others in terms of quality of its key personnel explains the significantly better showing AMTI was able to make for Factor 1, Technical Knowledge & Understanding, as well. Higher caliber technical personnel meant better written briefing charts and oral presentations for the three sample tasks, and greater ability to provide appropriate and complete oral responses to "pop quiz" questions.

41. The real advantage for AMTI was the inclusion on its team of Overlook as a major prospective subcontractor. Overlook personnel accounted for [Deleted] of 5 key personnel categories specified by the RFO ([Deleted]) and for [Deleted] of the [Deleted] key personnel identified in AMTI's proposal. In particular, [Deleted] Overlook incumbents on the GPS Product Team, proved critical to AMTI's success, as they were the presenters of AMTI's solutions for two of the three specified Sample Tasks under the RFO. The Evaluation Report, in addressing the evaluation of Factor 1, Technical Knowledge & Understanding, makes plain the advantage AMTI had secured as a result of having these Overlook incumbents on its GPS TAC team:

[Deleted]

42. Furthermore, the presence of such Overlook incumbents contributed to the degree of confidence reflected in the score AMTI attained for Factor 4 (Risk). The Evaluation Report likewise makes plain that such confidence stems from its positive "past experience" with the incumbents being offered by AMTI:

Overall the evaluators had a high degree of confidence that the offeror would perform satisfactorily and posed very little risk. Overall, the evaluators were almost completely confident in this offeror as reflected in

this score. However, due to some past performance issues included in the ASU advisory report, the evaluators decided to reflect this fact in the overall rating [[Deleted] out of a possible 1.0]. It was the evaluators' judgment obtained during past experience that performance problems will be addressed to the team's satisfaction. AR, Exh. 18, page 25.

43. Without these critical Overlook incumbents whom AMTI had designated and used as key personnel for its GPS TAC proposal, ISN was unable to fare as well. For example, ISN's evaluation for Factor 1, Technical Knowledge & Understanding, reflects how [Deleted] ISN did without Overlook's [Deleted], the incumbent who had prepared and presented the AMTI response for Sample Task 1, "WAAS Trade Study, Technical Analysis," and [Deleted], the incumbent whom AMTI had proposed as WAAS team lead and who also participated in the oral presentations on AMTI's behalf (AR, Exh. 14):

[Deleted]

AR, Exh. 18, page 13.

44. ISN's lack of the Overlook key personnel incumbents/WAAS experts [6] also contributed significantly to the evaluation team's belief that ISN would have a [Deleted] problem, a major element that was reflected in ISN's [Deleted] rating ([Deleted] out of a possible 1.0) for Factor 4 (Risk). In this regard, the Evaluation Report states, in pertinent part:

[Deleted]

AR, Exh. 18, page 16.

45. In terms of Factor 3, Key Personnel, the Evaluation Report narrative for ISN underscores just how much of an advantage AMTI had in putting forth such incumbents as key personnel in its proposal:

[Deleted]

AR, Exh. 18, page 15.

46. Camber, though an incumbent GPS contractor itself, also suffered in comparison with AMTI, especially when its responses were measured against those of Overlook's Messrs. [Deleted] and [Deleted], who, as noted above, had provided the input for Sample Tasks 1 and 3. The evaluation team obviously concluded that Camber's approach to those Sample Tasks, [Deleted], fell short of the treatment Overlook's people were able to give those tasks. In discussing Camber's rating for Factor 1, Technical Knowledge & Understanding, the evaluation team had the following to say:

[Deleted]

AR, Exh. 18, pages 21-22.

47. The technical evaluation of Factor 3, Key Personnel, reflects even more strongly AMTI's advantage over Camber, in terms of its use of Overlook personnel. Camber received a numeric score of [Deleted] for Factor 3, with an adjectival rating of [Deleted], because it was not able to propose what the evaluators deemed as "qualified key personnel" for [Deleted] required key personnel categories. As discussed above, [Deleted] was filled for AMTI with [Deleted] experienced and very well qualified Overlook incumbents. Camber now questions the evaluation team's failure to obtain the [Deleted] information that would have been needed to evaluate the credentials of [Deleted], one of the individuals Camber had proposed for that position. [7] See AR, Exh. 18, Appendix B, page B-4. No such information was needed to evaluate Overlook personnel who had been serving alongside evaluators on the GPS Product Team for some time. *Id.*, pages B-9 to B-10; AR, Exh. 14, Vol. 4, pages 4-6 and 4-20. It is small wonder that Camber's president, Mr. Walter Batson, has been quoted by the CO as saying that "he had been convinced that only a team that included Overlook would win the competition and for that reason had not been in favor of Camber competing for the TAC [*i.e.*, without Overlook on its team]." AR, Exh. 39, ¶16. It is also perfectly understandable why Camber, in late January 1998, admittedly had sought to entice Overlook to join its team, once it learned of Boeing's departure. Finding 33; AR, Exh. 35, Attachment 1, ¶3.

48. Conversely, it is completely understandable why, after that departure, the Program Office was willing to permit the Overlook Team to "regroup" and to have extra time to submit a proposal for the GPS TAC. Indeed, it was due in great measure to AMTI's subsequent assurances (1) that Overlook was an integral part of the reconstituted "AMTI Team," and (2) that Overlook would be providing its highly qualified employees to perform for AMTI under the GPS TAC contract, that the Program Office was so favorably disposed towards AMTI, had such a "high degree of confidence" in AMTI, and considered AMTI to pose "very little risk" to the successful performance of the contract. AR, Exh. 18, page 25.

49. In its January 30, 1998 letter to the CO, which forwarded the proposal, AMTI stated:

We have selected a first-class team comprising of AMTI, Overlook Technology Systems, Inc., Information Solutions International, and Zeta Associates, Inc. to respond to the Federal Aviation Administration's (FAA's) Product Team requirements to support the Global Positioning System (GPS) Integrated Product Team. Our Team's strength is further augmented by the fact that we have expert knowledge of, and experience working on, the FAA GPS program.

AR, Exh. 14, forwarding letter.

50. The AMTI technical proposal likewise contained a number of representations regarding the participation of Overlook as a member of the AMTI Team. Volume 1, Section III of the AMTI technical proposal is a KEY PERSONNEL chart which lists

Overlook employees for [Deleted] of the [Deleted] key employee positions for the AMTI Team. Volume 1, Section VI - STATEMENT OF CONFLICTS OF INTEREST lists Overlook as a "Subcontractor" and refers to and includes a letter dated January 27, 1998 from Overlook to AMTI, which provided a statement by Overlook regarding conflicts of interest and which forwarded a number of other items needed for AMTI's proposal submission, including a disc containing Overlook's "bid labor rates at sell prices." AR, Exh. 14.

51. Volume 2 of the AMTI technical proposal contains the written responses (briefing charts) for each of the three Sample Tasks provided with the RFO. The AMTI written response (briefing charts) for Sample Task 1 lists as the presenter "[Deleted], Overlook Systems Technologies, Inc., The AMTI Team." Similarly, the AMTI written response to Sample Task 3 lists as the presenter "[Deleted], Overlook Systems Technologies, Inc., The AMTI Team." The Briefing Personnel charts for those responses indicate a total participation for Overlook employees in the preparation of the two responses of [Deleted]% and [Deleted]%, respectively. The Briefing Personnel chart included with the written response to Sample Task 2 indicates that six Overlook employees contributed [Deleted]% of the effort towards preparing that response as well. (In contrast, the percentages of AMTI participation listed for each of the three Sample Task submissions were [Deleted]%, [Deleted]% and [Deleted]%, respectively.) *Id.*

52. The Introduction to Volume 3 of the AMTI technical proposal, Responses to Management Questionnaire, contains the following statements by AMTI regarding Overlook and the other members of the "AMTI Team":

AMTI has successfully organized [Deleted] businesses into an integrated contractor team with relevant satellite navigation experience and expertise in response to your Global Positioning System (GPS) Technical Assistance Contract (TAC) Request for Offers (RFO). Satellite navigation is our business, and we are fully prepared to meet the challenge. The AMTI Team consists of the following members:

- Advanced Management Technology, Inc. (AMTI)
- Overlook Systems Technologies, Inc. (Overlook)
- Innovative Solutions International (ISI)
- Zeta Associates Incorporated (Zeta)

The AMTI Team assures the FAA of a risk-free start-up on GPS TAC support activities. We have the relevant technical experience, a track record of [Deleted] of successful performance with your Program office, and have demonstrated the capability to respond to near-term demands as well as satisfying long-term staffing requirements. The award of the TAC

contract to this team has many advantages to the government apart from the technical expertise discussed herein.

Because this contract represents a significant portion of each team member's revenues, the FAA is guaranteed top management participation and attention.

53. Volume 3 of the AMTI technical proposal provided yet further assurance to the Program Office regarding the commitment of Overlook and the other AMTI Team members, by representing (1) that there were in place executed Teaming Agreements [8] with all of the team members; and (2) that the members had already agreed to how the work would be allocated among them -- that each would retain the work they previously had been doing for the GPS Product Team and would appropriately allocate the balance of other work ordered by the Government:

Allocation of Effort

AMTI has entered into Teaming Agreements with Overlook, ISI, and Zeta that establish goals for each subcontractor's participation in work efforts on the GPS TAC contract. Assuming that the FAA issues Task Orders authorizing all the support currently being provided to the GPS PT, including support comparable to that currently being provided by each of our subcontractors, it is our intent that each subcontractor will continue to provide the support that it is currently providing. In other support areas, the AMTI Team will assume the tasks currently performed by the displaced incumbents. We will take immediate action to hire or replace those displaced personnel so as to minimize task disruption. Our methodology and schedule for assuming this effort are described in detail in our Transition Plan provided in response to **Management Question 10**. The current effort being provided by AMTI Team members is as follows:

AMTI. In 1997, AMTI delivered approximately [Deleted]-years of effort to the GPS PT. Areas of support included: *
* *

Overlook. In 1997, Overlook delivered approximately [Deleted]-years of effort to the SatNav program office. Areas of support included: WAAS systems engineering; WAAS communications systems engineering; WAAS program management; NAS implementation; International/Public Affairs; and financial and program management support.

ISI. In 1997, ISI delivered approximately [Deleted]-years of effort to the GPS PT. The areas of support included: * *
*

Zeta. In 1997, Zeta delivered approximately [Deleted] years of effort, primarily to the WAAS project.

AR, Exh. 14, page 3-6-2 (emphasis in original). The notion that there already were in existence agreements with the prospective AMTI subcontractors and team members was likewise conveyed by AMTI's inclusion of a chart, based on RFO Table L-1, showing a breakdown of estimated hours by labor category and by allocation between AMTI and its subcontractors. That chart, Figure II.6-2, contains the following caption:

Figure III.6-2. Subcontracted Efforts by Labor Category and Percentage of Estimated Level of Effort. *AMTI's subcontractor agreements deliver the most qualified personnel available to satisfy FAA requirements.*

AR, Exh. 14, page 3-6-3 (emphasis in original). In fact, as AMTI concedes, there were no Teaming Agreements for the instant GPS TAC procurement other than the above-described May 27, 1996 Teaming Agreement contemplating an Overlook prime contract. There never was a Teaming Agreement of any sort with Zeta. Moreover, there were no other written "subcontractor agreements" or other documents executed by or among AMTI and members of the "AMTI Team" which "established goals" for each prospective subcontractor or which "allocated" prospective work among AMTI and the subcontractors.

54. Concurrent with the technical evaluation, the Contracting Officer reviewed cost information provided by the offerors in their proposals and information provided by the price analyst to determine price reasonableness. AR, Exhs. 19 and 20. [Deleted] Camber and ISN [Deleted], with evaluated price offers of \$[Deleted][9] and \$[Deleted], respectively. AMTI had submitted a [Deleted] offer, which was evaluated at \$[Deleted]. AR, Exh. 22.

55. Upon consensus of the evaluation team, it was determined not only that AMTI's proposal was clearly technically superior, but that it was the only proposal that would provide technically qualified personnel for each of the five specified key personnel positions. AR, Exh. 18. On this basis, the CO determined to recommend to the Source Selection Official ("SSO") to "downselect" and eliminate from the competition all offerors other than AMTI, in accordance with the following provision of the FAAAMS:

During the screening process, the SSO may decide to eliminate an offeror from further consideration without considering the cost or pricing information that was submitted in the response to the SIR.

FAAAMS §3.2.2.3.1.2.5. The CO then proposed to engage AMTI in price negotiations, in order to attain a more favorable price. By the same token, the CO determined it to be unwise to announce to AMTI and the others the "downselect," because, in doing so, she felt that the Program Office would be negating the "negotiating leverage of apparent competition." AR, Exh. 21. The CO issued a memorandum dated May 4, 1998 to the

Product Team's Legal Advisor documenting this determination. *Id.* On the basis of this determination, the Program Office engaged in price negotiations only with AMTI. Discussions were held on May 6, 1998 (AR, Exh. 22), and AMTI submitted revised pricing on May 8, 1998 (AR, Exh. 14).

56. AMTI may have been aware of the Program Office's interest in obtaining a revised price proposal from it one month or perhaps more prior to the May 4, 1998 memorandum. More particularly, although AMTI's revised pricing was submitted by a letter dated May 8, 1998 (AR, Exh. 14), it contains revised AMTI composite rate pricing information bearing an April 8, 1998 date and a spreadsheet from Overlook entitled "Overlook Systems Technologies, Inc. Best & Final Labor Rates At Selling Price, DTFA01-96-R-11087 Proposal" which bears a date of April 16, 1998. *Id.* The AMTI letter also forwards Best and Final Offer ("BAFO") revised rates from one other prospective subcontractor, ISI, and nothing whatsoever from the fourth member of the "AMTI Team," Zeta. *Id.*

57. The May 8, 1998 AMTI letter itself indicated that the revised price proposal was arrived at as a result of discussions with the prospective subcontractors and that, other than the revisions included in the new price proposal, no other aspect of the AMTI proposal of January 30, 1998 was being affected:

Advanced Management Technology, Inc. (AMT) is pleased to present this revised cost proposal in response to the above referenced request. ***These revisions are made as a result of recent discussions that have taken place regarding the original cost proposal data.***

AMTI believes the revisions incorporated into the enclosed proposal represent reasonable and realistic estimates for performing the effort described in the statement of work included with the RFO. Combined with our technical capability we believe the revised cost proposal will provide the government with the best value team to support the SATNAV GPS program. ***AMTI states that only those revisions required are incorporated and no other changes in any other portion of the original proposal have been made.***

AR, Exh. 14, May 8, 1998 AMTI letter to Ms. Sandra Harrelson (Emphasis supplied)

58. Accompanying the revised cost information presented with the AMTI May 8, 1998 letter was a "Revised Cost Information Summary," which contained the following statements:

DIRECT LABOR

[Deleted]. ***Several personnel utilized to determine AMTI's composite rate structure were either deleted or shifted to a more realistic category.***

[Deleted]

SUBCONTRACTORS

Successfully negotiated revised rates using a [Deleted] multiplier to further provide the government with more realistic prices and reduced risk. [Deleted]

[Deleted]

AR, Exh. 14, Revised Cost Information Summary (Emphasis supplied.) Thus, AMTI indicated that it was making [Deleted] reductions in [Deleted] its January 30, 1998 proposal, and that it had "successfully negotiated" with its prospective subcontractors reduced [Deleted] rates which incorporated a [Deleted] multiplier (*i.e.*, that the subcontractors had all agreed to incorporate within their "sell" rates [Deleted]). Also, AMTI indicated that, to achieve lower, "more realistic" composite rates, it either deleted personnel or shifted personnel to lower priced categories.

59. AMTI's May 8, 1998 letter enclosed the ISI revised rate information along with an undated ISI forwarding letter, which indicated ISI's permission to utilize the revised rates and which stated ISI's commitment to "abide by the negotiated composite rate." *Id.* No such forwarding letter accompanied Overlook's April 16, 1998 spreadsheet; at least none was presented to the Program Office with AMTI's May 8, 1998 letter. AR, Exh. 14. In fact, however, there was an Overlook letter dated April 16, 1998, which forwarded the revised rates and which indicated the conditions under which those rates may be used by AMTI, namely, that such rates were "based on Overlook being awarded a subcontract of approximately 33 percent of the prime contract award by each fiscal period."

60. According to a letter dated August 5, 1998 to the ODRA from AMTI's counsel, AMTI had held a meeting with its subcontractors Overlook and ISI on April 15, 1998 and all of them, "including Overlook," had "jointly agreed to use a multiplier of [Deleted]." The ISI letter purportedly was sent to AMTI on April 15, 1998 and supposedly was "written confirmation that [Deleted] would be the multiplier it used for its final bid rates." Also according to AMTI's counsel, Overlook on April 16, 1998 "renewed on its agreement to use the [Deleted] multiplier and notified AMTI that it would only agree to reduce its multiplier rates from [Deleted] [as it had used for the January 30, 1998 proposal] to [Deleted]." AMTI's counsel asserts that "when Overlook submitted this rate to AMTI, it was based upon staffing [Deleted] persons on this contract" and that "the 33% that Camber refers to was Overlook's ceiling percentage." No explanation is given as to what the term "ceiling percentage" means. Certainly, "approximately 33%" does not equate to "not more than 33%." In any event, [Deleted] persons (which is [Deleted] fewer than had been provided to the FAA by Overlook in 1997 -- *see* Finding 53) is not "approximately 33% of the prime contract award for each fiscal period." AMTI's counsel goes on to relate that, in response to the Program Office request on May 6, 1998, AMTI submitted a revised pricing proposal on May 8, 1998, and included in that proposal the

following final labor rate multipliers for itself and its two subcontractors, ISI and Overlook:

AMTI [Deleted]

ISI [Deleted]

Overlook [Deleted]

61. "Because Overlook would not lower its rate to the agreed upon [Deleted]," AMTI's counsel states, "AMTI was forced to lower its own multiplier to [Deleted] in order to achieve a realistic cost proposal." Further, AMTI, as its counsel indicates, "in the BAFO" did not bid 33% for Overlook or even the [Deleted] Overlook personnel AMTI contends Overlook had been discussing. Rather, he states, "AMTI bid [Deleted] Overlook personnel." He seeks to justify this action by AMTI as follows:

[B]ecause AMTI is a small, minority, woman-owned business, it quite simply could not afford to just cover the additional expense of the Overlook personnel. It would have cost AMTI an additional \$[Deleted] to bid all [Deleted] Overlook personnel at the [Deleted] rate. * * * This number was decreased from the original proposal because AMTI would be unable to justify to the FAA the high contract price caused by the expensive Overlook personnel. Overlook refused to lower the rates for its staff and thus, AMTI was forced to make a business decision: AMTI could bid all [Deleted] of Overlook's people at the [Deleted] multiplier and lose the contract, or AMTI could cut the number of Overlook's positions, and bid them at the higher rates. AMTI could not discuss this with Overlook, however, because no one at Overlook was available to make the decision.

62. The revised pricing proposal of May 8, 1998 does not appear to include even [Deleted] positions for Overlook. Instead, it seems, only [Deleted] positions were actually bid for Overlook in the revised AMTI proposal. The table immediately following the above-mentioned "Revised Cost Information Summary," a table entitled "Percentage Breakdown to Final Composite Rate Table," depicting the participation of AMTI and each of its subcontractors for Base Year 1, shows Overlook ("OSTI") with [Deleted]. As the table itself indicates, this represented for Overlook a share equal to [Deleted]% of the overall contract value for Year 1. This was far less than the 33% share for "each fiscal year" that Overlook's April 16, 1998 letter stated as a condition to AMTI's use of the revised pricing structure presented. In contrast, the share indicated for AMTI was [Deleted]% and approximately [Deleted] positions, nearly [Deleted] the amount of AMTI participation indicated earlier in its January 30, 1998 proposal. *See* AR, Exh. 14, January 30, 1998 proposal, Vol. 3, page 3-6-3, Figure III.6-2 (which shows a total percentage for AMTI for Year 1 of only [Deleted]%) [10]. This shift is apparently what AMTI meant when it said: "**Several personnel utilized to determine AMTI's composite rate structure were either deleted or shifted to a more realistic category.**" AR, Exh. 14, "Revised Cost Information Summary."

63. Based on the above, it is apparent that the use AMTI made of Overlook's April 16, 1998 rates and its highly qualified key personnel was completely unauthorized. AMTI proceeded to use those rates and personnel with no assurance that, once Overlook discovered what AMTI had done, Overlook would still make those critical individuals available for the GPS TAC effort.

64. As a result of the measures it had taken, AMTI's revised proposal was evaluated at a total price of \$44M, which represented a reduction of more than \$[Deleted] from AMTI's original proposal of January 30, 1998. Although the \$44M amount still exceeded the prices offered by the closest competitors [Deleted], the Program Office determined it to be "fair and reasonable." AR, Exh. 22.

65. The evaluation team's findings were briefed to the SSO on May 19, 1998, and the full evaluation report (AR, Exh. 18) was provided to him for consideration. AR, Exh. 23. On May 28, 1998, the SSO concurred with the team's recommendation that an award be made to AMTI. AR, Exh. 24. Contract No. DTFA01-98-C-00048 was then awarded to AMTI on June 2, 1998. AR, Exh. 25.

66. By letter dated June 5, 1998, Camber requested a post-award debriefing. Accompanying that letter was a series of questions relating to, *inter alia*, the screening process, oral presentations, evaluation process, and the selection process. AR, Exh. 35.

B. The Debriefings, Protests and ODRA Proceedings

67. A debriefing was conducted for Camber on June 11, 1998. Other debriefings were conducted for the remaining unsuccessful offerors, the last being conducted on June 15, 1998 for ISN. Thereafter, protests were received by the ODRA from Camber and ISN, on June 18, 1998 and June 22, 1998, respectively.

68. ODRA Dispute Resolution Officers ("DROs") were appointed, both for purposes of pursuing possible amicable resolution via alternative dispute resolution ("ADR") measures, as well as for adjudicating the protests under the ODRA's default adjudicative process. The two protests were consolidated for both purposes, since they involved the same procurement and raised at least one issue in common. Richard C. Walters was designated the DRO for adjudication and William R. Sheehan was designated to serve as DRO for purposes of exploring ADR. Under the flexible procedures ODRA may employ, both functioned concurrently and independently of one another.[11]

69. Upon request, AMTI, the awardee, was allowed to participate as an "interested party". By letter of June 24, 1998, SRC applied to intervene as an "interested party," but its application was denied by the ODRA, by Order dated July 6, 1998.

70. There were two other preliminary procedural matters that the ODRA addressed in these protests. First, in connection with a Protective Order, which the ODRA issued for

the consolidated protests on July 1, 1998, the ODRA, by Decision of the DRO dated July 7, 1998, denied an objection raised by ISN and permitted the admission under the Protective Order of Camber's attorneys, Alan M. Grayson, Esq. and Ira E. Hoffman, Esq. of Grayson and Associates, P.C. By that Decision, the ODRA also sustained the objections of Camber and AMTI and denied the applications of ISN's in-house counsel, Robert M. Cozzie, Esq. and its "outside General Counsel," Norman H. Singer, Esq. of Rudnick, Wolfe, Epstien & Zeidman for admission under the Protective Order. Upon motion for reconsideration by ISN, the Decision was affirmed by Order of the Director of the ODRA on July 17, 1998. The ODRA admitted under the Protective Order Kenneth D. Brody, Esq. of McMahon, David & Brody as ISN's counsel in the consolidated protests.

71. The second preliminary procedural matter involved a Motion to Dismiss filed by the Program Office based on purported lack of timeliness of Camber's protests. That motion was denied by the ODRA, by Order dated July 6, 1998.

72. Camber raised two protest grounds within its June 18, 1998 protest letter: (1) that "the FAA's determination that Overlook satisfied the screening Information Request ("SIR") requirements was incorrect; and (2) that "AMTI's late 'switch' with Overlook as the prime contractor was unlawful."

73. In its June 22, 1998 protest, ISN raised the following grounds:

"(1) The contract awardee does not have the requisite key personnel as represented in its proposal." ISN further asserted in this regard: "It now appears, subject to appropriate proof, that AMTI misrepresented the availability and capabilities of its Key Personnel" This was, in essence, an allegation that AMTI had utilized "bait and switch" tactics to secure the award.

"(2) AMTI was not a designated contractor eligible to compete in the procurement." This was substantially the same as the late "switch" grounds that Camber was asserting.

"(3) Two members of the evaluation team for the GPS TAC procurement were former employees of AMTI." ISN questioned the impact on the integrity of the procurement of including such employees as technical advisors to the evaluation team.

"(4) The evaluation process and scoring lacked an objective and rational basis as applied to the evaluation criteria." ISN challenged the rational basis for the scoring of Factor 4 (Risk), posited that the "team consensus approach" used was arbitrary and capricious, and inferred from a statement allegedly made by the SSO that the competition was a "pretense" and that the Program Office had essentially engineered a sole source award to favored incumbents "without proper justification."

"(5) Key personnel identified by ISN met and exceeded the requirements defined in the SIR."

74. On July 6, 1998, Camber filed a Supplemental Protest which adopts the "bait and switch" ground of ISN's protest and cites the fact that Overlook had walked off the job at the end of June 1998 (discussed in more detail below). In the supplemental protest, Camber alleges that it first became aware of Overlook's intention to abandon the GPS TAC project on June 29, 1998.

75. On July 13, 1998, the Program Office filed with the ODRA an Agency Response, containing a statement by the Program Office of the facts and of its legal arguments regarding both protests, together with three volumes of relevant documents. At the ODRA's request, the Program Office supplemented its Agency Response on July 21, 1998, with an additional volume of affidavits and other documents, together with its earlier Agency Response submittal annotated with citations to the affidavits and documents in the four volumes.[12] On July 27, 1998, the other parties submitted their comments to the ODRA with regard to the Agency Response, as supplemented. Thereafter, with the ODRA's permission or at its request, the parties provided additional factual submittals and legal arguments.

76. Camber filed a second Supplemental Protest on July 27, 1998. That protest raised the following grounds:

1. The awardee substituted the majority of its key personnel 3 1/2 weeks after beginning performance. This substitution is a violation of the contract and a cardinal change to AMTI's offer. Camber protests this material, uncompetitive modification to the contract and maintains that AMTI's award should be terminated and the competition re-opened.

2. The Program Office stated in its Agency Report that it considered Camber to be ineligible for award based on alleged defects in the qualifications of certain key personnel proposed in Camber's offer. This was Camber's first notice of the Program Office's intent to reject Camber's offer as non-responsive, and Camber protests the rejection of its offer on that ground.

77. The DRO, by letter dated July 28, 1998, suggested that the first ground of Camber's second Supplemental Protest was essentially an elaboration upon the "bait and switch" ground previously raised in its first Supplemental Protest. Camber concurred and, by its attorneys' letter of July 29, 1998 to the ODRA, withdrew the first ground on that basis. As to the second ground of Camber's second Supplemental Protest, the DRO, by its July 28 letter, had requested Camber to show cause why it ought not be dismissed for lack of timeliness (since the supplemental protest had been filed some 2 weeks after Camber's attorneys had received the Agency Response). Upon further reflection, the DRO, by letter dated July 29, 1998, advised Camber that the second ground of the second Supplemental Protest was not challenging any action by the Program Office, but merely a legal

argument: "The record does not reflect a Program Office rejection of Camber's proposal based on purported 'non-responsiveness.'" As such, the DRO stated that, rather than dismissing the second ground as untimely, the ODRA would consider what Camber had to say about "non-responsiveness" as additional comments by Camber regarding the Agency Response.

C. The Events After Contract Award

78. There appear to have been two post-award meetings conducted in June 1998 among the Program Office representatives and representatives of AMTI and its prospective subcontractors. These were held on June 16, 1998 and June 19, 1998, respectively. Overlook representatives were in attendance at both meetings. AR, Exhs. 27 and 28. According to Program Office Minutes of the June 19, 1998 meeting, AMTI represented to the Program Office that "all subcontractors had boilerplate subcontract agreements in hand [13] and good faith negotiations were underway to finalize the labor rates," and that "AMTI . . . planned to finalize all subcontract agreements by early [the following] week."

79. As part of the adjudication process, the ODRA requested that AMTI furnish to it all correspondence between AMTI and Overlook during the period mid-February (when the oral presentations took place) and July 2, 1998 (when the Program Office issued a cure notice to AMTI -- *see* Finding 89 below). The documents which AMTI furnished were represented, "to the best of [AMTI's] knowledge," as being all the correspondence that existed during that period between those parties. Among those documents, there was no written response to Overlook's April 16, 1998 letter regarding its BAFO rates being based on obtaining approximately 33% of the overall GPS TAC prime contract work volume. AMTI's counsel (by his letter of August 5, 1998) has advised the ODRA that there was no further communication of any sort regarding those rates up until AMTI's use of them in its May 8, 1998 BAFO proposal. Further, the documents provided by AMTI do not indicate that a copy of the BAFO proposal was ever furnished by it to Overlook. Indeed, there is nothing in the record to indicate that at any time prior to the June 16 and June 19, 1998 meetings, Overlook had been advised that AMTI had bid the GPS TAC contract with only the four key personnel from Overlook, and no non-key personnel.

80. An affidavit submitted along with ISN's comments on the Agency Response by [Deleted], describes a telephone call which he received from a "senior official with Overlook" on June 19, 1998, the same date as the second post-award meeting. At the time, ISN had had its debriefing (which occurred on June 15, 1998) but had yet to file its protest (which was accomplished on June 22, 1998). According to [Deleted], this individual from Overlook inquired as to whether ISN was intent on filing a protest and then proceeded to provide [Deleted] with information regarding difficulties it was experiencing with AMTI. [Deleted]'s affidavit also describes his subsequent communications with this individual during the latter part of June as well as on July 20, 1998. The [Deleted] affidavit contains the following description of those conversations:

6. On or about June 19, 1998, after ISN's debriefing but prior to submitting our protest, I received a call from a senior official with

Overlook who asked if we intended to file a protest. I told him that we were reviewing the available information and developing the protest grounds but that we had not yet filed our protest with the FAA. He then informed me that AMTI and Overlook had not, despite repeated attempts during the process, been able to come to mutual agreement on a subcontract, and that it was highly unlikely that any such agreement would be reached. Overlook's representative also stated that, because Overlook had provided the required key personnel, the contract award could be overturned because AMTI did not have key personnel that met the minimum RFO evaluation requirements.

7. After ISN filed its protest on June 22, 1998, and before July 2, 1998, I again spoke with the Overlook representative and asked whether Overlook had executed a subcontract agreement with AMTI. He stated that no agreement had been reached nor did there appear to be any possibility of resolution. He also told me that Overlook intended to complete the last task remaining on its contract and would be withdrawing its support from the team immediately thereafter. He also indicated during our conversation that the lack of an agreement was an ongoing problem. In fact, he commented that AMTI had been very reluctant to speak with Overlook after the contract award and that everyone else probably knew who won the contract before AMTI notified Overlook.

8. On July 20, 1998, I again spoke with Overlook's senior official who stated that when Overlook was the prime contractor for the team, it had executed teaming agreements with its members. The agreements generally stated that the team had three objectives: protect the incumbency; compete for new work; and utilize each member's rates as proposed in the bid/offer. When Boeing (and later AMTI) became the prime contractor for the incumbent contractor team, Overlook's teaming agreements were voided, but no new agreements were ever executed by the team members. The Overlook representative further informed me that Overlook had never entered into any written agreement with AMTI to ensure Overlook's commitment.

9. One of the primary issues for the failure to reach agreement, according to Overlook's representative, is that AMTI repeatedly attempted to impose labor rates and work scope on Overlook that were substantially lower than those proposed by Overlook. Because of the severe rate differential submitted by AMTI to the FAA, Overlook could never provide the key personnel to support the GPS TAC program at the proposal rates. According to the Overlook official, the rates proposed by AMTI precluded the use of Overlook's key personnel on the GPS contract.

81. The foregoing described communications with a "senior Overlook official" were apparently the basis for the following statements contained within ISN's protest:

It has been brought to ISN's attention that AMTI does not have a teaming agreement or subcontract in place with at least one of its team members. This team member is presently an incumbent in the FAA GPS arena and is to provide key personnel for the GPS TAC. However, sources have informed ISN that it is improbable that such an agreement will be reached and AMTI will not have the Key Personnel identified in its proposal to perform the GPS contract.

82. According to the August 5, 1998 letter of AMTI's counsel, AMTI held an "internal meeting" with the presidents of each of its prospective subcontractors on the day following the second post-award meeting with the Government, *i.e.*, on June 20, 1998. The June 20 meeting he describes as follows:

The specific contract rates and staffing levels were discussed at this point. At this meeting, AMTI offered Overlook all [Deleted] positions that it had originally bid on, but at the lower rate of [Deleted], plus additional non-key positions at contract rates. This would have resulted in increased revenue and a decrease [sic] indirect rates to Overlook.

83. Then, on June 22, 1998, AMTI's counsel says:

Overlook provided AMTI with its loaded labor rates. [14] The Overlook loaded labor rates exceeded the FAA GPS TAC contract rates in all but one labor category. All of the Overlook key personnel rates exceeded the FAA GPS TAC contract rates. [15]

84. By letter dated June 23, 1998, AMTI offered Overlook (referred to as "OSTI") the following "key positions" on the GPS TAC contract:

<u>Key Position Title</u>	<u>OSTI Employee Rate</u>	
Senior Systems Engineer	*	*
Senior Systems Engineer	*	*
Senior Comm Systems Engineer	*	*
Senior Program Management Analyst	*	*
Senior Financial/Acquisition Analyst	*	*

* [Deleted]

85. The rates for these positions were the same as those Overlook had offered as part of the January 30, 1998 proposal by AMTI, and reflected a multiplier of [Deleted]. According to AMTI's counsel (in the aforementioned August 5, 1998 letter), "when AMTI submitted its initial cost proposal in January 1998, Overlook personnel were bid

on [Deleted] positions, [Deleted] of which were key." The so-called "BAFO" rates offered by Overlook with its letter of April 16, 1998 reflected a reduced [Deleted] multiplier and, as stated above, were conditioned on Overlook being provided a substantial increase in work volume in order to be able to recover its overhead costs, approximately 33% of the overall prime contract work. Finding 59; *Compare* AR, Exh. 14, Vol. 5, chart entitled "Overlook Systems Technologies, Inc. Fully Burdened Fixed Hourly Rates" with AR, Exh. 14, spreadsheet dated "4/16/98" entitled "Overlook Systems Technologies, Inc. Best & Final Labor Rates At Selling Price."

86. As related above and in the August 5, 1998 letter of AMTI's counsel, AMTI chose to use those reduced Overlook rates and, unbeknownst to Overlook and without its authorization, to offer to the Government, not even the [Deleted] positions included in the original proposal, but less than half that number -- [Deleted] according to AMTI's counsel, but only [Deleted] according to the composite rate breakdown chart which accompanied AMTI's May 8, 1998 BAFO forwarding letter. AR, Exh. 14, "Percentage Breakdown to Final Composite Rate Table". Apparently, AMTI now forgets that it had eliminated Overlook's Mr. [Deleted] (previously offered as the [Deleted] -- AR, Exh. 14, January 30, 1998 proposal, Vol. 4, Key Personnel) from its BAFO cost proposal in May 1998. *Id.*

87. In any event, when on June 23, 1998, AMTI made an offer to Overlook, it offered five positions, including Mr. [Deleted], and reintroduced the "inflated" January 30, 1998 proposal rates for Overlook, apparently in the hope of inducing Overlook -- and, more particularly, the critical Overlook key personnel -- to remain with the "AMTI Team." By letter to AMTI dated June 24, 1998, Overlook indicated disappointment with that offer, but gave AMTI one more chance to redeem itself and have access to the Overlook key personnel that AMTI needed in order to remain in "compliance with the prime contract":

As you are aware, this offer is considerably different than what we have been discussing to date. This in and of itself is not a deterrent to consummating an agreement in a timely manner. However, as I indicated, in order to preclude future major changes, and enable OSTI to agree to a subcontract, we agreed that AMTI will furnish OSTI on June 24, 1998, by courier, a copy of your proposed subcontract. This should cover the length of time, rates, and other appropriate terms and conditions under which our service would be required.

Upon receipt and review of this document we will contact you. It is our desire to enter into a definitive mutually agreeable subcontract as quickly as possible in order to assure your compliance with the prime contract.

88. According to AMTI's counsel (in the August 5, 1998 letter), "AMTI and Overlook continued to negotiate the various rates and staffing allotments until June 29, 1998, when Overlook stopped performing under the contract." Overlook's June 29, 1998 letter to AMTI explains this action:

Thank you for your offer of June 23, 1998. Overlook has thoroughly reviewed your letter and the draft subcontract which you provided us on June 24.

As you know from all of our teaming discussions over the past 2 years, Overlook has had three fundamental objectives [16] in the Satnav TAC:

1. Providing optimum support to the FAA on a program of national importance through a cooperative, collaborative team process.
2. Preserving our incumbent staff; and
3. Having a reasonable opportunity for additional work as new task orders are issued.

The AMTI Team proposal to the FAA upon which contract DTFA01-98-C-0048 [sic] was awarded provided for performance by an integrated, cohesive contractor team. Your proposed subcontract to Overlook contains terms which were a complete surprise to us and fails to provide a vehicle which would enable us to perform as a team as described in the proposal. ***It does not afford us the opportunity to achieve the staffing levels required to achieve the favorable rates bid.*** Further, your offer included inflated rates for [Deleted] positions. These rates bear no resemblance to any that we have proposed in any of our submittals to you. [17]

The proposed subcontract neither preserves our incumbent staff nor affords us any opportunity for growth.

In light of these facts, Overlook has no choice to decline your offer.

(Emphasis supplied).

89. As a result of this action on the part of Overlook, the CO issued AMTI a "cure notice" on July 2, 1998, in which she said the following, in pertinent part:

You are hereby notified that the Government considers your failure to provide qualified personnel to support the GPS Product Team to be a condition endangering performance of the contract. In addition, by the particular failure to provide required key personnel AMTI has failed to meet a material condition of the contract that was a basis for the award.

To date, AMTI has not provided all qualified key personnel for the Senior Systems Engineer category nor key personnel for the Senior communications Systems Engineer (Terrestrial), Senior Program Management Analyst, and Senior Financial/Acquisition Analyst

categories. In addition, there has been no confirmation of the availability of the required key person for the Senior Communications Systems engineer (Satellite) category [which was to have been filled by Pat Reddan of Zeta]. Furthermore, since June 9, weekly transition status reports have listed all key personnel specified in Section H.2 of the contract to be either "on board" or "OK," *implying their commitment to the contract, when, in fact, there was no such commitment.*

AR, Exh. 43 (emphasis supplied).

90. As stated above, the Overlook walk-out and this "cure notice" by the CO gave rise to Camber's first Supplemental Protest. (Finding 74).

III. Discussion

The following discussion will address initially the question of standing raised by the Program Office and AMTI. Next, it will explore each of the protest grounds raised by ISN and Camber in light of the foregoing findings of fact, focusing first on those issues which are peculiar to the individual protests and then finally on the two issues which both protests share in common (*i.e.*, those relating to the "last minute switch" and the alleged "bait and switch").

A. Standing

Both the Program Office and AMTI present arguments regarding standing. The Agency Response begins its "Legal Argument" with the following statement:

The bottom line on these protests is that neither ISN nor Camber is an interested party under AMS Sec. 3.9.3.2.1.3. Neither protester submitted an acceptable proposal for the GPS TAC contract which could have been the basis for a contract award. Neither the ISN nor the Camber proposals conformed to the material requirement of the RFO to provide qualified key personnel for all of the mandatory key personnel categories. (Exhibit 18, Technical Evaluation Report, pages 15, 22 and Appendix B pages B-1 through B-3, and B-6 through B-8). As a result of this material defect, neither proposal could be the basis for contract award. Neither ISN nor Camber was next in line for award, nor for that matter, in line for award at all.

AR, page 38. The Agency Response goes on to raise a separate argument regarding ISN's standing to protest:

In addition, ISN's proposal was not responsive to a material requirement of the RFO. ISN's proposal would have obligated FAA to purchase significantly more services than the contract minimums specified by the RFO. (Exhibits 12 and 39, paragraph 6). This non-responsive proposal

could not have been the basis for a contract award. No provision of AMS Sec. 3.9 confers interested party status on non-responsive offerors. Whatever actions or inactions by FAA that ISN may allege that might otherwise confer interested party status under AMS Sec. 3.0, ISN's decision to submit a nonresponsive proposal reflects no protestable action by FAA, but was a decision solely within the control of ISN.

Id. AMTI does not directly challenge Camber's standing, but does contest the standing of ISN to maintain a protest before the ODRA, since it purportedly could not demonstrate that it would stand a "reasonable chance to receive award," even if it were to show improper action on the part of the agency:

As the Agency Report convincingly demonstrates, ISN was not eligible for award under any circumstances. The Report shows that ISN's [Deleted].

AMTI Comments, page 10 (emphasis in original). AMTI, like the Program Office, points to ISN's "failure to provide qualified key personnel under evaluation factor three" as well as to the proposal's supposed " requirement that the FAA purchase significantly more services than the Contract minimum specified in the RFO." *Id.*

In *Metro Monitoring Services, Inc.*, 97-ODRA-00047, the ODRA reviewed the requirements of the FAAAMS [hereinafter the "AMS"] regarding standing in bid protests before our Office:

Section 3.9.3.2.1.3 of the AMS provides that only "interested parties" are permitted to protest an SIR or contract award. That section defines an "interested party" as follows:

"An *Interested Party* is one who:

* * *

(2) After the closing date for responding to a SIR, is an actual participant who would be next in line for award under the SIR's selection criteria if the protest is successful. An actual participant who is not in line for award under the SIR's selection criteria is ineligible to protest unless that party's complaint alleges specific improper actions or inactions by the agency that caused the party to be other than in line for award . . . "

Appendix C to the AMS, in turn, defines "Protester" in the following manner:

"[A] prospective offeror whose direct economic interest would be affected by the award or failure to award an FAA contract, or an actual offeror with a reasonable chance to receive award of an FAA contract."

In *Metro Monitoring*, the protester could not demonstrate that it stood a "reasonable chance" to receive an award, because, as the fourth low offeror, it would have had to show that, by correcting for the alleged impropriety, its proposal would have displaced not only that of the awardee, but that of two other higher ranked proposals. That, the ODRA determined, would have been impossible, since there, the purported "bait and switch" impropriety raised by the protest "had absolutely nothing to do with the Agency's evaluation of those other two offerors." *Id.* at pages 5-6.

The same could not be said here, at least with respect to the allegations of "bait and switch" in this case, since, as noted in the above Findings of Fact, the participation of Overlook's key personnel on behalf of AMTI and AMTI's representations regarding the availability to it of those personnel for the GPS TAC contract played a critical role not only in how AMTI's proposal was evaluated, but also in how the proposals of all other competitors were viewed and evaluated. To correct for the alleged "bait and switch" impropriety in this case would require a reopening of the competition and hence would result in a "reasonable chance" for an award for both ISN and Camber. Under those circumstances, both would be "in line for award." AMS §3.9.3.2.1.3.

A similar situation existed in the *Protest of Boca Systems, Inc.*, 96-ODRA-00008, where the protester, Boca, was the fourth low offeror in a procurement where award was based on low price. The Agency's position there was that, since Boca was not *next in line* for award, it was not an interested party in this matter, and thus lacks standing. Addressing this contention, the ODRA observed that the failure to be "next in line" need not be fatal to one's standing to protest, particularly where a successful protest would result in a "revised procurement":

Under prior law, the General Accounting Office and the General Services Board of Contract Appeals recognized the doctrine of *standing* as it applied to an offeror *not next in line for award*. 4 CFR 21.0(a), Concrete Systems, 95-1 CPD 15, Tulane University, 95-1 CPD 210, U.S. v. International Business Machines Corp., 892 F. 2d 1006, 1011 (Fed. Cir. 1989), Federal Systems Group, GSBCA 13160-P, 1995 BPD 46. The theory underlying that doctrine has been that since the protester would not receive the award even if its protest were upheld, the protester was not *interested* within the meaning of the applicable regulations. An exception to that doctrine, however, is found where the protester's allegations, if true, might alter the relative standing of the competitors such that the protester would be *in line* for award. Telecom Design Group, GSBCA 13025-P, 1995 BPD 3. Here, the thrust of Boca's complaint is that the specifications were inadequate and that improper discussions were conducted; if upheld, these allegations could result in a revised procurement where Boca would be *in line* for award. Accordingly, while the *not next in line* doctrine should be applied, where appropriate, we do not urge dismissal of the instant case for lack of standing.

As to the contention that ISN's proposal was "non-responsive" in that it "would have obligated FAA to purchase significantly more services than the contract minimums specified by the RFO," it first must be realized that the notion of "non-responsiveness" ordinarily has no place in negotiated procurements. Indeed, the Program Office indicates that, absent other perceived deficiencies in the ISN proposal, it may have resolved the so-called "non-responsiveness" by means of further clarification or discussion. [18] Certainly, communication with offerors is encouraged by the AMS. *See* AMS §3.2.2.3.1.2.2: "Communications with all potential offerors should take place throughout the source selection process."

Second and perhaps more importantly, a close review of the ISN proposal reveals that the so-called "deviation" was no more than a clerical error on ISN's part. More specifically, as the Program Office itself indicates, the estimated minimums and maximums listed within Tables B-1 and B-2 of the ISN proposal were higher estimate figures than the Program Office itself had provided in the draft RFO. As is explained in the Affidavits of ISN's Michael McArdle and John Broughton, only due to an "administrative data entry error," ISN's labor rates had been entered into the "superseded FAA-prescribed form" rather than on the form provided with the final RFO.

Furthermore, when the Program Office evaluated price proposals of the various offerors, the ISN "deviation" on Tables B-1 and B-2 was never factored into the proposal's evaluated price. Rather, the evaluated price for ISN (\$[Deleted]) was derived from its completion of a totally separate table, Table L-1, Price Matrix.

Finally, with respect to this alleged "deviation," it must be noted that both Table B-1 and Table B-2 -- in both the draft RFO and the final RFO -- contained language which made clear (1) that the minimums and maximums listed on the tables were "estimates only"; and (2) that the "guaranteed minimum requirement and ceiling price" for the basic contract period and subsequent option periods were "as listed in Section B.1" and "Sections B.2 through B.5" of the RFO. ISN took no exception to the guaranteed minimums listed in Section B.1 and Sections B.2 through B.5 of the final RFO. AR, Exh. 12. The ceiling prices were to be supplied only after contract award. AR, Exh. 9. Accordingly, there was nothing about the ISN proposal that sought higher commitments from the Government than had been specified in the RFO. Thus, the "deviation" was of no consequence whatsoever, and poses no obstacle to ISN's standing in this case.

B. The ISN Issues

1. Former AMTI Employees as Technical Advisors -- Alleged Bias

Two Government employees who had participated in the technical evaluation for the GPS TAC procurement as technical advisors happened to have been previously employed by AMTI. Based on this fact alone, ISN implies that the technical evaluation must have been

unfairly biased in AMTI's favor. When faced with similar allegations against contracting officials, other fora have adopted a strict standard of proof. *See Kalvar v. U.S.*, 543 F. 2d 1298 (Ct. Cl. 1976), and *Seaward International, Comp. Gen. Dec. B-224497*, 66 Comp. Gen. 77, 86-2 CPD ¶507 (October 31, 1986). In those cases, the Court of Claims and the General Accounting Office both adopted the position that such allegations of government employee misconduct must be supported by "well nigh irrefragable proof" to overcome the presumption that public officials act conscientiously and in good faith. Mere innuendo and suspicion will not suffice. *See NES Government Services, Inc.; Urgent Care, Inc.*, Comp. Gen. Dec. B-242358.4; B-242358.6. 91-2 CPD ¶ 291 (October 4, 1991); *Laser Power Technologies, Inc.*, Comp. Gen. Dec. B-233369, *et al.*, 89-1 CPD ¶267 (March 13, 1989); *D/FW Appraisal Corp.*, Comp. Gen. Dec. B-248429.2, 92-2 CPD ¶218 (September 30, 1992). The ODRA has previously applied such a presumption as well. *Protest of DCT, Inc.*, 96-ODRA-00015; *Protest of JO-JA Construction Limited*, 97-ODRA-00024; *Protest of NanTom Services, Incorporated*, 97-ODRA-00030. *See also Protest of Weather Data Services*, 96-ODRA-00010. In the *Protest of J. Schouten Construction, Inc.*, 98-ODRA-00064, the ODRA observed:

Because government officials are presumed to act in good faith, we do not attribute unfair or prejudicial motives to them on the basis of inference or supposition. California Environmental Engineering, B-274807, January 3, 1997, 97-1 CPD 99. Where a protester alleges bias on the part of government officials, the protester must provide credible evidence clearly demonstrating a prejudice against the protester or for the awardee and that the agency's bias translated into action that unfairly affected the protester's competitive position. Advanced Sciences, Inc., B-259569, July 3, 1995, 95-2 CPD 52, Ameriko Maintenance Co., B-253274, August 25, 1993, 93-2 CPD 121.

In its protest letter of June 22, 1998, ISN contends that the members of the evaluation team were inadequately grounded in terms of technical expertise. As a result, ISN argues, the two technical advisors who were former AMTI employees must have been able to exert an undue amount of influence over the ultimate selection of AMTI as the contractor for the GPS TAC contract. There is no credible evidence in the record to support these contentions. Indeed, the declarations filed by the four evaluators show that each of them had more than sufficient experience in relevant technical areas. AR, Exh. 29. Thus, the contention of "undue influence" is without merit.

Furthermore, there is no indication whatsoever here that the two advisors in question exhibited actual bias either towards AMTI or against ISN or any of AMTI's other competitors for the GPS TAC contract. *See George A. Fuller Co.*, Comp. Gen. Dec. B-247171.2, 92-1 CPD ¶433 (May 11, 1992)(Protest denied by GAO, where there was no evidence of biased evaluation, notwithstanding involvement of evaluation panel member who was former employee of the awardee's subcontractor); *accord, Advanced Systems Technology, Inc.; Engineering and Professional Services, Inc.*, Comp. Gen. Dec. B-241530; B-241530.2, 91-1 CPD ¶153 (February 12, 1991). A protester must demonstrate actual bias, not merely the "opportunity for bias." *Booz, Allen & Hamilton*, 63 Comp.

Gen. 599 (1984), 84-2 CPD ¶329. Significantly, the evaluation scheme for the GPS TAC procurement did not permit any of the technical advisors to take part in the numeric scoring of proposals. AR, Exhs. 47, 48. Moreover, whatever negative comments the two former AMTI employees may have made in their assessment of ISN's proposal were no different in nature than comments made by other technical advisors to the evaluation team. AR, page 47; AR, Exh. 38, Affidavit of Sandra L. Gill, ¶8.

ISN, in its Comments on the Agency Response, seems at first to question the integrity of the two advisors, and does so, based solely on their execution in late January 1998 of standard Conflict of Interest certifications (AR, Exh. 30) which certified, *inter alia*, that they had not been employed by any of the companies listed on an exhibit, companies which included "AMTECH." ISN Comments, page 17. The Program Office asserts that such execution was "inadvertent" and that, in any event, the fact of their former employment with AMTI was already well known to the evaluation team. AR, page 49; AR, Exh. 38, ¶7. There is no evidence that proves that either individual executed the certificate, realizing that it contained a false statement.[19] Accordingly, the OIRA must apply the legal presumption of regularity of acts by public officials, *Kalvar, supra*, and must find that the certificates were executed without knowledge of their inaccuracy.

It is not uncommon for the Government's technical personnel to have worked at some stage for private firms. This is so, particularly in a situation such as this, where 90% of the personnel on the GPS Product Team are supplied by outside contractors. The question in this case is whether, by reason of their prior employment with AMTI (of two and three years, respectively), there is any substantial reason to believe that these two individuals would have been motivated to influence the evaluation process in favor of AMTI. The record does not support such an inference. The affidavits provided by these individuals indicate that they both left AMTI because of better employment and educational opportunities within the FAA and that neither had a financial interest of any sort in AMTI by the time they served as technical advisors for the instant GPS TAC procurement.^[20] AR, Exhs. 47 and 48. Indeed, one states that he only went to work for AMTI upon completing a 12-year stint with the Air Force, because working for AMTI (an incumbent FAA contractor) could serve as a stepping stone towards achieving his "personal goal" to become an FAA employee with the GPS TAC Product Team and "to support the transition of the National Airspace System (NAS) to GPS navigation." AR, Exh. 47, ¶5. Further, there is no evidence whatsoever in the record that either individual maintained close personal ties to AMTI after leaving that firm to enter Government service.

Perhaps having second thoughts about challenging the integrity of these individuals, ISN engages in sheer speculation about what these two advisors might *inadvertently* have disclosed to their former colleagues at AMTI:

Without casting aspersions on the credibility and forthrightness of these two individuals, it is quite probable that inadvertent disclosures may have been made to their former employer regarding the FAA's perception of the suitability of Overlook as prime contractor for the incumbent contractor team, or perhaps an off-the-record discussion of the proposed tasks to be

included in the RFO, or some "guidance" on the evaluation process. Of equal concern is that both of these individuals potentially had access to other offerors' proprietary technical and cost data when evaluating industry proposals as AMTI employees. If this information was inadvertently disclosed to other AMTI employees or its competitive decision-makers, AMTI would have an unfair and impermissible advantage over the other offerors which did not have access to this information.

ISN Comments, page 18. ISN concludes its argument by stating: "ISN does not expect the fact-finder to sustain this protest bas[ed] solely on the questions presented here, but neither should the fact-finder accept the FAA's recommendation and summarily dismiss this protest ground without further investigation." *Id.*

The ODRA cannot agree that such breaches of public trust were "quite probable" in this case, and the record in this case is utterly lacking in the kind of hard facts that would justify a further investigation. In short, ISN has not advanced the requisite "well nigh irrefragable proof." Accordingly, ISN's protest cannot be sustained on the ground of alleged bias by the Program Office technical advisors.

2. The Evaluation Process and Scoring

The technical evaluation here was, in our opinion, proper and thorough. The Evaluation Report (AR, Exh. 18), with supplemental advisory reports and source selection documentation (AR, Exhs. 15, 16, 23 and 24) consisted of well over 100 pages of analysis. ISN's challenge regarding the evaluation process is four-fold. First, it asserts that the methodology for scoring Factor 4 (Risk) was irrational. Risk under the RFO was to be rated from 0.0, representing complete lack of confidence in the ability of the offeror to perform the GPS TAC contract successfully, to 1.0, representing total confidence among the evaluators. In this regard, ISN notes that although "each of the unsuccessful offerors [the four offerors other than AMTI] was deemed to have the requisite competence and demonstrated ability to perform the GPS TAC" (presumably through the SIR qualification process), none of them was able to rate a risk score of more than [Deleted], which amounted to [Deleted]% less than that assigned to AMTI (*i.e.*, [Deleted]).

Second, it contends, the overall scoring methodology was "arbitrary and capricious," since it resulted in greatly magnified differences in total overall scores among competitors, even before application of the risk factor. -- with AMTI (at [Deleted]) scoring [Deleted]% better than the next higher competitor (Camber -- at a pre-risk score of [Deleted]), and "almost [Deleted]% greater than the next highest final total score" -- *i.e.*, AMTI's overall total of [Deleted] in comparison with Camber's overall total of [Deleted]. Third, ISN contests the propriety of the "team consensus score" approach used by the Program Office. Fourth and finally, it alleges that the whole evaluation was a mere "pretense" that was used "solely to avoid sole source selection without justification," that the Program Office intended all along to award a contract to the incumbents (the AMTI

Team), and that Mr. Jack Loewenstein, the SSO indicated as much with a reported statement that "he was perfectly comfortable with the performance of the incumbent contractors" and that there was no reason to "rock the boat."

As to the first allegation, even though there may be disagreement as to how risk should have been scored, the ODRA will not take it upon itself to second guess the scores assigned by the Program Office, so long as they had some rational basis. The methodology developed for scoring risk adhered to the criteria established for Factor 4 under the RFO.[21] *See* Finding 27. Here, it is clear from the record that AMTI received a [Deleted] higher score than the others in terms of the level of confidence it inspired, primarily because of the higher quality of the key personnel it presented to the Program Office for the GPS TAC effort. Finding 42. In its Comments on the Agency Response, ISN does not take issue with the Government's perceptions of quality differences among offerors' key personnel. Indeed, ISN's arguments regarding the alleged "bait and switch" are founded on those differences, especially with respect to the Overlook personnel which AMTI represented would be available for the GPS TAC contract. Moreover, as the above summary chart demonstrates, AMTI would have been in line for the award, even if the Factor 4 scores were to be eliminated entirely. *See* Finding 39.

As to its objections to the Program Office's use of the "team consensus score" approach, ISN fails to demonstrate how such an approach lacks a rational basis. Decision making in many contexts is done by means of obtaining consensus, and, in the context of Government contract source selection, it has been sanctioned by the Comptroller General on several occasions. *See Alcan Environmental, Inc.*, Comp. Gen. Dec. B-275859.2, 97-1 CPD ¶139 (April 11, 1997); *Resource Applications, Inc.*, Comp. Gen. Dec. B-274943.3, 97-1 CPD ¶137 (March 5, 1997); *Appalachian Council, Inc.*, Comp. Gen. Dec. B-256179, 94-1 CPD ¶319 (May 20, 1994); *GZA Remediation, Inc.*, Comp. Gen. Dec. B-272386, 96-2 CPD 155 n.3 (October 3, 1996). The ODRA finds no reason to criticize the Program Office's use of such an approach in the context of the GPS TAC procurement.

Finally, as to the notion that the Program Office was using the procurement as a pretext for making a pre-planned unjustified sole source award to the incumbent contractor team, there is nothing in the record to support such a notion. The SSO has denied making the statement ISN claims he made. AR, Exh. 39, Declaration of Jack Loewenstein. Furthermore, Mr. Loewenstein indicates: (1) that he had no first hand knowledge of the prior performance of the incumbent contractors; and (2) that he "never indicated or implied that competition was not desirable for Contract No. DTFA01-98-C-00048." *Id.* Thus, ISN's contentions regarding a sole source procurement are wholly unsupported.

3. The Adequacy of ISN's Designated Key Personnel

Mere disagreement with an agency's evaluation will not render the evaluation unreasonable. *Aero Tech Services, Incorporated*, 96-ODRA-00017. Moreover, the relative merit of competing proposals is primarily a matter of agency discretion, and the

ODRA will review an evaluation only to ensure that it was rationally based and consistent with the stated evaluation criteria. *Id.*

In its protest, ISN challenges the evaluation of its proposed key personnel for the positions of Senior Software Engineer and Senior Communication Systems Engineer. It states that those whom it proposed for those positions "have demonstrated the requisite knowledge and experience as defined and required by the RFO." Its statement in this regard is merely an expression of disagreement with the conclusions reached by the Program Office evaluation team, and it has not shown how the team's evaluation lacked a rational basis or was contrary to the stated evaluation criteria. Accordingly, the challenge must fail. *Id.*

The evaluators determined that the individuals proposed by ISN for these key positions did not satisfy the RFO's minimum qualification requirements. We do not find evidence in the record to suggest that this determination was without a rational basis. *See* AR, Exh. 18, page 15. According to ISN, the sole basis for this determination was "the fact that these individuals are not currently working with the FAA GPS navigation system -- a capability that can only be met by the current and former incumbent contractors." In this connection, it is clear that incumbency carried with it an advantage in terms of satisfying the RFO's minimum qualification requirements here. There is nothing inherently "unfair" about an "incumbency advantage" and an agency is under no duty to eliminate such an advantage from the competition in conjunction with a procurement. *PRC, Inc., Comp. Gen. Dec. B-274698.2 and 274698.3, 97-1 CPD ¶115 (January 23, 1997)*. Indeed, there is always the possibility for various competitors to propose the use of incumbent personnel. *See Science & Technology, Inc.; Madison Services, Inc., Comp. Gen. Dec. B-27248, et al., 97-1 CPD ¶121 (October 25, 1996)*.

ISN likewise finds fault in the team's evaluation of ISN's proposed Project Manager, [Deleted]. [Deleted]. This information was not made plain to the Program Office as part of the ISN proposal. Even if such information would have made a material difference in terms of the overall evaluation of ISN's key personnel, it was ISN's responsibility to bring such information to the fore as part of the proposal. Government evaluators can only analyze the information that is made available to them, and, in this case, the ODRA cannot conclude that their treatment of [Deleted]'s disclosed credentials was irrational or improper. *See Metro Monitoring Services, Inc., 97-ODRA-00047 (ODRA denied protest of alleged post-award substitution by the awardee of the same individual initially proposed by the protester to manage the worksite, because the protester's proposal neglected to include critical information regarding the individual's experience, information that was presented by the awardee subsequently when seeking to justify the substitution)*.

In terms of the evaluators' assessment of the four individuals proposed by ISN for the position of Senior Systems Engineer, ISN challenges the Program Office assertion that "neither as a group nor individually do the [Deleted] candidates . . . provide well rounded, multi-dimensional systems engineering knowledge." *See* AR, page 13. Although, as ISN states, the RFO does not specifically call for such "well-rounded, multi-dimensional

systems engineering knowledge," the RFO effectively calls for such "multi-dimensional" knowledge, when it states the minimum qualifications for the Senior Systems Engineer position:

Minimum 10 years experience in systems engineering/integration disciplines for aviation and navigation systems using GPS satellites. Knowledge of requirements analysis and traceability, engineering analyses related to system reliability, availability, and maintainability for safety critical systems, system performance monitoring using models or simulators, operational testing and analysis, human factors, configuration management. Requires Masters degree in Engineering, Physics, Math, or related discipline.

AR, Exh. 9, Attachment J-4, page 1. With regard to the Senior Systems Engineer position, the evaluation team noted that [Deleted]. AR, Exh. 18, Appendix B, page B-2. ISN has not rebutted this finding. On the whole, therefore, ISN has failed to support its protest on the basis of the Program Office's alleged failure to evaluate properly ISN's proposed key personnel.

C. The Camber Issues

Of the issues presented by Camber, the only one that is not shared with ISN's protest relates to the contention that Overlook ought not have been rated as "acceptable" under the SIR. Camber's position in this regard is that, absent the determination that Overlook was "qualified" and "acceptable" as a prime contractor for purposes of the GPS TAC procurement, AMTI would never have been able to submit its proposal in January 1998.

As stated in the above findings, Overlook had been rated "unacceptable" initially by one of the two SIR evaluators, but that rating was reversed and changed to "acceptable" once the evaluators met to discuss their findings. The reason given for the reversal was that, upon reconsideration, the evaluator was convinced that, even if Overlook's prior experience was not equivalent to the GPS TAC in terms of level of effort ("LOE"), Overlook had sufficient experience in handling tasks of equivalent scope and complexity. In this regard, the "consensus" view was that, since the GPS TAC contract was to be an IDIQ, task order contract, Overlook's qualifications statement was adequate, albeit weak, in terms of satisfying the essential purpose and intent of the SIR, to determine whether a prospective offeror would be capable of handling "discrete technical tasks". See Finding 15. Even though there might be disagreement with this conclusion, the ODRA cannot say that the determination that Overlook was "acceptable" lacked a rational basis. The ODRA will not substitute its judgment for that of the contracting officials under such circumstances. *Protest of Weather Experts*, 96-ODRA-00013 (Decision of Special Master), citing *Grey Advertising, Inc.*, 55 Comp. Gen. 1111 (1976).

D. The Joint Issues

1. The "Last Minute Switch"

Both ISN and Camber question the propriety of the Program Office decision to allow AMTI to submit a proposal as a prime contractor on the GPS TAC contract in late January 1998. Both contend that AMTI was ineligible to participate in this manner, because the "last minute switch" from Boeing to AMTI was violative of the November 7 "deadline" for notifying the Program Office of team realignments that had been established by the CO's letter of October 16, 1997. The Program Office, on the other hand, disputes the characterization of the November 7 date as a "hard deadline."

Pursuant to a request from the ODRA, the CO recently sought to explain, by way of sworn affidavit, why she had required notification of changes in teaming arrangements by the November 7 date. Her affidavit, in addressing the significance of the November 7 date, comments on her October 27, 1997 request for the submittal of additional information by November 17, 1997, and asserts that she expected further changes to teaming arrangements up until the date for receipt of proposals in response to the RFO. In her explanation, the CO also provides her rationale for not abandoning the SIR entirely and resoliciting from the general public, in light of the lengthy hiatus in time, and for electing to include in the competition for the GPS TAC contract not only those companies which had themselves been qualified via the SIR, but team members of those companies as well. According to the CO, nothing about her October 16, 1997 letter indicated that November 7 was to be a "hard deadline":

By the fall of 1997, I realized that it would still be some time before an award could be made for the TAC. The information provided in the SIR submittals in September 1996 was already outdated. The SIR had asked only for a statement of intentions regarding labor and personnel. The companies interested in the SIR, either as primes or as subcontractors, would have moved on to new contracts and business interests. Performance history on existing contracts could have changed for better or worse over the intervening year. I considered that the negotiation of NISC II might raise some OCI questions that had been unforeseeable in September 1996. I was also beginning to receive telephone calls from companies that had not responded to the SIR inquiring about participating in the RFO. Given the situation, I realized that the screening process would have to be redone to "requalify" prospective offerors, but this time in a single step to award. I considered issuing the RFO to the public, but out of fairness to the SIR participants and after speaking with members of the team, decided to proceed with all of the companies, both primes and subcontractors, that had participated in any way under the SIR. However, I had had little or no communication with these companies since the May 1997 announcement of acceptability under the SIR and was concerned about the extent of competitive interest remaining in the procurement. On October 16, 1997, I issued a letter to the SIR submitters to gauge the interest and intentions of potential offerors. **I specified a response date to encourage early notice and underlined it to draw attention to it. I specified November 7, because I thought that after the long hiatus, three weeks would allow time for former SIR participants to regroup**

their corporate resources, make basic business decisions about continuing in the procurement, and inform us of their intentions. Nothing in the document indicates that November 7 was a hard deadline at which teams were to be frozen. We were only seeking information to assist us in planning for the procurement. In fact, November 7 was one of a series of dates issued to obtain information about prospective offerors. The transmittal letter to the draft RFO followed up the October 16 letter by requesting that past performance information be submitted on November 17 to streamline the evaluation process. The ultimate date was the date for receipt of proposals, at which time all team relationships would necessarily be firm. I expected changes between November 7 and November 17 and between November 17 and the proposal due date, because team members would necessarily be negotiating among themselves for lead/sub roles and shares to be allocated to individual team members. I realized that particularly by November 7, the best I could hope for was a snapshot of team arrangements as they evolved. Customary business practice is that team negotiations go on at least until after a final RFO is issued and final estimates of required labor and labor categories are released. . . . Therefore, the October 16 letter was written to encourage an early response by citing a date but also to acknowledge that business decisions could not be finalized until after FAA's final requirements were known. For that reason, **the letter did not require written submittals or the signatures of authorized officials. Neither did it specify that a notice or change in team arrangements made after November 7 would be subject to any sanction or adverse action, such as provided in the late submittals clause of the SIR and, later, the RFO.**"

AR, Exh. 39, ¶10 (emphasis supplied).

Initially, it should be noted that the protesters did not seek to file a protest to contest the CO's October 1997 letter modifying of the SIR to allow team realignments, but only challenged the subsequent action in late January 1998 to permit one of the teams -- the Overlook Team -- to "regroup" upon the departure of its then prime, Boeing. The questions to be answered are whether that latter action was consistent with the guidance set forth in the AMS and, if so, whether it had a rational basis.

Under Section 348 of the 1996 Department of Transportation Appropriations Act, Public Law 104-50, the FAA was directed by Congress to develop a new acquisition management system to meet the agency's "unique needs." In that statute, the Congress mandated that a number of procurement related statutes not apply to the new FAA acquisition management system, what became the AMS, including notably the Competition in Contracting Act ("CICA"). Thus, the CICA's requirement for "full and open competition" is not applicable to the AMS. The AMS is more flexible in terms of authorizing sole source procurement, permitting it "when it is determined to be in the best interest of the FAA, "there is a rational basis for the decision not to compete the

procurement," and "the rational basis is documented." AMS §§3.2.2.2 and 3.2.2.4. By the same token, the AMS expresses a preference for procuring products and services from among two or more sources and calls for the FAA to "provide reasonable access to competition for firms interested in obtaining contracts." AMS §3.2.2.2.

The AMS requires that all procurements over \$100,000 be publicly announced on the Internet or through other means. AMS §3.2.1.3.12. This requirement does not apply to emergency single source actions, purchases from an established Qualified Vendors List (QVL) or from the Federal Supply Schedule (FSS) administered by the General Services Administration (GSA). Public announcements are also not required for the exercise of options or the issuance of change orders under existing contracts. *Id.* The Integrated Product Team (IPT) is required to issue the public announcement in order to "inform[] industry of the FAA's procurement strategy," and the announcement must be issued "before, or concurrent with, the issuance of the initial SIR." AMS §3.2.2.2.

In the present case, the IPT did issue a public announcement prior to the issuance of the SIR and, based on requests received in response to that announcement, issued the SIR to 91 companies which had expressed an interest in the procurement. *See* AR, Exh. 1, Enclosure 4. The IPT initially proceeded with the screening process outlined in the SIR but, as noted above, the CO decided to modify the SIR screening process to allow changes in offeror team composition, to accommodate changes in the marketplace, mergers, acquisitions, etc., because the procurement was taking far longer to accomplish than had been anticipated.

This decision, 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.

Furthermore, there would have been no legal basis to have excluded those firms from the competition and to have precluded consideration of their proposal in this case. Even though the October 16, 1997 CO letter may have established what appeared to be a mandatory "deadline" for the submission of information about team realignment, and even though Camber arguably adhered to that "deadline,"^[22] as the CO correctly points out, the October 16 letter did not state that teams were to be frozen after November 7 and did not provide a sanction for failure to adhere to the November 7 "deadline." In other words, the letter did not say that proposals would not be accepted from any reconstituted offeror team that did not provide the CO with the requested information on or before November 7, 1997. The ODRA has previously held that, unless a SIR makes plain that an

offer will be rejected for failure to adhere to a requirement, even a so-called "mandatory" requirement, such a sanction may not be imposed on an offeror. *Protest of Haworth, Incorporated*, 98-ODRA-00075 (Protest sustained, where offer was rejected based on failure of offeror's employee to attend "mandatory" pre-proposal conference, when notice of such a sanction was inadequate.)

2. The Alleged "Bait and Switch"

Although decisions of the Comptroller General are by no means binding on the FAA's procurement activities under the AMS, such decisions may constitute "persuasive authority," where they are applicable and where they are consistent with the policy guidance set forth in the AMS. In the present case, since the ODRA has yet to evolve a body of case law in the area of allegations of "bait and switch" other than its decision in *Metro Monitoring, supra*. (discussed further below), it is appropriate to review the existing Comptroller General decisions as well as court decisions addressing this issue.

In *Ann Riley & Associates, Ltd., Reconsideration*, Comp. Gen. Dec. B-271741.3, 1997 U.S. Comp. Gen. LEXIS 299, 97-1 CPD ¶122 (March 10, 1997), the Comptroller General provided the following explanation of the concept of "bait and switch" and outlined the elements of proof needed to establish an improper "bait and switch":

[T]he term "bait and switch" generally refers to an offeror's misrepresentation in its proposal of the personnel that it expects to use during contract performance. *Planning Research Corp. v. United States*, 971 F.2d 736 (Fed. Cir. 1992)(personnel misrepresentation); *CBIS Fed., Inc.*, 71 Comp. Gen. 319 (1992), 92-1 CPD P 308 (misrepresentation of personnel availability); *Informatics, Inc.*, 57 Comp. Gen. 217 (1978), 78-1 CPD P 53 (awardee misrepresented its survey of the availability of incumbent's personnel); *KPMG Peat Marwick, LLP*, B-259479.2, May 9, 1995, 95-2 CPD P 13 (awardee replaced 13 of 18 key personnel immediately after award); *ManTech Advanced Sys. Int'l. Inc.*, B-255719.2, May 11, 1994, 94-1 CPD P 326 (awardee misrepresented availability of incumbent's personnel); *Mantech Field Eng'g Corp.*, B-245886.4, Mar. 27, 1992, 92-1 CPD P 309, recon. denied, B-245886.5, Aug. 7, 1992, 92-2 CPD P 89 (misrepresentation of personnel availability). Where such a misrepresentation materially influences an agency's evaluation of an offeror's proposal, it undermines the integrity of the competitive procurement system and generally provides a basis for proposal rejection or termination of a contract award based upon the proposal. *ManTech Advanced Sys. Int'l. Inc., supra*.

To demonstrate a "bait and switch," a protester must show not only that personnel other than those proposed are performing the services, i.e., the "switch" -- but also that: (1) the awardee represented in its proposal that it

would rely on certain specified personnel in performing the services; (2) the agency relied on this representation in evaluating the proposal; and (3) it was foreseeable that the individuals named in the proposal would not be available to perform the contract work. *Combat Sys. Dev. Assocs. Joint Venture*, B-259920.6, Nov. 28, 1995, 95-2 CPD P 244; *Free State Reporting, Inc.*, B-259650, Apr. 14, 1995, 95-1 CPD P 199. Each of these three elements must be present to establish the "bait" portion of a "bait and switch" claim. *Free State Reporting, Inc., supra*.

Clearly, where an offeror misrepresents the identity of key personnel to be used on a contract, knowing it has no intention of ever using those individuals, an impermissible "bait and switch" has occurred. *Planning Research Corporation v. United States and Electronic Data Systems Federal Corporation*, 971 F. 2d 736 (Fed. Cir. 1992) (awardee, PRC, had proposed 101 individuals from its employee computer base -- 19 key personnel and 82 non-key personnel -- representing its intention to utilize those individuals to perform a contract, when (as had been determined by the General Services Administration Board of Contract Appeals) it actually intended to hire and use employees of the incumbent contractor and "never even attempted, or intended, to provide the proposed personnel"). However, the Comptroller General has made clear that the misrepresentation need not be "knowing," and intentional to constitute impermissible "bait and switch," but may be "negligent" misrepresentation. *USATREX International, Inc.*, Comp. Gen. Dec. B-275592; B-275592.2, 1997 U.S. Comp. Gen. LEXIS 510 (March 6, 1997).

In *Metro Monitoring, supra*, the FAA Administrator, acting on the recommendation of the ODRA, rejected a protester's allegation of "bait and switch," where the post-award substitution was made only by reason of a change in personal circumstances for the key employee in question (death in his family). The ODRA distinguished the situation in *Metro Monitoring* from that in a frequently cited GAO "bait and switch" case, *KPMG Peat Marwick, LLP*, Comp. Gen. Dec. B-259479.2, 95-2 CPD ¶13 (May 9, 1995), where substitutions of 13 of 18 proposed key personnel were effected by means of post-award contract modifications initiated by the agency itself:

In contrast with its decision in *KPMG Peat Marwick*, the GAO has held that "an agency's evaluation that is based on an offeror's proposed key personnel is not objectionable, even though some are changed after award, when the offeror provided firm letters of commitment and the names were submitted in good faith with the consent of the respective individuals (that is, the offeror was not proposing personnel it had no intention of providing)." *Robocom Systems, Inc.*, Comp. Gen. Dec. B-244974 (December 4, 1991), 91-2 CPD ¶513, citing *Informatics Gen. Corp.*, Comp. Gen. Dec. B-224182 (February 2, 1987), 87-1 CPD ¶105.

In *Metro Monitoring*, there was no question that the awardee had permission to utilize the name and resume of the individual who had later been replaced. However, where a solicitation seeks proposals which offer specific individuals for key positions, the offeror

may not be awarded a contract, if it does not have the individuals' permission to use their names for those positions, and cannot provide a satisfactory explanation for having used those names as part of its proposal. *Aerospace Design & Fabrication, Inc.*, Comp. Gen. Dec. B-278896.2, *et al.*, 98-1 CPD ¶139 (May 4, 1998); *Ultra Technology Corp.*, Comp. Gen. Dec. B-230309.6, 89-1 CPD ¶42 (January 18, 1989). Similarly, the Comptroller General has held, an offeror has a responsibility to ascertain the current availability of personnel it proposes to use in performing a contract. *ManTech Field Engineering Corporation*, Comp. Gen. Dec. B-245886.4, 92-1 CPD ¶309 (March 27, 1992), *reconsideration denied*, Comp. Gen. Dec. B-245886.5, 92-2 CPD ¶89 (August 7, 1992); *see also Resource Consultants, Inc.*, Comp. Gen. Dec. B-250241, B-250241.2, 1993 U.S. Comp. Gen. LEXIS 15 (January 11, 1993).

Thus, where best and final offers ("BAFOs") are called for, an offeror must make sure that prior representations in earlier proposals regarding the availability of key personnel are still current and accurate when it submits its BAFO. *ManTech Field Engineering, supra.* (GAO sustained protest and recommended that agency reopen negotiations and call for new round of BAFOs, where awardee failed to ascertain whether its proposed personnel were still actually available); *CBIS Federal, Inc.*, Comp. Gen. Dec. B-245844.2, 92-1 ¶308 (March 27, 1992), *reconsideration denied*, *Telesec Library Services; Department of Agriculture -- Reconsideration*, Comp. Gen. Dec. B-245844.3; B-245844.4, 92-2 CPD ¶103 (August 13, 1992)(protest sustained where awardee unreasonably assumed one employee was still available despite strong indication to the contrary, and failed to confirm continued availability of second proposed key employee whose letter of intent was signed 8 months previously).

In *Omni Analysis*, Comp. Gen. Dec. B-233372, 89-1 CPD ¶239 (March 6, 1989), for example, two of the individuals proposed by the awardee were no longer available to perform after submission of the initial offer; yet, the awardee's BAFO did not reflect this fact and actually contained "continued assurances that the personnel team it had originally proposed remained intact." In this regard, the Comptroller General in *Omni* observed:

Where an offeror knows prior to submission of BAFOs that proposed key employees are no longer available, the appropriate course of action is to withdraw the individuals and propose substitutes who will be available. *See Informatics General Corp.*, B-244182, Feb. 2, 1987, 87-1 CPD P105. To do otherwise is, in effect, to misrepresent the availability of proposed personnel, a circumstance which impermissibly compromises the validity of the technical evaluation, notwithstanding the fact that post-award substitutions of key personnel may later be made and approved by the agency pursuant to a clause in the awardee's contract. *Ultra Technology Corp.*, B-230309.6, Jan. 18, 1989, 89-1 CPD P . This is particularly true where, as here, the factual accuracy of an offeror's submissions may have had a material influence on the evaluation of the proposals. *Informatics, Inc.*, 57 Comp. Gen. 217 (1978), 78-1 CPD P53.

The present case is unlike *KPMG Peat Marwick, supra.*, which involved Government complicity in making wholesale post-award "switches," and it is not a case like *Planning Research, supra.*, in which the awardee never had the intention of using the key personnel it had proposed to use. Nevertheless, there was an impermissible "bait and switch" here. More specifically, as indicated in the above Findings of Fact, 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).

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.[23] (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.[24] Yet, like the awardee in *Omni, supra.*, AMTI here provided the Program Office with "continued assurances that the personnel team it had originally proposed remained intact."

Notably, in *Omni*, the contract in question contained a provision which allowed for immediate post-award substitution of designated key personnel, so long as the substitutes were approved by the agency and had equivalent credentials. In *Applications Research Corporation v. Naval Air Development Center, et al.*, 752 F. Supp. 660 (E.D. Pa. 1990), the Court addressed such a clause as follows:

[W]here an agency provides in its solicitation that proposed personnel will be deemed "key" but also provides that substitutions with personnel "of at least substantially equal ability and qualifications" are permissible, the word key refers to a level of personnel qualification rather than to particular persons. [citations omitted].

Such a clause is the norm. Indeed, the contract in *Metro Monitoring, supra*, contained such a clause. The present case is clearly exceptional, having a solicitation provision which instead provided for no substitutions of key personnel for a period of 12 months after contract award (other than for death, illness, or termination of employment). Here, the word "key" was very much an indicator that "particular persons" were critical, not merely "personnel qualifications." Thus, the need for assurance of availability of the key personnel offered was all the more important in the present case.

But even in *Omni*, the GAO would not countenance the awardee's reliance on its more lenient personnel substitutions clause to justify knowing misrepresentations as to the availability of two key individuals: "Given the evaluation emphasis on proposed personnel, we do not believe an offeror can rely on such a clause as a substitute for the fact that some of its proposed key people will not be available." *Omni, supra*. Offerors who become aware that key personnel whom they offer will not be available to perform a contract simply cannot keep such information to themselves. *Compare Unisys Corporation*, Comp. Gen. Dec. B-242897, 91-1 CPD ¶577 (June 18, 1991) (when availability of proposed key individuals changed, the awardee made the Government aware of that fact).

The present case is much like *ManTech Advanced Systems International, Inc.*, Comp. Gen. Dec. B-255719.2, 94-1 CPD ¶326 (May 11, 1994), where the awardee, Raytheon, argued that it "had a reasonable basis to believe that the incumbent personnel' it had proposed to use "would be available to work for Raytheon should it win the award" There, the Comptroller General noted, "Raytheon represented more than such a belief in its proposal, by stating that it had agreements and employment commitments from the incumbent personnel whose resumes it submitted."

Regardless of whether AMTI was convinced it could negotiate successfully with Overlook once the award was made, it, like Raytheon, did more than simply convey that belief to the Program Office. It represented it had already entered into a teaming agreement with Overlook, that it had already successfully negotiated rates and work allocations with Overlook, and that the Overlook key personnel whom it was proposing to use would be available for use.

There is no question here 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 their availability for this contract was material. *Compare Veda Incorporated*, Comp. Gen. Dec. B-278516.2, 1998 U.S. Comp. Gen. LEXIS (March 19, 1998) (Agency was aware of the unavailability of 1 of 45 proposed key personnel, and the offer of that individual had "minimal impact" on the agency's evaluation of proposals and source selection.). The participation of Overlook's Messrs. [Deleted] and [Deleted] in preparing and presenting AMTI's solutions to two of the 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 proposal, but the proposals of all of its competitors. *See Findings 39 through 48*. Accordingly, all of the elements of impermissible "bait and switch" outlined in *Ann Riley, supra*, and the other

Comptroller General and court decisions discussed above have been satisfied in this case: (1) intentional or negligent representation regarding the availability of key Overlook personnel; (2) foreseeability that the personnel would not be available; (3) Government reliance on the representation; (4) materiality; and finally (5) failure to make the named individuals available after award.

It is clear from the record that the Program Office committed no wrongdoing or impropriety related to the "bait and switch". In fact, the technical evaluation here was both thorough and comprehensive, and, absent the misrepresentation, would have provided a rational basis for contract award. However, the technical evaluation and decision to award the GPS TAC contract to AMTI were rendered "irrational" by (1) AMTI's misrepresentation of its relationship with Overlook and the availability of Overlook's key personnel for the GPS TAC effort; and (2) the Program Office's reasonable reliance on that material misrepresentation. *See Ralvin Pacific Properties, Inc., et al. v. United States*, 87 F. Supp. 468 (D.D.C. 1994) (vacating award of a contract in part because the awardee made a material misrepresentation on which the GSA relied); *Rudolph F. Matzer & Associates, Inc. v. Warner*, 348 F. Supp. 991, 995 (M.D. Fla. 1972)(holding that "the evaluation of personnel qualifications on the basis of resumes of persons who are not employed by an offeror and who will not perform the work is patently irrational").

IV. The Appropriate Remedy

AMS §3.9.3.2.3.4 conveys to the ODRA "broad discretion" to recommend remedies for both protests and contract disputes:

The Dispute Resolution Officer or Special Master, where applicable, has broad discretion to recommend a remedy for a successful protest or contract dispute, that is consistent with the FAA's Acquisition Management System and applicable statutes. The Administrator has final authority to impose a remedy.

Although there would be Comptroller General precedent for excluding AMTI from the resumed GPS TAC procurement, in light of the significance and materiality of its "misstatements," *See Informatics, Inc.*, Comp. Gen. Dec. B-188566, as indicated above, the FAA is not bound by such precedent and may choose to construct a remedy appropriate to its own needs and which takes into account the likely impacts that it may sustain. *See Haworth, Incorporated, supra*. (Unlike the GAO, the FAA is not bound or "constrained" by the CICA's requirement that "corrective action" be formulated "without regard to any cost or disruption from terminating, re-competing, or re-awarding the contract").

In the present instance, the ODRA recognizes that the operation of the GPS Product Team is heavily dependent on the personnel made available to it via the GPS TAC contract. It is also mindful that, notwithstanding our recommendation that the protests be sustained on the basis of "bait and switch," there was no improper or illegal action on the

part of the Program Office in connection with the GPS TAC procurement. Nevertheless, 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. In the interim, so as not to disrupt the Product Team's operations, the AMTI contract should be left in place -- assuming that the Program Office does not itself decide to terminate that contract for default, in furtherance of the earlier cure notice or for other reasons consistent with its contract administration authority.

The resumed procurement can properly be limited to those prime contractors and subcontractors who had responded to the RFO in January 1998. Inasmuch as we do not find that AMTI's actions rise to the level of actual intent to defraud the Government, it is AMTI ought be included in the resumed procurement, in order to provide the Program Office with maximum competition. In our view, AMTI's sanction appropriately should be limited to having to re compete for the GPS TAC work. 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. Additionally, given that virtually all elements of the earlier technical evaluation had been impacted by the presence, participation, and contributions of Overlook's key personnel, if the Program Office wishes to utilize the same evaluation protocol, the resumed procurement should include new Sample Tasks, proposals, and oral presentations. Once such a process is completed, if the Program Office determines that award should be made to an offeror other than AMTI, the current AMTI contract would then be terminated for convenience, and an award would be made to the successful offeror.

In order to avoid the possibility of a repetition of the instant "bait and switch" situation, and because of the obvious criticality of assuring commitments from key personnel in the context of the GPS TAC procurement, the ODRA suggests that the Program Office consider requiring appropriate written assurances in conjunction with the resumed procurement. Thus, any new proposals would be accompanied by current/updated letters of commitment or contingent employment agreements for prospective key employees and/or current/updated letters from prospective subcontractors stating that the companies in question have reviewed the proposal being submitted on behalf of their team and have committed the key personnel in their employ who have been offered for the GPS TAC effort.

V. Conclusions and Recommendations

For the reasons set forth above, the ODRA finds the protests meritorious, but only on the ground of the alleged "bait and switch." On that basis, the ODRA recommends that the Administrator sustain the protests and direct the Program Office to reopen the GPS TAC procurement and proceed with a resumed procurement, in accordance with the steps outlined in Section IV above.

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

APPROVED:

_____/s/_____
Anthony N. Palladino
Director, Office of Dispute Resolution for Acquisition

SUPPLEMENTARY STATEMENT OF THE ODRA DIRECTOR

The requirement that the Government's award decisions be grounded on full and fair consideration of bona fide offers is fundamental to the integrity of any procurement system. It is particularly critical to a new, alternate process such as the FAA's Acquisition Management System. Offerors must be in a position to provide the services that they proffer and must be actively discouraged from submitting offers containing unauthorized elements in order to obtain an award. The decision by the awardee, AMTI, to include in its final offer, key personnel whom it was not authorized to proffer, effectively tainted the selection process to the detriment of the other offerors and the FAA.

Corrective action is required in a situation such as this, where: (1) the underlying RFO evidences the importance to the FAA and to the selection process of specific key personnel, and severely limits the substitution of such personnel after award; (2) an offeror misstates or omits key facts concerning the availability of such mission-critical key personnel; (3) the misrepresentation pervasively impacts the technical scoring and results in an award to the offeror in question; and (4) within a month of contract award, it becomes clear that the key personnel are not available, and the Agency is forced to issue a cure notice to the awardee. To sanction such conduct of the awardee, by ignoring it,

would send precisely the wrong message to the contracting community and only serve to encourage similar conduct to the detriment of future FAA procurements.

The ODRA has carefully considered the recommended remedy in this case. As is noted in the above Findings and Recommendations, the technical evaluation of the Program Office here was thorough and complete. The record is devoid of any suggestion that the Program Office knowingly participated in, or sanctioned, the "bait and switch." Thus, the award decision was not arbitrary, capricious or an abuse of discretion. But for the misrepresentation, it would have been rationally based.* We believe that the recommended remedy promotes the integrity of the AMS process and properly permits the Program Office to address a defect that was not of its making.

_____/s/_____

Anthony N. Palladino,
Director

* While the Administrator has recognized the applicability of the Equal Access to Justice Act, 5 U.S.C. §504 ("EAJA"), a claimant must not only "prevail" but be able to establish that the Government's position in the matter was not "substantially justified." *See IBEX Group, Inc.*, 96-ODRA-00037EAJA.

Footnotes:

[1] The GPS TAC procurement contemplated a base contract period of 3 years with four 1 year renewal options. *See* AR, Exh. 9.

[2] The FAAAMS has been promulgated as policy guidance for the new, unique acquisition system that Congress directed the FAA to develop, pursuant to Section 348 of Public Law 104-50.

[3] FAAAMS §3.2.2.2 provides, in pertinent part:

Awards shall be made to responsible contractors only. To be determined responsible, a prospective contractor must:

- have adequate resources (financial, technical, etc.) to perform the contract, or the ability to obtain them;

- be able to comply with the required or proposed delivery or performance schedule, considering all existing business commitments;
- have a satisfactory performance record;
- have a satisfactory record of integrity and business ethics; and
- be otherwise qualified and eligible to receive an award under applicable laws and regulations.

The CO's [Contracting Officer's] signing of the contract shall constitute a determination that the prospective contractor is responsible with respect to that contract. If an offer is rejected because the prospective contractor is nonresponsible, the CO shall make a determination of nonresponsibility. The CO is given great discretion in making this determination.

[4] Within the week after the issuance of the May 2, 1997 letter, the Program Office posted a notice on the Internet advising of the names and addresses of the eight companies that had qualified to submit proposals on the GPS TAC contract. According to the Contracting Officer, this notice was for the purpose of "enabl[ing] small businesses to market their services as potential subcontractors." AR, Exh. 10, ¶2.

[5] Rates were to be inclusive of "all indirect costs, general and administrative expense and profit." AR, Exh. 9, Tables B-1 and B-2.

[6] [Deleted]' resume reveals that he was the incumbent Lead for FAA's Master Station portion of the WAAS, that, in that capacity, he "[m]aintains extensive knowledge of the WAAS architecture and design," "develops engineering change proposals, design analyses, and engineering concepts for system architecture," and that as a "technical expert," he had "evaluated the adequacy of the Raytheon WAAS design with emphasis on system architecture, safety and security." AR, Exh. 14, Attachment 4, page 4-20. As to [Deleted], his resume reveals perhaps even greater depth with WAAS: "Developed, coordinated, and maintained WAAS requirements. Developed WAAS RFP and participated in WAAS Source Selection. Wrote WAAS System Engineering Plan; established the System Engineering Team. Wrote the Design Review Plan and established design review entrance and exit criteria, agenda, and MIL-STD matrix. Deputy Systems Engineering Task Lead and key in the technical management of the WAAS Prime Contract. Defined the End-state WAAS, Phase E, and wrote the Phase E Plan." *Id.*, page 4-6. It would appear that Messrs. [Deleted] and [Deleted] literally "wrote the book" on WAAS.

[7] Camber's challenge to the alleged improper evaluation of [Deleted]'s credentials, raised for the first time in its comments on the Agency Response (*see* Camber Comments, pages 14-15), was never presented as a supplemental protest. Had it been, it clearly would have been untimely, under either the protest time limitations of FAFAAAMS §3.9.3.2.1.2, or those of the RFO's standard "Protest" clause (AR, Exh. 9, Section L.1, Clause 3.9.1-3, "Protest (August 8, 1996)"). The comments were filed on July 27, 1998. The Agency Response, with the information on how [Deleted]'s credentials were addressed, had been filed on July 13, 1998, *i.e.*, more than seven (7) business days before.

[8] It should be noted that nowhere in either the SIR or the RFO did the Program Office make the execution or submission of teaming agreements a mandatory requirement.

[9] The Program Office has noted that ISN's proposal contained a superseded version of RFO Tables B-1 and B-2. Apparently, the estimated minimum and maximum hour figures shown on the earlier, Draft RFO, version were significantly higher. The Program Office argues that the substitution of the earlier version was purposeful on ISN's part and that the proposal must be viewed as unacceptable, in "non-conformance to a

material requirement of the RFO." AR, Exh. 39, ¶6. More will be said about this argument in the Discussion below.

[10] The "Percentage Breakdown to Final Composite Rate Table" accompanying the AMTI May 8, 1998 BAFO proposal shows a [Deleted]% share for ISI (roughly [Deleted] positions) and a share of [Deleted]% for Zeta, representing [Deleted]. The same table accompanying AMTI's original January 30, 1998 proposal showed significantly higher participation by Overlook: [Deleted] positions and a [Deleted]% share overall and significantly lower participation for AMTI that it bid for itself in May, [Deleted] positions and only [Deleted]% of the overall GPS TAC effort. AR, Exh. 14, January 30, 1998 Proposal Vol. 5, chart following page 5-1-5.

[11] All further mention herein of the "DRO" is meant to refer to Mr. Walters.

[12] The Program Office had also submitted a letter to the ODRA dated July 16, 1998, in which some additional legal argument was included. The DRO instructed the other parties to treat such argument as supplemental to the Agency Response for purposes of their comments.

[13] This statement by AMTI does not appear to have been accurate, at least insofar as Overlook was concerned. *See* Finding 87 below.

[14] A chart provided by AMTI entitled "FAA Rates, Overlook Systems Technologies, Inc., Loaded Labor Rates, FAA Proposal, June 22, 1998," indicates that, on June 22, 1998, Overlook was seeking from AMTI [Deleted] positions on the GPS TAC for Year 1 ([Deleted] current positions and [Deleted] "new hires"), and that the rates it was proposing for those positions had a multiplier of [Deleted].

[15] This statement is inaccurate. The contract rates for [Deleted] of the individuals in questions were actually higher, since they were put into the contract at a [Deleted] multiplier. For example, [Deleted]. The other individuals on the June 22, 1998 chart were never bid by AMTI. It is apparent from Overlook's June 22, 1998 chart which AMTI has furnished the ODRA that Overlook may not have known of this fact, even as late as June 22, 1998.

[16] This language is somewhat similar to that reported in the above-quoted [Deleted] affidavit, in its description of the Overlook teaming agreements. Finding 80, [Deleted] Affidavit, ¶8.

[17] This assertion, as indicated above (Finding 85), was inaccurate, since the rates were the very same rates initially proposed for Overlook in conjunction with the January 30, 1998 proposal.

[18] Along with a letter to the ODRA dated August 5, 1998, the Program Office provides the following statement:

"Material conditions of an agreement are those that relate to price, quantity, quality, or delivery of items offered. The concept of materiality is most usually discussed in cases involving sealed bidding where a single discrepancy may render a bid nonresponsive. Although this is not a sealed bid situation, ISN's nonconformance regarding alternate quantities represents a material discrepancy. In the arena of negotiated procurement it is necessary to consider the entire evaluation process and the treatment of individual offerors vis a vis the stated evaluation criteria. ISN's deviation from the RFO's price schedules is only one of many factors that rendered its proposal ineligible for award. The record shows that the government also considered [Deleted].* * *"

[19] It may also be that, if they did read the list on Exhibit A to the certificates and did happen to notice the reference to "AMTECH," either or both may not have known when they signed the documents that the abbreviation was for their former employer, Advanced Management Technology, Inc., *i.e.*, AMTI.

[20] Both had withdrawn whatever contributions they had in the AMTI 401(k) plan upon leaving AMTI.

[21] If ISN's protest is with regard to the methodology specified in the RFO, it would be untimely under AMS §3.9.3.2.1.2, which requires protests regarding alleged improprieties in a solicitation to be filed with the ODRA prior to the date established for receipt of offers.

[22] Although Camber did significantly reduce the participation of one subcontractor on its team, [Deleted], it argues that the "deadline" applied only to additional subcontractors who are expected to perform 20% or more of the GPS TAC effort. ISN clearly did not adhere to the "deadline" when it included a new major subcontractor, [Deleted], within its January 30, 1998 proposal, and when it reduced the participation of its other major subcontractor, [Deleted], to slightly below 20% of the overall effort.

[23] Even if the ODRA were to consider the May 1996 Overlook Teaming Agreement to have been applicable to the teaming arrangement between AMTI, as Prime, and Overlook, as prospective subcontractor Teammate, by putting forth Overlook's BAFO rates to the Program Office in May 1998, without complying with the condition Overlook imposed on the use of those rate, *i.e.*, the condition regarding Overlook's overall share of the GPS TAC contract work, AMTI failed to adhere even to that earlier Teaming Agreement, which clearly required the prime to "consult with and obtain concurrence of Teammate prior to making any proposal changes which concern the Teammate's proposed portion of the project." *See* Finding 7 (Overlook Teaming Agreement, Article 2).

[24] Although Overlook had its people attend two post-award meetings with the Government in June 1998 (Finding 78), it appears that, at the time of those meetings, Overlook was not yet fully apprised of the radically reduced role AMTI intended for it to play in the performance of the GPS TAC contract.