

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

FINDINGS AND RECOMMENDATIONS

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

Docket No.: 01-ODRA-00177

Appearances:

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

For Intervenor, Tivoli Systems, Inc.: Jonathan D. Shaffer, Esq., John S. Pachter, Esq., Jennifer H. McCabe, Esq., and Jason C. Tomasulo, Esq., Smith, Pachter, McWhorter & D'Ambrosio, P.L.C.; and Carl T. Hahn, Esq., Staff Counsel, IBM Corporation

For the Agency Product Team: Greg Carter, Esq., FAA Office of Chief Counsel

I. Introduction

This Protest by Computer Associates International, Inc. ("CA") challenges a contract award made to Tivoli Systems, Inc., an IBM company ("Tivoli") under a solicitation issued by the FAA Headquarters, Solicitation No. DTFA01-00-RFO-NIMSEM ("Solicitation") for an Enterprise Management (EM) framework tool as a component of FAA's National Airspace System (NAS) Infrastructure Management (NIM) implementation. The contract is for a base period through September 30, 2001, and four subsequent one-year options. The Solicitation called for award based on a determination of best value to the Agency.

CA had previously been awarded a contract under the same Solicitation on October 27, 2000. That award had been challenged by an earlier protest (the “Original Protest”) filed with the ODRA by Tivoli on November 9, 2000, and docketed as 00-ODRA-00171. Tivoli filed a supplemental protest (“Supplemental Protest”), by letter dated November 28, 2000 (filed with the ODRA on November 29, 2000). CA had intervened in those protests, and had participated along with the FAA Product Team and Tivoli in alternative dispute resolution (“ADR”) proceedings conducted by Administrative Judge Catherine Hyatt of the General Services Administration Board of Contract Appeals (“GSBCA”), pursuant to an ADR Agreement.

As a result of the ADR proceedings, Tivoli and the Product Team entered into a settlement agreement dated November 30, 2000 (the “Settlement Agreement”). Subsequently, the two parties entered into a revised settlement agreement dated December 5, 2000 (the “Revised Settlement Agreement”). Under the Revised Settlement Agreement, the Product Team agreed to terminate the earlier contract award and to issue an amendment to the Solicitation to delete Functional Characteristic 15, “Security Management,” one of 18 Functional Characteristics specified, and to substitute a new Functional Characteristic 15, “Security Interface.”

The Solicitation Amendment, Amendment 004, issued on December 12, 2000, called for the Product Team to evaluate “the ability of each proposer’s product to interface with security software products that the FAA owns.” As originally formulated, the Solicitation contemplated that offerors were themselves to furnish security software products. The Revised Settlement Agreement provided for Tivoli and CA to submit best and final offers (“BAFOs”) based on the Solicitation Amendment. Pursuant to the Revised Settlement Agreement, Tivoli withdrew its Original and Supplemental Protests upon its receipt of the Solicitation Amendment.

On December 6, 2000, after its contract award had been terminated for the Government’s convenience, pursuant to the Revised Settlement Agreement, but prior to the issuance of

the Solicitation Amendment and before any withdrawal by Tivoli of the Original Protest and Supplemental Protest, CA filed a protest (the “First CA Protest”) with the ODRA, *Protest of Computer Associates International, Inc.*, 00-ODRA-00173, in which it took issue with the proposed “corrective action” under the Revised Settlement Agreement, challenging the Product Team’s authority to enter into the Agreement and seeking to overturn the Amendment’s request for new price proposals, arguing that an impermissible “auction” would result. At the ODRA’s recommendation, the Administrator, by FAA Order No. ODRA-01-165, dated December 20, 2000, denied the First CA Protest.¹

Prior to the issuance of the Administrator’s Order, on December 15, 2000, Tivoli and CA submitted their BAFOs in response to Solicitation Amendment 004. On January 4, 2001, the instant contract was awarded to Tivoli. The Product Team conducted a debriefing with CA on January 9, 2001. Thereafter, at CA’s request, and by means of an ODRA “pre-dispute” process, certain proprietary and/or source selection sensitive documentation was made available to CA under ODRA Protective Order, in order for it to determine whether it had grounds for a protest. That documentation was released to CA’s attorneys on January 16, 2001, and, by letter dated January 18, 2001, CA filed the instant Protest with the ODRA.

For the reasons enunciated below, the ODRA recommends that the instant CA Protest be denied.

II. Findings of Fact

1. The Product Team issued the Solicitation (AR1², Tab 3) on September 11, 2000, seeking proposals for an Enterprise Management (EM) framework tool as a component of FAA’s National Airspace System (NAS) Infrastructure Management (NIM)

¹ CA has since filed with the United States Court of Appeals for the District of Columbia Circuit a Petition for Review with respect the Administrator’s December 20, 2001 Order.

² The designation “AR1” signifies the initial Product Team Agency Report filed with the ODRA by letter dated November 27, 2000 relating to the Original Protest of Tivoli under ODRA Docket No. 00-ODRA-00171. References to AR1 followed by tab numbers refers to tabbed documents within a binder marked “Volume 1” accompanying that initial Agency Report.

implementation. According to the Product Team's initial Agency Report in ODRA Docket No. 00-ODRA-00171:

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

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

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

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

4. On September 14, 2000, the FAA issued Amendment 001 to the Solicitation, adding four additional Functional Characteristics under the Technical Evaluation Criteria,

changing the total number from fourteen (14) to eighteen (18) (AR1, Tab 3, Section 2.3(c) and Amendment 001). The Statement of Work (SOW) was amended to include these additional functional capability requirements (AR1, Tab 3, Amendment 001). Among these four new capabilities was Functional Characteristic 15, Security Management, which called for the furnishing of security management software.

5. Thereafter, offers were received from both CA and Tivoli, among others. The offers were subject to a technical evaluation process as well as an analysis of the price proposals of the various offers. Ultimately, a report was prepared for the Source Selection Official (the “SSO report”). The SSO report noted that the overall technical scores of “Offeror A” (CA) and “Offeror B” (Tivoli) were “extremely close,” and pointed out that Section 2.2 of the Solicitation states that the cost area will become more important as the differences among offerors’ overall scores in other areas diminish (AR1, Tab 3). Since it appeared that CA’s product could be acquired for [Deleted] less than Tivoli’s, the evaluators recommended award to CA. The SSO adopted this award recommendation on October 27, 2000 (AR1, Tab 15), and award was made to CA on that date via delivery order DTFA01-01-F-50002 (AR1, Tab 16). Also on that date, the FAA notified the other offerors, including Tivoli, of the award decision. At Tivoli’s request, a debriefing was held on November 2, 2000. (AR1, p. 3).

10. Tivoli filed a protest with the ODRA on November 9, 2000. The Tivoli protest – *i.e.*, the Original Protest – was docketed as 00-ODRA-00171. On November 14, 2000, the FAA agreed voluntarily to stay delivery of Computer Associates’ product until December 15, 2000. AR1, p. 4.

11. The ODRA's Richard C. Walters, Esq., acting on behalf of the ODRA Director³, designated himself as the Dispute Resolution Officer ("DRO") for purposes of any adjudication in 00-ODRA-00171. CA intervened in Tivoli's protest and along with the Product Team and Tivoli, executed an ADR Agreement, which called for neutral evaluation to be provided by GSBCA Judge Catherine Hyatt as an ADR Neutral. The ADR Agreement was reviewed and executed by Mr. Walters, acting for the ODRA Director. By agreement, ADR was to proceed before Judge Hyatt concurrently with the DRO's adjudication under the default adjudicative process.

12. Tivoli, by letter of its counsel dated November 28, 2000, filed with the ODRA a Supplemental Protest contending, *inter alia*, that the Product Team had failed to adhere to the Solicitation's evaluation criteria, in that, without a further Solicitation amendment, it chose to evaluate the technical and price proposals without reference to one of the 18 specified Functional Characteristics, *i.e.*, Functional Characteristic 15, Security Management. According to the Supplemental Protest, this fact was not disclosed during the November 2, 2000 debriefing and was only discovered in connection with the review of documents provided to Tivoli on November 22, 2000 through the discovery process in the Original Protest. Because the Product Team had determined that it no longer needed security software to be furnished as part of this acquisition, the FAA already having procured such software elsewhere, it had decided not to include an evaluation of this Functional Characteristic as part of the evaluation of technical and price proposals. The record in 00-ODRA-00171 indicates that, although some partial evaluation efforts regarding "Security Management" had been undertaken, the Product Team discounted the factor completely in computing technical scores and in the evaluation of price proposals.

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

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

1. The Computer Associates International contract (DTFA01-01-F-50002) under the referenced solicitation will be terminated. [As indicated above, that event had already transpired by December 5, 2000.]
2. The Product Team will issue an amendment to the SIR⁴ on or about the week of December 4, 2000. The amendment will revise the SIR to state that Functional Characteristic 15, Security Management, is deleted and that Security Management will not be considered for evaluation and award purposes in an offeror’s technical solution and proposed costs. In its place, Functional Characteristic 15 will be renamed “Security Interface”, and the FAA will evaluate for award purposes the ability of each offeror’s product to interface with security software products that the FAA owns. Tivoli and the awardee, Computer Associates, will be invited to submit final proposal revisions. Tivoli and Computer Associates will be given a reasonable time (no less than four business days) in which to respond to the amendment. The Product Team will evaluate the proposals and make award in accordance with the SIR, as amended.
3. Upon receipt of the amendment, Tivoli will withdraw its pending protests (dated November 9, 2000 and November 28, 2000) with prejudice, to be reinstated only in the event this settlement is not consummated.

⁴ The term “SIR” refers to the instant Solicitation, an FAA Screening Information Request.

AR2, Tab C.

14. CA, on December 6, 2000, submitted to the ODRA the First CA Protest, which was docketed as 00-ODRA-00173. Mr. Walters again designated himself as the DRO for the case, and consolidated it with the earlier Tivoli protests under 00-ODRA-00171.

15. The First CA Protest challenged the propriety of the Product Team's decision to enter into a settlement with Tivoli, and contended that, since the offerors' prices had already been exposed, seeking revised pricing would create an impermissible "auction". First CA Protest, p. 9.

16. Amendment 004 to the Solicitation was issued to CA and Tivoli on December 12, 2000. (AR2⁵, Tab E). It revised Technical Evaluation Criterion 15 to read: "Demonstrated capability to support interfaces with FAA's existing security tools software." Paragraph 1 of Amendment 004 substituted a new corresponding Functional Characteristic 15 called "Security Interface," which required the following:

15. Security Interface

The EM tool shall interface readily and with minimal difficulty with FAA's existing suite of contractor-off-the-shelf (COTS) security software identified in Attachment 1 of this document. The EM tool *shall* allow a system manager *to manage* those services that provide access protection to system resources. [Emphasis added.]

Paragraph 3 of Amendment 004 required offerors to comply with the following:

For the evaluation of the security interface, each Offeror shall identify those existing FAA software security tools with which its proposed EM tool has an existing, currently available interface and *shall provide a description of the interface which addresses the level of interoperability/compatibility of the proposed EM tool with*

⁵ Citations to "AR2" refer to the Agency Report filed by the Product Team by letter to the ODRA dated December 11, 2000, in response to the First CA Protest, and to tabbed exhibits accompanying that Report.

the existing FAA software security tools. Offerors shall respond on Attachment 1 of this document indicating whether its proposed EM tool has an existing, currently available interface as discussed herein. Should the interface exist, Offerors' description of the interface shall either (a) not exceed two (2) pages per FAA software security tool or (b) not exceed a cumulative total of twenty-five (25) pages for all FAA software security tools. [Emphasis added.]

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

18. The ODRA issued Findings and Recommendations in 00-ODRA-00173, and, on the basis of the ODRA's recommendation, the Administrator, by FAA Order No. ODRA-00-165, dated December 20, 2000, denied the First CA Protest.

19. Previously, on December 15, 2000, CA and Tivoli both submitted BAFOs – revised technical submissions and revised price proposals – in response to Solicitation Amendment 004. The new price proposals differed radically from those initially offered. Tivoli offered a price of \$465,602, which was approximately 10 percent of its original price for the same software. Computer Associates' price was [Deleted], which was [Deleted] the price it initially offered.

20. In terms of indicating whether their respective EM tools had existing interfaces with the FAA's suite of security management software, both CA and Tivoli responded unqualifiedly "Yes" with respect to each of the security software items enumerated by the Agency in Attachment 1 of Solicitation Amendment 004. (AR3⁶, Tabs 2 and 3). Tivoli's Revised Technical Response for Solicitation Amendment 004 also states, in pertinent part: "The proposed suite of EM products includes integration and compatibility with all of the FAA specified

⁶ The designation "AR3" refers to the Product Team Agency Response filed with the ODRA by letter dated February 20, 2001, in response to the instant CA Protest, and to the tabbed exhibits accompanying that Report.

NIMS security software products.” AR3, Tab 2, Revised Technical Response, p. 2. As to the requirement of Solicitation Amendment 004 that offerors “provide a description of the interface which addresses the level of interoperability/compatibility of the proposed EM tool with the existing FAA software security tools,” Tivoli’s Revised Technical Response contains a single page chart/matrix that addresses “Product Integration/Compatibility” for each specified FAA software security tool. In some instances, an individualized statement is included in the chart/matrix for a particular security tool. For example, for Entrust Technologies’ Fedstart – Firewall/VPN, the Tivoli chart/matrix provides the following detail: “The use of VPN technology is transparent to Tivoli operations and management. Tivoli is designed to operate in environments protected by firewalls.” For details on interfaces with most of the specified security tools, however, the chart/matrix merely refers to the following general description of the “Tivoli Enterprise Console ” appearing immediately after the chart/matrix:

Tivoli Enterprise Console (TEC), the hub of Tivoli’s solutions for availability, is a powerful event management and automation application. Designed specifically for enterprise computing environments, the Tivoli Enterprise Console processes and correlates common management events from many different system and network components and automatically initiates corrective action. Grouping and filtering capabilities significantly reduce the number of events displayed to your operations staff, enabling them to manage even the largest, most complex environments. As a result, you can zero in on the most critical, relevant events. TEC sets a new benchmark by combining four unique tools in a single solution: event integration; event processing; event response and notification; and automation capabilities.

TEC collects, correlates, and automatically responds to a full range of enterprise management events, ensuring the high availability of your business-critical applications. Events from systems that are not presently managed by Tivoli can easily be integrated into TEC, giving you greater visibility and control. TEC provides a complete mission-control view of the health of your entire distributed environment from a single screen on your desktop.

Network management applications have become an important part of monitoring the availability of resources in the enterprise. The Tivoli Enterprise Console can seamlessly integrate alarms and events from all the major network management platforms and can correlate them with other system, database, and application events.

Adapters are passive collectors of all types of events from systems and applications, including the network management applications. All of your existing network management configuration and monitoring of events can be preserved: these events can simply be forwarded to the Tivoli Enterprise Console event server for correlation with other events, where automated responses can be triggered or Information Technology (IT) staff can be notified.

AR3, Tab 2, Tivoli Revised Technical Response, pages 3-4.

21. CA's revised Technical Submission contained somewhat more verbiage than Tivoli's in terms of describing the nature of existing interfaces with each of the specified security software tools. AR3, Tab 3, CA Revised Technical Submission, section entitled "NIMS Security Software." It spoke of the use of "right click" menus associated with particular applications (security software tools) in order to "launch" those applications "in-context". Also, the CA proposal addressed "9 levels of integration" and advised that, of the 9 levels, only 3 require additional "3rd party generated code or the use of APIs." *Id.*, section entitled "TNG Software Developers Kit (SDK)". An API, or application program interface, according to CA⁷, is only "*one side* of an interface between two software products" and something that would allow for integration by means of the writing of code. Functional Characteristic 12 of the Solicitation, Application Programming Interfaces (APIs) and Tool Kits, specifically called for the offerors'

⁷ There does not appear to be uniformity among information technology (IT) professionals in terms of defining "API". For example, Dr. Raj Jain, Professor of Computer and Information Science at the Ohio State University, defines API as a "set of interfaces to access the functionality of lower level services." See http://www.cis.ohio-state.edu/~jain/atm/atm_api.htm. Another definition states: "An API is a set of routines, protocols, and tools for building software applications." See <http://webcompare.internet.com/desc/api-desc.html>. A May 1996 article by Aram Mirkazemi, Protel International Pty Ltd. states: "Generally speaking, there are three kinds of interface[s] that a program can have: a Program-to-User interface, a Program-to-Program interface or a Program-to-Hardware interface. The API is commonly used to refer to the Program-to-Program interface." <http://www.protel.com/earticles/art1566.htm>.

Enterprise Management (EM) tools to include APIs. AR1, Tab 3, page 14. Unlike Tivoli (*see* Tivoli letter of March 9, 2001) and the Product Team (Product Team letter of March 9, 2001, Affidavit of James A. Robb, ¶4), CA takes the position that APIs do not themselves provide an “immediate level of interoperability.” CA letter of March 9, 2001, page 2. However, like the Tivoli proposal, CA’s proposal, in responding to the requirement of Solicitation Amendment 004 for existing interfaces, expressly mentions the use of APIs as one of the means of CA’s achieving interoperability between its Enterprise Management (EM) tool – Unicenter TNG – and the Agency’s security software tools:

Computer Associates Unicenter TNG is an integrated Enterprise Management solution providing true end-to-end management and “out of the box” integration interfaces. Different facets of Unicenter TNG address all of the following NIMS software. . . . The interoperability of Unicenter TNG and the current NIMS software packages can be accomplished without specialized programming, primarily using the openness and extensibility of the Unicenter TNG Framework. *Using information gathered through* SNMP, event logs, agents, MIBS, Operating Systems, *API’s* and the applications, information can flow to Unicenter TNG from a NIMS application, or from Unicenter TNG to a NIMS software application.

* * *

TNG Software Developers Kit (SDK)

The Unicenter TNG SDK provides another level of integration. Designing and implementing an enterprise management process that use (sic) the full range of the *Unicenter/TNG APIs*, can integrate Government Off The Shelf solutions as well as non-IT devices. There are over 1400 features already implemented and available. . . .

(Emphasis added). Like the Tivoli proposal, CA’s proposal did not identify “security specific APIs,” *i.e.*, ones tailored to one or more of the Government-owned security software tools specified in Solicitation Amendment 004. Product Team letter of March 9, 2001, Affidavit of James A. Robb, ¶4.

22. Based on their review of the proposals, all but one of the members of the Technical Evaluation Team (“TET”) perceived that both CA and Tivoli had EM

tools that possessed “some level of management capabilities,” AR3, Tab 14, Robb Deposition Tr., p. 94, but that neither were offering an EM tool that had existing interfaces with the degree of interoperability they considered complete, without some significant additional coding/configuration that would have to be done under the follow-on integration contract. In fact, as indicated by the deposition testimony of the TET Lead, Mr. James Robb, there was no certainty as to how much coding would be needed ultimately, since decisions regarding establishing security performance rules acceptable to the user would necessarily have to be made during the integration process, *i.e.*, as part of that follow-on contract. *Id.*, pp. 93-94; *see also* Tivoli letter of March 9, 2001, Supplemental Declaration of Wayne Greenberg, ¶¶4-6. Hence, out of the possible 5 points that could have been assigned for Functional Characteristic 15, “Security Interface,” those evaluators assigned scores of 3 to both CA and Tivoli. (The one evaluator assigned the full 5 points to both. That scoring was never explained.⁸) AR3, Tabs 6, 7, 8 and 14 (Robb Deposition Transcript). Based on these ratings, the overall technical scores of CA and Tivoli were still “extremely close,” with only about a [Deleted] difference, CA with [Deleted] and Tivoli with [Deleted].⁹ AR3, Tab 11, page 13. In addition to the technical evaluation, Mr. Michael Sparks, the NIMS Program Office Lead System Engineer, conducted an independent qualitative and quantitative (“Q&Q”) analysis of the Tivoli and CA proposals -- to determine whether the quantities and quality of items offered matched what was required in the Solicitation – and concluded that both the CA and Tivoli EM tools were “compatible for integration.” AR3, Tab 15, Sparks Dep. Tr., pages 9, 39-40. Because Tivoli’s price proposal was substantially ([Deleted]) lower than that of CA, the Amended Report to the Source Selection Official (“SSOR”)

⁸ The fact that the remaining evaluator had assigned scores of 5 to both (instead of scores of 3) would not appear to have made a difference, in terms of the overall scores and relative standing of the two competitors.

⁹ In accordance with Solicitation Amendment 004, the previous technical scores for the other Functional Characteristics were not modified. Mr. Robb, the TET Lead, “rolled” the scores assigned to Functional Characteristic 15, “Security Interface” into the pre-existing technical score sheets for the two offerors and arrived at these overall scores for technical merit and past performance. AR3, page 3 and Tabs 7 and 8.

recommended award to Tivoli based on “best value” to the Government. AR3, Tab 11, page 13.

23. This recommendation was adopted, and the instant contract was awarded to Tivoli by issuance of a Delivery Order on January 4, 2001. AR3, Tab 13.

24. The Product Team conducted a debriefing with CA on January 9, 2001. Thereafter, CA requested that the Product Team permit it to review certain documentation containing source selection and/or proprietary data, in order to determine whether it had grounds for a protest, and, by letter dated January 11, 2001, asked the ODRA to extend the Protective Order issued in conjunction with the prior protests so as to cover release of such materials to CA’s attorneys. With the consent of all parties, the ODRA opened a “pre-dispute” docket (ODRA Docket 01-PD-13) with respect to CA’s request. The ODRA conducted a telephone conference with the parties on January 11, 2001, and, by letter of that date, the ODRA confirmed that the Protective Order would extend to the “pre-dispute.” The documentation was subsequently released on January 16, 2001, and, by letter dated January 18, 2001, CA filed the instant Protest with the ODRA. CA submitted a letter of “clarification” on January 22, 2001.

25. The Protest contained a request by CA for a stay of contract performance. The ODRA, by an interlocutory decision dated January 25, 2001 and for the reasons stated therein, refused to recommend such a stay to the Administrator. The ODRA, by a second interlocutory decision dated February 5, 2001, denied two separate motions to dismiss filed by the Product Team and Tivoli, finding that, “when the facts are viewed in a light most favorable to CA” (as is required by the ODRA Procedural Rules, 14 C.F.R. §17.19(b)), the protest could not be said to be “without basis in fact or law.”

26. In its decision on CA’s request for a stay of performance, the ODRA described the present CA Protest as follows:

The instant protest by CA (as clarified by its letter of January 22, 2001) asserts two grounds for contesting the award to Tivoli – first, that the Product Team improperly relaxed the specifications for one competitor, and, second, that it improperly evaluated the CA proposal as not meeting the technical specifications. Paragraph 1 of Solicitation Amendment 004 added a new Functional Characteristic called “Security Interface,” which requires the following in terms of management of the FAA’s existing security software:

15. Security Interface

The EM tool shall interface readily and with minimal difficulty with FAA’s existing suite of contractor-off-the-shelf (COTS) security software identified in Attachment 1 of this document. The EM tool *shall* allow a system manager *to manage* those services that provide access protection to system resources. [Emphasis added.]

In its January 18, 2001 protest letter, CA contends that the Product Team relaxed this requirement of Amendment 004 that the proposed EM tool “manage” the FAA’s existing security software. CA alleges that the Tivoli proposal fails to evidence that Tivoli will be providing “integration modules” and that such modules are necessary to “manage” such “third party software.” CA January 18, 2001 Protest Letter, p. 2. CA also points to the descriptions of Tivoli’s various products that are set forth on the Tivoli Internet website¹⁰, and more specifically to the website’s descriptions of the two levels of integration capability available for Tivoli software – “Foundation Level” Integration and so-called “Tivoli Ready” Integration. In light of the price cut represented by Tivoli’s best and final offer (which was significantly lower than its previous offer for the EM software), CA urges that what Tivoli will provide the FAA will be its lower level of integration, “Foundation Level” Integration, which, according to CA, fails to satisfy the *management* requirement of the specified security interface.

By its “clarification” letter of January 22, 2001, CA asserts that the Product Team itself recognized that Tivoli’s offered EM product would not fulfill the “management” requirement. In particular, CA cites to the Report to the Source Selection Official (the “SSO Report”), which states, in pertinent part, as follows:

¹⁰ http://www.tivoli.com/products/tivoli_ready/integration.html

Offeror [A and B]’s framework exhibited the following weakness as measured against the technical submission and scored regarding its demonstrated current capability to support interfaces with FAA’s existing security tools software.

- The level of interoperability/compatibility of the proposed EM tool with the existing FAA software security tools appears to be one of *monitoring and controlling* the security tools through the EM M&C function; however, *it does not appear that the framework tool can act as an extension of the security tools*. This extendibility would significantly reduce the number of operator key strokes needed to perform security tasks and greatly reduce the context limitations often encountered when responding to activities outside the primary function of the EM framework, thereby providing the *required* interoperability. [Emphasis added by CA]

According to CA, the Product Team was correct in acknowledging this “weakness” in terms of Tivoli’s proposal, but was not correct in extending this criticism to CA’s proposal. CA January 22, 2001 letter at pp. 1-2. CA insists that its own proposal presented an EM product that satisfies the Product Team’s “management” requirement. *Id.*, p. 2. CA, in its protest, cites to the ODRA’s decision in the *Protest of Danka Office Imaging Company*, 98-ODRA-00099, case where the ODRA had sustained a protest, because the FAA had improperly relaxed a requirement for a “networking” capability in conjunction with the procurement of copiers. On the basis of *Danka* and its allegations regarding improper specification relaxation here, CA requests that the ODRA recommend, in the alternative, that:

(a) if the FAA’s requirements are as set forth in the SIR, that the FAA terminate the award to Tivoli and make award to Computer Associates or (b) if the FAA does not have the integration requirement as set forth in the SIR, that the FAA amend the SIR accordingly and evaluate a new round of best and final offers.

ODRA Decision on Request for Stay, citing CA Protest letter, January 18, 2001, p. 8.

27. In the protest, CA emphasizes that the “management” requirement was a “mandatory one,” that Tivoli’s proposal in regard to such a requirement was “nonresponsive,” and that the award to Tivoli represented an improper “relaxation” of the requirement:

In awarding to Tivoli, the FAA relaxed the new, mandatory requirement (per Amendment 004) that the EM tool allow system managers “to manage” FAA’s existing security products. According to Tivoli’s web site, Tivoli offers two levels of integration for its Enterprise product – one providing minimal integration called “Foundation level” and one providing complete integration called “Tivoli Ready.” The Foundation level integration allows monitoring of events, *but does not allow management of third party software.*

Tivoli’s proposal is obtuse, but a careful reading makes it clear that Tivoli offered only the Foundation level integration. This is confirmed by Tivoli’s extremely low price (approximately 10 percent of its original price) and by Tivoli’s omission from its proposal of certain “integration modules” that would be necessary to manage the third party security software. Therefore, the FAA should have deemed Tivoli’s proposal nonresponsive and made award to Computer Associates.

ODRA Decision on Motions to Dismiss, pages 3-4, citing CA Protest letter of January 18, 2001, pages 1-2 (emphasis in original).

28. The Product Team, by letter dated February 20, 2001, submitted its Agency Report on the Protest. Tivoli and CA, by their respective letters dated February 27, 2001, provided comments with respect to the Agency Report.

29. In the Agency Report, the Product Team stressed that Solicitation Amendment 004 was aimed at identifying whether the offerors’ respective EM tools had existing interfaces with each of the various FAA-owned security software products and, if so, at obtaining some detail on the level of interoperability such EM tools had with the security software products. In terms of “management”, the Product Team asserted, both CA and Tivoli had already satisfied the requirement for “management”, *i.e.*, even prior to the issuance of

Solicitation Amendment 004. More specifically, the Product Team stated, that requirement was satisfied by the proposals' responses to Functional Characteristic 11, Interfaces – Internal & External, and Functional Characteristic 12, Application Programming Interfaces (APIs) and Tool Kits. Under Functional Characteristic 15 (as revised by Solicitation Amendment 004), the Product Team had asked for information about interfaces with the security software suite, so as to determine the extent to which the existence of previously developed interfaces would eliminate the need for further coding effort to develop custom interfaces, *i.e.*, as part of the FAA's follow-on integration contract:

What CA has overlooked in its protest is the nature of information already provided to the evaluators under the original solicitation. Given the intent behind Amendment 4, and of FC 15, it is clear that any "materiality" concern was addressed and answered prior to the issuance of Amendment 4. In evaluating offeror submissions pursuant to Amendment 4, much of what the agency relied on was information it already had. Mr. Robb, the NIMS Acquisition Lead, believed both offerors could manage the security software.

* * *

The SIR contained FC 11, Interfaces – Internal & External, which stated:

The EM tool shall be capable of supporting interfaces that are used to exchange operational information with remote locations and users. The tool should have the ability to interface with other management systems, proxy agents, and internal legacy systems and equipment.

The enterprise management tool must be able to provide administrators and users with the ability to view *and control* the FAA enterprise graphically. It is one of the primary ways in which users and administrators tailor their views to reflect their respective business responsibilities. (Emphasis added)[Tivoli Protest Response, Tab 3, at 14].

The SIR also contained FC 12, Application Programming Interfaces (APIs) and Tool Kits, which stated:

The EM tool suite shall contain Application Program Interfaces (APIs) with supporting software developers tool

kits to support sharing of information between components of the FAA enterprise. The APIs shall allow ready scalability of the tool suite, as additional functions and managed objects are implemented. [Sparks Affidavit, AR3, Tab 16].

Having the interface capabilities provided pursuant to FC 11, and the Application Programming Interface Toolkit provided by FC 12, is sufficient to provide the required interface mechanisms. Mr. Sparks, who is the Lead Systems Engineer for the NIMS Product Team, reaffirmed that the “respective CA and Tivoli product suites [...] can allow a system manager to manage those services that provide access protection to system resources.” [AR3, Sparks Affidavit, Tab 16]. Note that Mr. Sparks holds this opinion of the offerors’ respective product suites, *based on their pre-Amendment 4 submissions*.¹¹ Information provided (primarily) in response to FCs 11 and 12 provided the FAA with sufficient information to determine that both products could manage the desired services. In Mr. Robb’s deposition, he described why the API and tool kits were required:

Q. At the time that Amendment 1 was released in September of 2000, when you first put out the original function characteristics 15, did you have a view whether the offerors would meet that requirement with a product for which the integration contractor would need to write code? Or was it your view or understanding that the requirement would be met out of the box? And again I am talking about back in September of the year 2000.

A. Well, we were unsure about the market’s ability to meet this requirement, as you say, out of the box. That is why we asked for offerors to submit the software development kits software to go along with all of the other things that is we asked, so that if in the eventuality it arose that we would have to write code, that we would have that sort of software development kit to do that there.

Q. And that was in a separate functional characteristic, right?

A. Correct. [AR3, Tab 14, Robb Deposition at 32-33].

Even though the agency already knew the “management” aspect of FC 15 was met, it asked for the information as a scored evaluation criteria to determine the extent to which the agency could use

¹¹ AR3, Footnote 42: “*Id.*, at Paragraph 8. Note also that Mr. Sparks knew that the Tivoli and CA product suites would successfully integrate, and be compatible, with the Entrust product line, representing 5 of the 15 security products at issue. *Id.*, at Paragraphs 2-5.”

existing previously developed interfaces as opposed to spending time and money developing custom interfaces. [Sparks Deposition, AR3, Tab 15 at Paragraph 9].

AR3, pages 10-13.

30. In its comments on the Agency Report, Tivoli advised that, for purposes of achieving “management” capability for its EM tool, with respect to the various security software products, it did not require the use of “integration modules” or so-called “Plus” modules, that the APIs and tool kits it furnished were sufficient. Tivoli also asserted that the modules that had been included in its original proposal and that had been eliminated in its BAFO in response to Solicitation Amendment 004 were meant to manage software security tools it no longer would be providing, by reason of Amendment 004’s switch over to Government-furnished software security tools. Tivoli letter of February 27, 2001, and accompanying Declaration of Wayne Greenberg. Tivoli, in its comments, argued that, even if the ODRA were to recommend that CA’s Protest be sustained, the only possible remedy would be the award of bid and proposal costs, since the Tivoli EM product had already been delivered and installed. Tivoli letter of February 27, 2001, pages 32-35. The Product Team’s Agency Report failed to address the issue of available remedies.

31. In its own comments on the Agency Report, CA pointed out an apparent inconsistency in terms of the interpretation of what was being required and evaluated under Solicitation Amendment 004:

A deposition was also taken of Mr. Michael Sparks, who performed the Quantitative and Qualitative (“Q&Q”) analysis. Mr. Sparks explained that the Q&Q ensured that the assumptions in the revised proposals remained the same as in the original proposals, that the products being offered are consistent with those assumptions, and that the proposals are offering the correct quantities of software. FAA Exh. 15 (Sparks at 40-41.)

Mr. Sparks believed that, in connection with Functional Characteristic 15, there were two types of requirements – a “high

level requirement” embodied in paragraph 1 to Amendment 004 and “a lower level requirement that is a matter of degree of how well the interface can be [e]ffected.” (Sparks at 13-14.)

Mr. Sparks was asked for his understanding of the purpose of paragraph 3 to Amendment 004 (which required offerors (i) to identify “existing, currently available interface[s]” with the FAA security software and (ii) to provide a description of the level of interoperability/ compatibility of the proposed EM tool). Mr. Sparks responded as follows:

A. What we were looking for here was to determine whether or not there was an existing *application programming interface*, and by determining whether or not there was one, that would determine the degree of work it would take to integrate the existing security products with the Enterprise Management tool.

Q. The idea . . . being that if that interface existed, you would have less coding to do later on?

A. Less coding, [less] work, less cost.

Q. And when you say an existing interface, what do you mean by that?

A. Has anybody done it before. Is it commercially available. Is it being offered.

(Sparks at 14-15; emphasis added) (We have emphasized the phrase “application programming interface” because the phrase does not appear in Amendment 004; as discussed below, this is one aspect of the FAA’s error.)

Mr. Sparks was familiar with the Tivoli concept of Plus modules. He testified that Plus modules were developed by Tivoli or third-party vendors and “marketed for the purpose of easily integrating what is known as Tivoli ready products.” (Sparks at 15.) He concurred that Plus modules were “existing interfaces” within the meaning of paragraph 3 of Amendment 004. (Sparks at 15-16.) He then answered “no” to the question whether he would have expected Tivoli to propose Plus modules in response to Amendment 004. His explanation follows:

Q. And why not?

A. Because the degree of the plus module would *go beyond* the level that we were looking for. We asked for an interfaced capability, not for a fully developed procedure or integration policy.

Q. And how does one know that from looking at anything that is written in amendment 4 or [somewhere] else in the [solicitation]?

A. In the [solicitation] we would also address our needs for APIs, and we would address our need for software developing tool kits and other functional characteristics. And we clearly indicated that our intent was to utilize those tools to develop interfaces if there was no preexisting interface that was available.

(Sparks at 16.) (Emphasis added.) (We have included this exchange because it shows so plainly the internal and irreconcilable contradiction in the FAA's position – on the one hand, the FAA is requiring off-the-shelf management capability to reduce the amount of software development during the integration process, but on the other hand it does not expect Tivoli to offer commercially available interfaces (Plus Modules) because that would be *too much* capability!)

CA letter of February 27, 2001, pages 10-11 (Emphasis in original).

32. As part of its comments regarding the Agency Report, CA also noted that the Product Team evaluators purportedly had failed to recognize that CA's proposal had included [Deleted] remote agents. In this regard, CA urged that these remote agents would provide the required management without need for any additional coding:

Mr. Sparks' deposition then turned to CA's revised technical proposal and specifically to the reference in CA's proposal to "remote agents." Mr. Sparks concurred that a remote agent "allows you to integrate, and . . . specifically to integrate with whatever remote device you were planning to interface with." (Sparks at 33.) Mr. Sparks also agreed that certain of CA's remote agents permit a user to take full control of a remote computer. (Sparks at 35.) (Mr. Robb also testified regarding CA's remote agents, and he concurred that the remote agents could perform the management functionality that might otherwise be provided by coding with APIs. Robb at 85.)

However, Mr. Sparks testified that he was confused about whether CA's remote agents would require coding or not. (Sparks at 34.) He also testified, "if I don't understand something in a proposal, then I request clarification from the vendor." (Sparks at 38.) When asked why he did not clarify his confusion about CA's remote agents, he responded:

A. They didn't propose any agents. So I didn't need that clarification.

(Sparks at 39.) Mr. Robb also testified that CA had not proposed to supply remote agents in its revised proposal. (Robb at 83.) This testimony – denying that CA was offering to supply remote agents as part of its solution to meeting the management requirement of Functional Characteristic 15 – is remarkable because:

- While giving this testimony, both Mr. Sparks and Mr. Robb were looking right at CA's revised proposal, and specifically at the bullet stating "Remote agents integration (*no-coding required*)."
- Mr. Sparks was charged with reviewing both the technical and cost proposals (*see* Sparks at 9, 37-43), and CA's revised cost proposal listed [Deleted] remote agents. (*See* FAA Exh. 3, Attachment B).

CA letter of February 27, 2001, pages 11-12. As to remedies, CA, in its comments, sought that the ODRA recommend that Tivoli's contract be terminated and that an award be made to it, or, in the alternative, that the FAA "clarify its needs in connection with the management of security tools and hold another round of best and final offers." *Id.*, page 18.

33.

The ODRA's Mr. V

First, I note an apparent inconsistency between: (1) the language of Solicitation Amendment 004 regarding "existing, currently available interface[s]" (and the related requirement that offerors describe for each interface the [existing] "level of interoperability/compatibility of the proposed EM tool with the existing FAA software security tools") and Tivoli's affirmation in its proposal that it had existing interfaces for all of the specified

FAA security software products; and on the other hand (2) the statements in Tivoli's February 27, 2001 comments regarding how Tivoli "could achieve [in the future the required] interoperability through the use of APIs and toolkits," coupled with Mr. Sparks' testimony that APIs and toolkits are used "to develop interfaces if there [are] no pre-existing interface[s] . . . available." Sparks Dep. At 16. Is it the FAA's position (and that of Tivoli) that Solicitation Amendment 004 was requiring offerors to identify their capability for developing interfaces in the future, rather than to identify and describe already existing and available interfaces? If so, what wording of Amendment 004 would permit that interpretation? Is an API the same as an "existing interface" and, if so, does it carry with it an immediate level of interoperability, even in the absence of any additional coding?

Second, I need the Agency's position regarding: (1) whether CA's proposal included [Deleted] remote agents (*see* Feith & Zell, P.C. letter of February 27, 2001); (2) whether remote agents can serve the function of an "existing, currently available interface" without the need for additional coding; (3) how, if at all, the technical evaluators took into consideration CA's provision of remote agents as part of its EM tool; and (4) whether and, if so, to what extent the scoring of CA's proposal for Technical Characteristic 15 would have been higher had the inclusion of remote agents within CA's EM tool been fully understood and considered.

Third and finally, I need the Agency's input regarding the appropriate remedy, should the ODRA determine to recommend that the protest be sustained.

The input was sought in the form of affidavits and documents, with brief accompanying explanation. ODRA letter dated March 1, 2001.

34. Each of the parties responded to the ODRA's request by letters dated March 9, 2001, together with affidavits. Both the Product Team and Tivoli stated that APIs will qualify as "existing interfaces" and that they will allow for interoperability immediately, even without additional coding. Product Team letter of March 9, 2001, Affidavit of James A. Robb, §4; Tivoli letter of March 9, 2001, Supplemental Declaration of Wayne Greenberg, ¶6. The Product Team explained Solicitation Amendment 004's language regarding "existing, currently available interfaces" as simply a request for the identification of available APIs,

together with a description of the level of interoperability that could be obtained through each API – thus equating “interfaces” with APIs:

The agency set out a simple proposition [in Solicitation Amendment 004]. Offerors were to tell the agency the extent of APIs that interfaced with the FAA security software suite, and describe the level of interoperability/compatibility of each such API. The agency would score the offerors on this characteristic on the extent to which preexisting, compatible interfaces existed.

Product Team letter of March 9, 2001, page 2. In terms of gauging the “level of interoperability” offered by an API, Mr. Robb noted, that “would require the evaluation of the information submitted by the offeror regarding the specific API and its intended purpose.” In this regard, he emphasizes: “No security specific APIs were referenced to any of the FAA’s security applications in the CA submission for SIR Amendment 4.” Product Team letter of March 9, 2001, Affidavit of James A. Robb, ¶4. The Product Team letter likewise states: “Tivoli did not reference any security specific API or interface, either.” “[N]either disclosed APIs specific to the FAA’s security software tool suite.” The lack of such identification of security specific APIs, the Product Team explains, was the reason “why all but one of the evaluators gave the offerors a middle-of-the-pack score, a three.” Product Team March 9, 2001 letter, pp. 1-2.

35. Tivoli, in its March 9, 2001 response, states with respect to APIs: “The additional coding required, if any, relates to the need to tailor the interface to address customer policies and rules.” Tivoli’s response continues: “Several interfaces are used for the interoperation of Tivoli and third-party products. These include APIs, toolkits and general capabilities that are included in the [Tivoli EM] product (*e.g.*, graphical and command line interfaces). All of these interfaces and APIs are pre-existing and available with the proposed Tivoli product suite and do not require any integration or coding to achieve interoperability. . . . In addition to performing a large variety of management functions for computing resources, Tivoli’s products are designed to interface and communicate with other third-party management products such as those listed in

Amendment 4.” Tivoli letter of March 9, 2001, Supplemental Declaration of Wayne Greenberg, ¶¶6-7.

36. In its March 9, 2001 response, Tivoli contends, regardless of whether an EM product contains an “existing, currently available interface,” any offered product would require “some additional work ... for integration after the FAA establishes its specific security policies and rules.” *Id.*, ¶4. Tivoli’s Mr. Greenberg explains further:

5. For example, during the follow-on integration contract, the FAA will need to establish security policies or rules related to the Enterprise Management tool. These security rules will be established by the FAA with the assistance of the integration contractor. As one example, the FAA will need to decide which FAA personnel will have authority to respond to security alerts. Not every individual having access to the system can have full security authority. Security principles mandate protections against abuse by individuals with access to the system. However, the final FAA security policies will most likely be developed under the integration contract. In any event, information regarding final security policies was not communicated to the offerors in this procurement and thus these issues could not be resolved or addressed by any bidder.

* * *

10. In summary, the ability of Tivoli’s products to interface with third-party products is a pre-existing capability, but the determination as to what precise items are to be monitored, managed and subsequent actions to be performed are customer specific. Thus, some integration will be required during the follow-on contract for any contractor. All major enterprise management software products are designed to be configurable to customer requirements and would require some level of integration to configure the management solution based on customer driven policies.

Id., ¶¶5, 10.

37. CA, in its March 9, 2001 letter and in the affidavits accompanying it, takes the position that APIs ought not be equated to “existing, currently available interfaces,” that they do not offer immediate interoperability without additional

coding, and that the Product Team, in holding an opposite view, was improperly interpreting the terms of Solicitation Amendment 004:

[Interpreting Solicitation Amendment 004 as requiring offerors to identify their capability for developing interfaces in the future, rather than to identify and describe already existing and available interfaces] is the only explanation for (a) the FAA's acceptance of Tivoli's revised proposal, which did not even purport to offer the requisite management capabilities (in contrast to Tivoli's original proposal) and (b) the FAA's position in this protest as set forth in its February 20, 2001 Agency Response, which openly admits that the FAA treated Amendment 004 as an information gathering exercise, rather than as a material solicitation requirement.

Similarly, this is the only explanation for (a) the manner in which Tivoli revised its proposal, withdrawing products that apparently have (according to Tivoli's website) existing interfaces with some of the FAA's security tools and withdrawing all reference to the capability of its offered products to manage the security tools and (b) Tivoli's position in this protest, which emphasizes the ability of its offered products to interface in the *future*, after the integration contractor *creates* interfaces by coding APIs, developing integration modules, etc.

* * *

No wording in Amendment 004 would permit that interpretation. The FAA's and Tivoli's interpretation turns Amendment 004 on its head. The only reasonable and logical reading is that Amendment 004 required the offerors to offer (a) *existing* (i.e., already-coded) interfaces and (b) the capability to manage the FAA's security tools, thereby *minimizing* subsequent software development by the integration contractor. Any other interpretation reads the requirements out of the solicitation. [Deleted].

* * *

As explained in the attached affidavit of Mr. David McNama (CA Exh. 13, ¶¶ 5-6), an API is *one side* of an interface between two software products. For example, Microsoft publishes APIs for its Windows operating system. Other developers can use those APIs *to code* an interface between the Windows operating system and some other product. Until the coding occurs, however, the APIs provide no immediate level of interoperability between the Windows operating system and such other products.

The same is true for APIs delivered as part of the EM tool suite. Developers could use those APIs to code interfaces between the EM tool suite and third party products, such as the FAA's security

tools. Until the coding occurs, however, those APIs provide no immediate level of interoperability between the EM tool suite and such third party products. CA Exh. 13, McNama Aff. ¶ 6.

38. As to CA's contention regarding [Deleted] remote agents within its BAFO proposal, CA's March 9, 2001 letter provides further information as to the pricing of remote agents within its proposal.¹² The fact that remote agents were included in CA's BAFO proposal appears to be conceded. Further, the Product Team, in its March 9, 2001 letter to the ODRA, agrees with CA that a remote agent can serve as an "existing, currently available interface" without the need for additional coding, and maintains that it did consider the remote agents when evaluating CA's proposal. However, the Product Team insists that CA's inclusion of the remote agents was to satisfy purposes other than to provide interfaces to the Government-owned security software suite under Functional Characteristic 15. In this regard, the Product Team observes, no additional remote agents were added to CA's initial proposal, and, as with APIs, no particular remote agents were identified as providing an interface and interoperability with respect to any specified security software tool. In addition, the Product Team notes, were the remote agents to have been removed, in whole or in part, from CA's BAFO proposal (as CA indicates – via the Declaration of CA's Regional Vice President, Mr. Daniel O'Malley – it may have done, had it known in advance of the Product Team's interpretation of the language of Solicitation Amendment 004), this removal may well have had a negative impact on CA's overall technical score vis-a-vis Tivoli:

Clearly, CA's Amendment 4 proposal contained remote agents in the Base Requirements section. These agents were provided, not to meet the security requirement of Amendment 4, but to meet other functional characteristics *presented in the original SIR!* Robb Affidavit, ¶ 6. Note, also, that CA provided no information, in its original proposal nor in its Amendment 4 proposal, to support a finding that these agents provide any functionality sought by Amendment 4. *Id.*, ¶¶ 7, 8, 11, 12. Therefore, yes, these agents can serve as an "existing, currently available interface" without the need for additional coding, but that is because the usage CA

¹² CA advises that the cost included for remote agents totaled [Deleted]. CA letter of March 9, 2001, pages 2-3; AR3, Exh.3, Attachment B.

presents for the vast majority of these agents (the 9,000 TNG Agent Runtime) is that of providing “framework services” for most any other agent running on the system. *Id.*, ¶ 7, 9. CA has provided no information to assess the level of any of these remote agents’ interoperability or compatibility with the FAA security software tool suite. *Id.*, ¶ 7.

CA’s 27 Feb submission discussing this point is disingenuous. Its advocacy makes no differentiation between the different agents CA offered in its proposal, and yet the only remote agents CA points out has no apparent significance relative to the FAA security software tool suite. Mr. Sparks’ testimony was accurate; CA did not propose any remote agents specifically for the FAA security software. The runtime agents were presented in the original proposal in the same quantity; there was no agent change from the first proposal to the Amendment 4 proposal in this regard. For CA to say in its 27 Feb submission that these agents had relevance to Amendment 4, when CA’s proposal itself made no such statement is to belie the true minimal functionality of these runtime agents. Note also that CA itself implies that additional coding will be required to provide any functionality greater than simply monitoring systems and databases. Robb Affidavit, ¶ 9.

The evaluators did include remote agents in their evaluation of CA’s Amendment 4 submission. Robb Affidavit, ¶¶ 10, 11. The scores given by the evaluators was commensurate with the level of detail provided by CA as to any of the agents’ functionality relative to the FAA security software tool suite. *Id.*, ¶ 12. CA provided little, if any, substantive information as to any existing interface (including agents) and its functionality interoperating with the FAA security software. *Id.*, ¶ 11. For CA to now claim its offer of remote agents (a term undefined by CA) was improperly evaluated, and base that claim on a skewed and unsupported reading of its own proposal, is patently improper.

The Declaration of Daniel O’Malley deserves comment at this point. For the first time in all the CA submissions, in the competition as well as the protest, CA makes the statement that the remote agents provide management capabilities. His statement at Paragraph 6 is particularly curious. In its original proposal, CA itself proposed these remote agents, in this same quantity, in response to a number of requirements, none of which was Functional Characteristic 15. Robb Affidavit, ¶ 6. If CA were to remove [Deleted] these agents, based on a characteristic that CA itself did not believe required such agents, such an action would potentially, and probably, have a negative effect on its technical

score in each of those other characteristics, and thus, affect the best value determination as well.

Product Team letter of March 9, 2001, page 4.

39. As to Mr. Walters' question regarding possible remedies in the event the CA Protest were to be sustained, CA, in its March 9, 2001 response, for several reasons, again indicated that it should receive a directed award. Tivoli, in turn, again maintained that the provision of CA's bid and proposal costs would be the only appropriate remedy. In this regard, it provided the ODRA with documentation of Tivoli's receipt on February 26, 2001 of a payment from the FAA in the amount of \$242,548.79 (including a \$128.79 late payment fee) for the previously delivered and installed Tivoli EM product and for the first year of maintenance under Tivoli's contract. Tivoli March 9, 2001 letter, pp. 5-6; Supplemental Declaration of Wayne Greenberg, ¶13, and Attachment 1 (IBM Invoice and account detail). The Product Team, in its own March 9, 2001 letter, agreed with Tivoli that the circumstances would mandate the limited remedy of reimbursement for bid and proposal costs, in the event the Administrator were to sustain CA's protest. In this regard, the Product Team furnished the following explanation:

As an initial matter, the agency is presenting this section of information at the request of your office, and no inference of culpability, or admission of liability, is to be inferred by this response. In the event CA's protest is sustained, your office will consider what remedies are available to CA and which one(s) is/are appropriate to the instant action. The regulations governing Procedures for Protests and Contract Disputes provide guidance in this consideration:

In determining the appropriate recommendation, the Office of Dispute Resolution for Acquisition should consider the circumstances surrounding the procurement or proposed procurement including, but not limited to: the nature of the procurement deficiency; the degree of prejudice to other parties or to the integrity of the acquisition system; the good faith of the parties; the extent of performance completed; the cost of any proposed remedy to the FAA;

the urgency of the procurement; and the impact of the recommendation on the FAA.

14 C.F.R. §17.21(b). In the unlikely event the protest is sustained, the agency believes the appropriate remedy to be reimbursement of bid and proposal preparation (“B&P”) costs for responding to Amendment 4. Since this protest centers on the evaluation of offeror responses to Amendment 4, CA has not raised any issue concerning improper agency actions occurring before the issuance of that amendment, nor is it seeking in this forum any relief based on pre-issuance activities by any party. Thus, CA has not raised any issue that would entitle it to any B&P costs unrelated to its response to Amendment 4.

As the Competition in Contracting Act is not applicable to agency acquisitions initiated under the AMS (A Bill Making Appropriations for the Department of Transportation and Related Agencies for the Fiscal Year Ending September 30, 1996, and for Other Purposes, Pub.L. No. 104-50, Sec. 348), programmatic disruptions and cost impacts are proper in considering recommendations for corrective actions. *Protest of Haworth*, 98-ODRA-00075.

Paragraphs 13 through 18 of Mr. Robb’s Affidavit set out relevant actions that have occurred since award of the contract under protest. Significant time has been spent obtaining the integration contractor that will help integrate the Tivoli tool suite within the various FAA systems. Excerpts from the NIMS Integration Contractor Statement of Work are found at Exhibit 2 to Tivoli’s 27 February Comments on Agency Response. Given that the key criterion for selection was the offeror’s capabilities with the Tivoli products, recompetition would be required if the NIMS team was directed to use the CA product suite. Recompetition would also entail losing the \$242,420 investment made in the Tivoli product suite. Agency Response, Tab 13.

Activities have begun in earnest to implement the Tivoli product suite, and receive the expected benefits of the EM tool suite. The CAASD NIMS lab, as well as the NIMS Premier Facility, is well on its way to fully embracing and incorporating Tivoli’s product suite. Training is scheduled to begin March 26, with an estimated first class of 12 to 14 people. Robb Affidavit, ¶ 14, 15. The architecture group has been meeting to prepare the initial design documentation, and will soon have the integration contractor ordering hardware components. Both Government and support

contract personnel have been preparing since January for these design team meetings. *Id.*, ¶ 16.

In addition, Mr. Robb points out the day-for-day slip that may well occur in installing the prototype in the NIMS Premier Facility if the actions to date must be revised, and in some cases, redone. Robb Affidavit, ¶ 17. While installation at the three Operational Control Centers is not until at least August 2002, the schedule does not have an allowance for the re-solicitation and evaluation, or the impact of an award to other than Tivoli.

Significant person-hours, as well as agency funds, have gone into implementing the Tivoli product suite into, and become an integral part of, the NIMS environment. Requiring the use of CA software would cause, essentially, a doubling of many, if not most, of these efforts, with no appreciable benefit to the program office, or to the agency mission under which NIMS operates. The Tivoli product suite meets current agency requirements. Robb Affidavit, ¶ 13. There would be little gained by reversing the progress made since contract award; the CA product suite is not markedly better (See Tivoli's and CA's Scoring Matrix, Tab 7 and 8, respectively).

If the Administrator determines that some aspect of Functional Characteristic 15 was waived in favor of Tivoli, the impact to the agency is that additional coding would be required, over and above what the CA product line would require. Only if CA prevailed in the re-evaluation, or upon directed award, would the agency realize any such resource savings. CA has not put a dollar figure to that coding and Mr. Robb has already testified that, *for both product lines*, the amount of coding required is not known at this time. (Robb Deposition, at 93-94, quoted above.) Such a speculative savings should not form the basis of a remand or directed award, and in addition, could easily be dwarfed by the price differential in the offers, Tivoli's \$465,602 (Agency Response, Tab 9) to CA's \$[Deleted]. If, in fact, the agency erred in its acquisition process, CA would be entitled to its bid and proposal costs for the Amendment 4 submission.

Product Team letter of March 9, 2001, pages 4-6; *see also* Affidavit of James A. Robb, ¶¶13-18.

40. Although the record was to close with the parties' submission of their three letters on March 9, 2001, CA, by letter of March 12, 2001, submitted to the

ODRA a rebuttal to the Product Team's position regarding remedies. In particular, based on its counsel's recollection of earlier conversations with Product Team counsel, CA took issue with the Product Team's statements concerning how terminating Tivoli contract would create the further need to recompile the integration contract (since at least some of the competing offerors on that procurement do not possess integration capability for the CA product). CA also characterized the Product Team's actions in connection with the protest as appearing to be "an unprincipled attempt to undermine the ODRA's ability to recommend a meaningful remedy."¹³ CA letter of March 12, 2001. With the ODRA's permission, Tivoli and the Product Team submitted brief responses on March 13, 2001, whereupon the record closed.

III. Discussion

As the ODRA has stated on a number of occasions, in the context of resolving bid protests, the ODRA will not recommend that the Administrator overturn Agency actions, so long as they have a rational basis, are neither arbitrary, capricious, nor an abuse of discretion, and are supported by substantial evidence. *Protest of Computer Associates International, Inc.*, 00-ODRA-00173, citing *Protests of Information Systems & Networks Corporation*, 98-ODRA-00095 and 99-ODRA-00116, *aff'd* 203 F.3d 52 (D.C. Cir. 1999); and *Protests of Camber Corporation and Information Systems & Networks, Inc.*, 98-ODRA-00079 and 98-ODRA-00080 (Consolidated). If FAA Product Teams exercise reasonable judgment in "best value" procurements and make source selection decisions in consonance with the FAA's Acquisition Management System ("AMS") and specified Solicitation evaluation and award criteria, the ODRA will not substitute its judgment for theirs. *See Protest of Information Systems & Networks Corporation*, 99-ODRA-00116.

¹³ Because we are recommending denial of the instant CA Protest, *see infra*, the matter of possible remedies has been rendered moot.

In the present case, the issue is whether the Product Team adhered to the criteria set forth in Solicitation Amendment 004 when they evaluated the BAFOs of CA and Tivoli and, more particularly, whether, in light of such criteria: (1) the technical evaluators were exercising reasonable judgment when they scored Functional Characteristic 15, “Security Interface”; and (2) the Product Team’s Source Selection Official had a rational basis for selecting Tivoli for contract award.

In this regard, we find CA’s reliance on *Protest of Danka Office Imaging Company*, 98-ODRA-00099 to be misplaced. In *Danka*, the ODRA observed: “[A] waiver or relaxation of . . . a [material] technical specification in favor of one offeror creates a double standard that is so inherently at odds with general principles of procurement fairness and efficiency as to fail the ‘rational basis’ analysis.” From the record in *Danka*, it was clear that the awardee’s product did not satisfy the specified criterion for “networking” of the copiers being procured and that the Agency’s Product Team had effectively waived that requirement when it made the contract award. More specifically, the ODRA found, the awardee there (Xerox) effectively acknowledged, as part of a letter to the Contracting Officer, that certain of the copiers being offered did not satisfy the “networking” requirement, that a separate kit would be needed to obtain “networking” capability for those copiers.

In this case, in contrast, Tivoli has never acknowledged in any manner that its EM product does not satisfy the technical criteria of Functional Characteristic 15 criteria, in terms of “management” of the Government-owned software security management tools. Indeed, it has maintained all along that its EM product has existing, available interfaces with each of the specified software security tools, and that such interfaces have immediate interoperability, albeit not the refined level of interoperability conforming to as yet established security policies and rules that will result from coding in connection with the integration process. See Findings 22, 33, and 34. The Product Team here acted on the basis of Tivoli’s

unqualified representations that its EM product had existing, available interfaces for each security software tool and that its “suite of EM products includes integration and compatibility with all of the FAA specified NIMS security software products.” See Finding 20, above. Thus, there was no “double standard” being applied and no waiver or abandonment of a material solicitation requirement for only one of the offerors, as there had been in *Danka*.

Moreover, notwithstanding CA’s arguments to the contrary, the ODRA is satisfied that the Product Team had a rational basis for determining that the Tivoli EM product possessed some management capability with respect to the Agency’s various security software tools. In this regard, it should be noted, Solicitation Amendment 004 – as part of the instant “best value” procurement – did not define a minimum level for the quality of “existing, available interfaces” or for the nature of “management” being sought. It merely called for the EM tool to “interface readily and with minimal difficulty with FAA’s existing suite of contractor-off-the-shelf (COTS) security software” and for the EM tool “to allow a system manager *to manage* those services that provide access protection to system resources.” Finding 16, *supra*.

Here, in terms of “existing, available interfaces,” both offerors’ products would rely, to some extent and, in Tivoli’s case, apparently to a somewhat greater extent, on existing application programming interfaces (APIs). Finding 21. Based on the record before us, these APIs appear to be more than just interfaces in name. There is substantial evidence in the record that these APIs will permit the offerors’ EM tools to communicate with the Agency’s security software products and will offer a degree of interoperability with those products, and thus “some level of management capabilities.” AR3, Tab 14, Robb Deposition Tr., p. 94. See Finding 21; CA Proposal, AR3, Tab 3; Tivoli letter of February 27, 2001, Declaration of Wayne Greenberg, ¶¶3-4; Tivoli letter of March 9, 2001, Supplemental Declaration of Wayne Greenberg, ¶6; Product Team letter of March

9, 2001, Affidavit of James A. Robb, ¶4.¹⁴ In other words, the record contains substantial evidence to support the Product Team’s finding that both EM products satisfy the revised Technical Evaluation Criterion 15 under Solicitation Amendment 004: “Demonstrated current capability to support interfaces with FAA’s existing security tools software.” *See* Finding 16, above.

The ODRA also finds substantial evidence in the record in support of the Product Team’s determination that neither EM tool possesses full management capabilities without the need for further refinement through coding. More specifically, it is clear that neither party identified individual APIs, remote agents or other software devices, protocols or mechanisms within their EM products that were tailored specifically to particular security software tools owned by the Agency. *See* Findings 21, 32 and 36. From the ODRA’s perspective, the evaluators exercised reasonable judgment in concluding that more would be needed for either of the offerors’ products in order to achieve the desired level of management, and in assigning to both EM products “middle-of-the-pack” scores of 3 out of a possible 5 for Functional Characteristic 15, “Security Interface”. The resultant overall scores were close and the price differential in favor of Tivoli was substantial. *See* Finding 22. We thus find that the ultimate selection of Tivoli by the Source Selection Official had a rational basis, was supported by substantial evidence and was neither arbitrary, capricious, nor an abuse of discretion in this “best value” procurement. Under these circumstances, even if the ODRA were to find itself inclined to score the two products differently for Functional Characteristic 15, it would be improper for the ODRA to “second guess” and substitute its judgment for that of the Product Team and its evaluators in this regard. *Protest of Information Systems & Networks Corporation*, 99-ODRA-

¹⁴ Although we recognize that CA has presented opposing testimony (*see* CA letter of March 9, 2001, Declaration of David McNama, ¶6), we do not find this evidence inherently more credible than that presented by Tivoli and the Product Team and cannot conclude that the Product Team’s actions were without basis in “substantial evidence.” Furthermore, because those actions were induced in part by Tivoli’s representations, should the Tivoli product fail to perform as warranted, the Product Team will have available contract remedies.

00116; *see also Danka, supra* (“ODRA will not substitute its judgment for that of the contracting office.”).

IV. Conclusion

For the reasons set forth above, the ODRA recommends that the instant Protest be denied.

/s/

Richard C. Walters¹⁵
Dispute Resolution Officer
Office of Dispute Resolution for Acquisition

¹⁵ We have noted above (Note 3, *supra*) that, as with the prior protests, the Director of the Office of Dispute Resolution for Acquisition recused himself completely, because of certain conflicts, and delegated to Mr. Walters full authority to act on his behalf.