PUBLIC VERSION

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

AMENDED FINDINGS AND RECOMMENDATIONS[1]

Matter: **Protest of Frequentis**
Under Solicitation No. DTFA01-01-R-00022

Docket No.: 02-ODRA-00231

Appearances:

For the Protester, Frequentis: William H. Butterfield, Esq. and Lawrence Prosen, Esq., Bell, Boyd & Lloyd PLLC

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

For the Intervenor, Northrop Grumman Systems Corporation – Denro Systems: Gregory A. Smith, Esq. and Robert Nichols, Esq., Piper Rudnick LLC

I. Introduction

This protest ("Protest"), filed by Frequentis with the Office of Dispute Resolution for Acquisition ("ODRA"), challenges a contract award made to Northrop Grumman Systems Corporation – Denro Systems ("Northrop/Denro" or "N-G") under Solicitation No. DTFA01-01-R-00022 ("Solicitation" or "SIR") issued by an FAA Headquarters Product Team ("Product Team"). The contract ("Contract") is for the maintenance and enhancement of voice switching (VS) capabilities for the FAA's Automated Flight Service Stations (AFSS) throughout the United States. Because the parties were unable to agree on the use of alternative dispute resolution ("ADR") to resolve the Protest, the

[1] As explained herein, the Findings and Recommendations issued on October 1, 2002 together with the Administrator's Order, FAA Order No. ODRA-02-229, have been amended in response to Motions for Reconsideration submitted by the FAA Headquarters Product Team and by the intervenor, Northrop Grumman Systems Corporation – Denro Systems.

matter proceeded under the ODRA's Default Adjudicative Process. The ODRA's Richard C. Walters, Esq. was designated as the Dispute Resolution Officer for the adjudication.

Based upon the record in this Protest, the ODRA finds that the award decision lacked a rational basis, and was not in accord with the SIR's evaluation criteria and the requirements of the FAA Acquisition Management System ("AMS"). The ODRA specifically finds that the Product Team: (1) improperly equated the two proposals in terms of Operational Capability Test (OCT) results; (2) failed to incorporate OCT results properly into its ultimate evaluation of the proposals; (3) improperly found the Frequentis and Northrop/Denro proposals to be technically equivalent; (4) assigned improper weight and significance to the differences in the two companies' cost/price proposals, in contravention of the SIR evaluation criteria; and (5) improperly considered and accepted what it acknowledged to be an unreasonable, unrealistically low, "buy-in" cost/price proposal from Northrop/Denro. In this latter regard, the ODRA finds that the Product Team's decision to accept such a proposal was, in part, motivated by Northrop/Denro's failure to satisfy a SIR past performance-related requirement regarding identification of a prior contract that had been terminated for default. Accordingly, the ODRA recommends that the Protest be sustained. The ODRA further recommends, as an appropriate remedy, that the Administrator direct the Product Team to terminate the Northrop/Denro contract for the Government's convenience and to issue an award to Frequentis.

II. Findings of Fact

1. The Product Team states that the SIR called for "the supply of voice switches for utilization in the 61 FAA Automated Flight Service Stations (AFSS) located throughout the United States, Alaska, and Puerto Rico." According to the Product Team, "AFSSs provide (among other services) preflight weather briefings, airport advisories, acceptance of flight plans, Notice to Airmen classification and dissemination, monitoring of emergency communications radio frequencies, search and rescue initiation and coordination, and air/ground communications services for commercial, general aviation,

and military pilots." The voice switches being procured are to "replace the Type III Integrated Communications Switching System (ICSS) that have been in operation at the 61 AFSSs since the 1980s." Agency Response ("AR"), pages 1-2.

2. On November 29, 2000, the Product Team issued for comment a draft form of the SIR on the FAA Contracting Opportunities website. The SIR was released in final form on February 28, 2001. *Id*. The SIR called for a three-phase competition, with the possibility of "down-select" decisions being made at the end of Phases I and II. *Id.*, page 2; AR, Vol. II, Exh. 2, SIR, Section M1.0. The Product Team has provided further uncontested detail on the nature and conduct of the three-phase procurement. It describes Phase I as follows:

> Phase I (Prequalification Stage) consisted of an evaluation of Offerors' Product Capability, Production Capability, Life Cycle Support, and Record of Sales. Offerors were required to submit general technical and management information, product information, and record of sales data. [SIR at Section L2.0] The SIR stated that those Offerors whose submittals are rated as demonstrating a product and a capability that could most likely lead to contract award would advance to Phase II. [SIR at Section M3.1] Phase I findings were not carried forward to Phase II or III.
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> On March 20, 2001, six Offerors responded to the SIR with Phase I submittals. The FAA evaluated the submittals based on the factors in Section M3.1.1 of the SIR. The FAA completed the Phase I evaluations on April 20, 2001. The evaluation resulted in the removal of two Offerors from the competition and an invitation to four Offerors to proceed to Phase II.

AR, pages 2-3. The Product Team then describes what transpired with respect to Phase II of the procurement:

> The four Offerors invited to participate in Phase II all elected to continue to participate. The companies and their assigned evaluation "code" names listed throughout the evaluation process . . . [included]: . . . Frequentis ("Dolphin") [and] N-G ("Bass") . . . .
>
> Phase II consisted of an evaluation of Offerors' Technical Approach, Management, Past Performance and Cost/Price. Specifically, the SIR stated that the Offerors' Phase II submittal would be evaluated based on the Offeror's proposed approach, understanding of the requirements and the proposed product's feasibility to meet the needs of the Government.

[SIR at Section M3.2] The SIR also stated that adjectival ratings would be derived for each of these factors. Those Offerors who demonstrate a product and a capability that could most likely lead to contract award would then advance to Phase III.

Offerors proceeding to Phase II were required to submit the following Proposal Volumes: (1) Technical, (2) Management and Subcontracting Plan, (3) Past Performance, and (4) Cost/Price. [SIR at Section L12.3] In addition, Phase II Offerors were required to provide a Model Contract response and a Capability Assessment Plan. [SIR at Section L12, Attachment L.1]

On August 6, 2001, the four Offerors, including N-G (Bass) and Frequentis (Dolphin), submitted Technical, Management and Subcontracting, and Past Performance Proposals, as well as a proposed model contract. [AR, Exhibits 9A, 9B, 9C, 9D, 9F, 9G, 9H (Frequentis); 10A, 10B, 10C, 10E (N-G)]

On August 10, 2001, the FAA approved its Technical Evaluation Plan, Management Evaluation, Plan, Past Performance Evaluation Plan, and Cost/Price Evaluation Plan. [AR, Exhibits 4 through 7]

On September 7, 2001, the FAA responded to the Offerors' proposed model contract submissions. The final result of the "model contract" was a tailored contract that reflected each Offeror's specific approach to the procurement. [SIR at Section L4.0] The four Offerors, including N-G and Frequentis, submitted Cost/Price proposals to the FAA on October 19, 2001. [AR, Exhibit 9E (Frequentis); Exhibit 10D (N-G)]

While the Offerors were preparing their cost proposals, they were also participating in Operational Capability Assessments (OCAs). OCAs provided the Offerors an opportunity to demonstrate, and for the FAA to assess, the array of capabilities and solutions being proposed to meet the AFSSVS Statement of Work (SOW) and Specification requirements. [SIR at Attachment L.1] The OCAs were not separately rated, but were used as additional data to clarify, substantiate and validate information provided in Offerors' technical and management proposals. OCAs for the four Offerors, including N-G and Frequentis, took place in the timeframe from September 28, 2001 to November 9, 2001. [AR, Exhibits 9H and I (Frequentis); and Exhibit 10H (N-G)]

Throughout the Phase II evaluation process, the FAA Contracting Officer (CO) issued both Items for Discussion and Items for Clarification to the Offerors. On November 29, 2001, the FAA requested the Offerors to submit Best and Final Offers (BAFOs). On December 13, 2001, the FAA

> received BAFOs from the Offerors, including N-G and Frequentis. [AR, Exhibit 9J (Frequentis), and Exhibit 10H (N-G)]
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> Phase II evaluations (Technical, Management, Past Performance and Cost/Price) were completed on December 21, 2001. [AR Exhibits 11 (Technical), 12 (Management), 13 (Past Performance), and 14 (Cost/Price)] The Source Evaluation Board (SEB) then rolled up these results into the Phase II SEB Report. [AR, Exhibit 15] *** Only those Offerors demonstrating a product and a capability that could most likely lead to a contract award were invited to participate in Phase III. Based upon the recommendation of the SEB, the Source Selection Official (SSO) determined that of the four Offerors participating in Phase II, only N-G and Frequentis were eligible to participate in Phase III. [AR, Exhibit 16]

AR, pages 3-4. Finally, the Product Team details what transpired in connection with Phase III:

> Phase III consisted of an Operational Capability Test (OCT), which placed the two Offerors' voice switches into an operational environment to assess their suitability, functionality and effectiveness in response to the Operational Requirements Traceability Matrix (ORTM) items. [SIR, Section M3.3.1, Attachment L-4] The SIR stated that during the OCT, the Government would assess the strengths and weaknesses of each proposed system and identify the risks associated with each. The SIR also stated that the OCT would be a risk mitigation activity, and was not related to requirements compliance and verification. The OCT results would support the Government's best value determination. [SIR, Attachment L.3]
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> N-G and Frequentis installed their voice switch equipment at the FAA Technical Center between January 14 and January 25, 2002. The FAA approved the OCT Evaluation Plan on January 28, 2002. Two FAA Teams assessed each Offeror's product during a six-week timeframe beginning February 4, 2002. The OCT evaluation report was completed on April 29, 2002. * * *
>
> From the April to June 2002 timeframe, the Source Evaluation Board (SEB) considered the results of the Phase II and III evaluations and compiled its findings and recommendation in the Source Evaluation Report for Award Decision. [AR, Exhibit 18] This report, recommending award to N-G (Bass), was finalized on June 13, 2002 and presented to the SSO. On June 19, 2002, the SSO considered the evaluation findings and made a best value award decision to award the contract to N-G. [AR, Exhibit 19] * * *

AR, pages 4-5.

3. Section M of the SIR enumerated five areas that were to be used for evaluation and for determining "best value": Technical; Management; Past Performance; Cost/Price; and Operational Capabilities Test (OCT). AR, Exhibit 2, SIR, Section M2.1. As to the weighting of these five areas, the SIR designated Technical as "most important." Management and Past Performance were next in importance and were to receive equal weight. Cost/Price would then follow those two areas in terms of importance. Last in importance would be the OCT. *Id.*, Section M2.3. The SIR made clear that the importance of Cost/Price and the OCT would increase "as the relative assessment of each offeror's Volume I, II, and III [Technical, Management, and Past Performance] responses . . . becomes less significant." *Id.* Regarding evaluation of the Cost/Price submittal, the SIR provided, "the total price and reasonableness, completeness, realism and consistency/traceability of each price will be considered as part of the overall risk assessment." *Id.*, Section M2.1. Finally, as to the OCT results, the SIR makes plain that such results are to be taken into consideration in the overall assessment of risk inherent in offerors' proposals, in the final evaluation of technical capabilities, and in the ultimate source selection decision. In this regard, SIR Section L.19.0 Operational Capability Test (OCT), states, in part:

> The OCT will be operational in nature, assess functionality, effectiveness and operational suitability in the AFSS environment, and include Air Traffic specialists and Airway Facility Maintenance personnel. The OCT will also serve as a performance risk mitigator ***to verify each Offeror's written proposal.***

AR, Exhibit 2, SIR Section L.19.0 (emphasis added). SIR Attachment L-4, Operational Capabilities Test – Information for Offerors, ¶1.0 Introduction, provides, in part:

> An OCT will be conducted on each Offeror's proposed AFSSVS system prior to contract award. ***The results of the OCT will constitute an integral element of the technical evaluation and source selection process.*** Specifically, the OCT will be used to evaluate the performance and capabilities and assess the operational risks associated with each proposed AFSSVS system.

Id., SIR Attachment L-4, ¶1.0 (emphasis added). Attachment L-4, ¶1.2, Objective of the AFSSVS OCT, reads:

> – ***The objective of the OCT is to assist the FAA in selecting the most technically qualified product for the AFSSVS.*** During the OCT, the Government will assess the strengths and weaknesses of each proposed system and identify risks associated with each. The OCT results will ***support*** the Government's "Best Value" determination. The OCT will be a risk mitigation and not a requirements compliance and verification activity.

Id., SIR Attachment L-4, ¶1.2 (emphasis added). As to risks identified during OCT and the role of OCT results in the assessment of overall risk inherent in the proposals, SIR Section M2.0, BASIS FOR AWARD, ¶M2.1, Award Selection, reads, in part:

> This is a best value selection conducted in accordance with the FAA Acquisition Management System (AMS). Award will be made to the offeror whose proposal is judged to represent the best value to the Government. Best value will be based on an evaluation of all factors in relation to the stated evaluation criteria and will be determined by evaluating each proposal in five areas: Technical, Management, Past Performance, Cost/Price and OCT. . . . For the OCT area, the results of the test will be used to determine the strengths, weaknesses and operational risk of the Offeror's solution and ***will be considered as part of the overall risk assessment.***

Id., SIR Section M2.0, ¶M2.1 (emphasis added). Along these lines, the SIR also made plain that risk evaluation would be integral to the overall evaluation of each area, including the OCT:

> Explicit in the evaluation of all proposal volumes ***and OCT*** is an assessment of risks inherent in the proposal. **Risk is defined as the likelihood that the Government will be negatively impacted by the Offeror's failure to meet performance and schedule baselines.** This integral component of the evaluation will serve to capture and assess the likelihood that the Offeror's proposed solutions would successfully meet the requirements of this SIR.
>
> Risks identified within any aspect of an Offeror's proposal, and within any of the evaluation factors, will be analyzed as to their potential impact on the AFSSVS program (i.e., equipment performance, work performance, program management, schedules, and cost). Additionally, risk identified

> due to inconsistencies and discrepancies between various aspects (Volumes) of each Offeror's proposal will be considered, as will risks that pertain to unsubstantiated representation made by any Offeror within any aspect of their proposal. ***Risk will be assessed as part of the Technical and Management factors.***

Id., SIR Section ¶M2.8 Risks Inherent in the Proposal (emphasis added). Similarly, the SIR indicated that OCT results were to be used in gauging the impact of observed strengths, weaknesses and risks on all aspects of performance for the systems being proposed – technical, cost and schedule:

> The Operational Capability Test (OCT) will place two (2) of the Offeror's proposed voice switches into an operational environment to assess their suitability, functionality and effectiveness in response to the Operational Requirements Traceability Matrix (ORTM) items. . . . ***Test results will be used to discern any strengths, weaknesses and risk identified during the OCT for their potential impact to areas of technical, cost and schedule***.

Id., SIR ¶M3.3.1 Operational Capability Testing (emphasis added).

4. As to risks associated with an Offeror's record of past performance, the SIR states:

> The Offeror's record of past performance must show no deficiencies in performance within the last 3 years that would increase the risk of failure in performance of the AFSSVS contract. . . . The FAA will not hold the Offeror responsible for failures or deficiencies that were beyond the Offeror's control. The Government reserves the right to make inquiries as to the prospective Offeror's past performance on any existing or previous contracts, regardless of whether or not they are included in the proposal submission.

Id., Section M3.2.3. In terms of the Price/Cost proposal, the SIR permits the Government to "assign a degree of risk as appropriate . . . if the proposal shows evidence of being seriously flawed." *Id.*, Section M3.2.4. Finally, the SIR provides the following definitions regarding risks to be "discerned" in connection with the OCT:

> Low: Proposed system is operationally suitable with only minor system modifications.
>
> Moderate: Proposed system is operationally suitable with modifications.

> High: Proposed system requires significant modifications/redesign to be operationally suitable.

Id., SIR Section M3.3.1. The Source Selection Plan and Evaluation Plans for the various proposal areas tracked the language of the SIR and are consistent with the SIR in terms of evaluation factors and the evaluation process. *See* AR, Exhibits 3 through 8.

5. As noted above (Finding 2), only Frequentis (Dolphin) and Northrop/Denro (Bass) were invited to participate in Phase III of the evaluation process. For Phase II, whereas the Dolphin proposal had been assigned an overall adjectival rating of "Satisfactory," the Bass proposal received a lower, "Marginal," rating. These two adjectival ratings to be used for Phases I and II were defined by SIR Section M4.0 as follows:

Satisfactory	The Offeror's response to the topic is appropriate and addresses adequately the full range of requirements and work effort and, although there may be some areas for improvement, these areas are offset by strengths in other areas.
Marginal	The Offeror's response does not provide all requested information nor does the Offeror respond adequately to the full range of requirements and work efforts. The Offeror does not meet the requirements of the Satisfactory rating. Offeror's response is deficient in several areas with no corresponding offset in other areas.

6. The scoring of Phases II and III for the two firms was summarized in the Executive Summary of the Final Report of the Source Evaluation Board ("SEB") as follows:

AREA RATED	OFFEROR BASS	OFFEROR DOLPHIN
Phase II Technical	Satisfactory	Satisfactory
Phase II Management	Satisfactory	Good
Phase II Past Performance	Marginal	Good
Phase II Cost	$68 Million	$127 Million
Phase III OCT	High Risk	Moderate Risk

AR, Exhibit 18, page i.

7. As the above chart indicates, in connection with the Phase II evaluation, both firms were assigned an overall score of Satisfactory for Technical. Frequentis had received higher scores than Northrop/Denro for a number of the individual Technical sub-factors. The Product Team provides the following explanation for the derivation of the overall scores:

> The Technical area was the most important of the five evaluation factors. The technical area consisted of five factors. [AR, Exhibit 2, SIR, Section M2.3] Those factors were:
>
> 1. AFSS Voice Switch Architecture,
> 2. AFSS Voice Switch Operations,
> 3. Computer Human Interface,
> 4. Offloading/Telecommunications for Offloading Interface, and
> 5. Test and Evaluation and Installation
>
> [AR, Exhibit 2, SIR, Sections M3.2.1.1 and M3.2.1.5]
>
> Of the five technical factors, the first four were the most important, and the fifth was of lesser importance. [AR, Exhibit 2, SIR, Section M3.2.1] Within each of the five factors, there were subfactors that were of equal priority for evaluation purposes.
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> * * *
>
> Section M.3.2 of the SIR informed Offerors that an adjectival rating would be derived for each of these five factors, and then an overall adjectival rating for technical would be assigned. Specifically, this section stated, "Judgment will be applied in the evaluation to derive the overall rating."

Furthermore, Section M4.0 presented the five adjectival ratings (from Excellent to Unsatisfactory) to the Offerors that would be used during the technical evaluation.

* * *

Both the Awardee and Protester received an OVERALL technical rating of Satisfactory.

* * *

For Factor 1, AFSS Voice Switch Architecture, there were thirteen (13) subfactors, all of equal importance. [AR, Exhibit 2, SIR, Section M3.2.1.1] Both Offerors were rated Satisfactory for Factor 1. The results for the thirteen subfactors were as follows:

Subfactor	N-G (Bass) Rating	Frequentis (Dolphin) Rating
1	Satisfactory	Good
2	Marginal	Satisfactory
3	Satisfactory	Satisfactory
4	Satisfactory	Satisfactory
5	Good	Good
6	Satisfactory	Satisfactory
7	Satisfactory	Marginal
8	Satisfactory	Satisfactory
9	Satisfactory	Good
10	Satisfactory	Satisfactory
11	Satisfactory	Satisfactory
12	Good	Good
13	Satisfactory	Satisfactory
OVERALL RATING	SATISFACTORY	SATISFACTORY

[AR, Exhibit 11, pages 11-12, 27]

Given the breakdown of the subfactor results above, coupled with the fact that all subfactors were of equal importance, it was reasonable for the Product Team to assign a Satisfactory rating for this factor to both Offerors.

For Factor 2, AFSS Voice Switch Operations, there were three (3) subfactors, all of equal importance. For Factor 2, N-G was rated Good, and Protester was rated Satisfactory. The results for the three subfactors were as follows:

Subfactor	N-G (Bass) Rating	Frequentis (Dolphin) Rating
1	Good	Good
2	Satisfactory	Satisfactory
3	Good	Satisfactory
OVERALL RATING	GOOD	SATISFACTORY

[AR, Exhibit 11, pages 14-15, 29]

Given the breakdown of the subfactor results above, and the fact that all three subfactors were of equal importance, it was reasonable for the Product Team to assign a Good rating to N-G, and a Satisfactory rating to Protester.

For Factor 3, Computer Human Interface, there were two subfactors, both of equal importance. For Factor 3, N-G was rated Satisfactory and Protester was rated Good. The results for the two subfactors were as follows:

Subfactor	N-G (Bass) Rating	Frequentis (Dolphin) Rating
1	Satisfactory	Good
2	Satisfactory	Excellent
OVERALL RATING	SATISFACTORY	GOOD

[AR, Exhibit 11, pages 14-15, 30]

Given the breakdown of the subfactor results above, and the fact that both subfactors were of equal importance, it was reasonable for the Product Team to assign a Satisfactory rating to N-G and a Good rating to Protester. Although Protester received one "Good" and one "Excellent" under this factor, the weaknesses and related impacts identified in the technical report resulted in the overall rating being "Good." [AR, Exhibit 11, page 31]

For Factor 4, Offloading/Telecommunications for Offloading Interface, there were four subfactors, all of equal importance. For Factor 4, Both N-G and Protester were rated Satisfactory. The results for the four subfactors were as follows:

Subfactor	N-G (Bass) Rating	Frequentis (Dolphin) Rating
1	Good	Satisfactory
2	Satisfactory	Satisfactory
3	Satisfactory	Satisfactory
4	Satisfactory	Satisfactory
OVERALL RATING	SATISFACTORY	SATISFACTORY

[AR, Exhibit 11, pages 15, 31]

Given the breakdown of the subfactor results above, and the fact that all subfactors were of equal importance, it was reasonable for the Product Team to assign a Satisfactory rating to both N-G and Protester.

For Factor 5, Test and Evaluation and Installation (of lesser importance than factors 1 through 4) there were two subfactors, both of equal importance. [AR, Exhibit 2, SIR, Section M3.2.1] N-G received a Satisfactory rating and Protester received a Good rating. [AR, Exhibit 11, pages 16, 32] The results for the two subfactors were as follows:

Subfactor	N-G (Bass) Rating	Frequentis (Dolphin) Rating
1	Satisfactory	Good
2	Marginal	Good
OVERALL RATING	SATISFACTORY	GOOD

Given the breakdown of the subfactor results above, and the fact that both subfactors were of equal importance, it was reasonable for the Product Team to assign a Good rating to Protester and a Satisfactory rating to N-G. Although N-G received one Satisfactory and one Marginal rating, the weaknesses and related impacts noted under this factor were not pervasive enough to warrant N-G receiving a less than Satisfactory rating overall. [AR, Exhibit 11, page 16]

AR, pages 6-9. The foregoing is summarized in the following chart:

FACTOR	**N-G**	**FREQUENTIS**
AFSS Voice Switch Architecture	Satisfactory	Satisfactory
AFSS Voice Switch Operations	Good	Satisfactory
Computer Human Interface	Satisfactory	Good
Offloading/Telecommunications For Offloading Interface	Satisfactory	Satisfactory
Test and Evaluation and Installation	Satisfactory	Good
OVERALL RATING	Satisfactory	Satisfactory

Id., page 10.

8. In terms of the Management scoring, the Product Team provides the following information:

> Section M2.3 of the SIR stated that of the five evaluation factors for award, Management and Subcontracting "followed" Technical in importance. Furthermore, Section M3.2 of the SIR stated that an adjectival rating would be derived for this area. Section M.3.2.2 laid out the three factors in the Management area. They were: (1) Program Management; (2) Life Cycle Support Services; and (3) the Subcontracting Plan. [AR, Exhibit 2, SIR, Sections M3.2.2.1 and M3.2.2.3] Factors 1 and 2 were of equal importance; Factor 3 was evaluated on a pass/fail basis, and a "fail" would make an Offeror ineligible for award. [AR, Exhibit 2, SIR, Sections M3.2.2 and M3.2.2.4]
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> Within Factor 1 (Program Management), there were five (5) subfactors, all of equal importance. [AR, Exhibit 2, SIR, Section M3.2.2.1] Within Factor 2 (Life Cycle Support Services), there were also five subfactors, also all of equal importance. [AR, Exhibit 2, SIR, Section M3.2.2.2] Factor 3 did not contain subfactors.
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> * * *
>
> N-G (Bass) received an Overall Management rating of Satisfactory; Protester (Dolphin) received an Overall Management rating of Good. [AR, Exhibit 12 at 3, 21] The results at the factor and subfactor levels were as follows:

FACTOR/SUBFACTOR	N-G (Bass) Rating	Frequentis (Dolphin) Rating
M1-Program Management		
Subfactor 1	Satisfactory	Satisfactory
Subfactor 2	Satisfactory	Satisfactory
Subfactor 3	Satisfactory	Good
Subfactor 4	Marginal	Excellent
Subfactor 5	Satisfactory	Good
Overall Factor 1 Rating	Satisfactory	Good
M2-Life Cycle Support Services		
Subfactor 1	Satisfactory	Satisfactory
Subfactor 2	Satisfactory	Good
Subfactor 3	Satisfactory	Good
Subfactor 4	Satisfactory	Good
Subfactor 5	Satisfactory	Good
Overall Factor 2 Rating	Satisfactory	Good
Overall Factor 3 Rating	Pass	N/A
OVERALL MANAGEMENT RATING	SATISFACTORY	GOOD

[AR, Exhibit 12 at 3, 21]

Id., pages 11-12.

9. As to Past Performance, for which Northrop/Denro had received an overall "Marginal" rating, the Product Team offers the following:

> The past performance evaluation for AFFSVS was conducted pursuant to the Past Performance Plan approved August 13, 2001, by the Source Selection Official [AR, Exhibit 6]. The participating Offerors were required to provide completed performance questionnaires from at least three of the Offerors' clients for evaluation by the AFSSVS Past Performance Team. Both Frequentis and N-G provided the requested information. The team evaluated those completed questionnaires against technical performance, schedule performance, and cost performance and assigned adjectival ratings. The Product Team obtained additional information from other Government sources, which was translated into the adjectival ratings through an additional qualitative review by the Past Performance Team.

> The Product Team received seven completed questionnaires from N-G clients. The contracts were for air traffic operation voice switches and a "recorder product" supporting air traffic requirements. Because of comments on two particular questionnaires, one from the Department of Defense and one from the FAA on an FAA contract, the Product Team decided to obtain additional information. The Product Team subjected the additional information to a careful review. All Offerors had the opportunity to comment on any adverse information.
>
> **After compiling and evaluating all of the information received, the Product Team appropriately assigned a marginal rating for technical and schedule, and a satisfactory rating for cost. These were folded into an overall marginal rating for past performance for N-G.** In short, N-G complied with the SIR in submitting past performance information. The Product Team followed Section M in evaluating the submitted information.

Id., pages 13-14 (Emphasis added).

10. In terms of past performance, the SIR required that offerors "cite and briefly describe" at least three "Government or non-Government" contracts they had performed within the past 3 years "that are $5,000,000 or more, and are of a similar technical nature and complexity to the AFSSVS effort." The SIR required that offerors **"also"** list **"all contracts of $5,000,000 or more"** that were **"terminated for default or convenience in the last three years and where such termination actions are still pending."** In this latter regard, offerors were instructed to provide "the basis for the terminations." AR, Exhibit 2, SIR, Section L.16 (Emphasis added).

11. One contract that was not referenced by Northrop/Denro in its proposal, and that the Product Team was not aware of prior to the instant Protest – and had not taken into account when evaluating Northrop/Denro's past performance – was a voice switching contract it had held with the Government of Sweden. More specifically, that contract was with the Luftfartsverket ("LFV"), the Swedish Civil Aviation Administration. Although there was a "Termination for Convenience" clause in the LFV contract, there was no "Termination for Default" clause. Rather, the Swedish contract, which was expressly made subject to "Swedish substantive law" (Northrop/Denro Comments, Exhibits Tab 2,

LFV Contract for System Talk, Article 30), contained a clause that provided for "[Deleted]." That clause reads, in pertinent part:

[Deleted]

Northrop/Denro Comments, Tab 2, Article 16 (Emphasis added).

12. It is undisputed that the Swedish LFV contract had ended at the direction of the LFV prior to contract completion, pursuant to the terms of this [Deleted] clause. As part of the discovery process in connection with this Protest, certain documents relating to the Swedish contract were made part of the record. The documents reveal the following:

[Deleted]

13. The record does not reflect that the Product Team, by means of its own inquiry or otherwise, knew of the termination of the TALK contract. There is no evidence that this information was considered by the past performance evaluation team, the SEB, or the SSO. The "Marginal" past performance rating assigned to the Northrop/Denro (Bass) proposal was without reference to the Litton/Denro performance history on the Swedish LFV contract.

14. For purposes of determining whether a cost/price proposal was reasonable and realistic, the cost/price evaluation team developed two Independent Government Cost Estimates (IGCEs). The first IGCE, dubbed the "inflated IGCE," was in the amount of $117,959,433 and was derived based on the SIR pricing guidelines and Section M evaluation criteria. The second IGCE, referred to as the "true IGCE," totaling $[Deleted], reflected what the Product Team actually anticipated in terms of projected work orders. The Cost/Price Evaluation Team Report of December 21, 2001 explains: "The 'inflated IGCE' added costs associated with doing certain activities more often and buying more spares than were included in the true IGCE." AR, Exhibit 14, Cost/Price Evaluation Report at 8. The overall cost/price proposal offered by Frequentis (Dolphin) -- $127,197,851 in comparison with the "inflated IGCE" of $117,959,433 and $[Deleted] in comparison with the "true IGCE" of $[Deleted] -- was considered "a complete, generally reasonable and realistic cost proposal." *Id.,* at 11. By contrast, the

cost/proposal submitted by Northrop/Denro (Bass) -- totaling $68,230,699 in comparison with the "inflated IGCE" of $117,959,433 and $[Deleted] in comparison with the "true IGCE" of $[Deleted] -- was considered "overall" as an "unreasonably low and unrealistic cost/price proposal." This proposal was perceived by the cost evaluation team as representing a procurement "buy-in" by Northrop/Denro and one that the team believed posed a significant risk to the Government in terms of both the "technical solution" and the Agency's "schedule requirements":

[Deleted]

Id. at 10 (Emphasis added).

15. Finally, as to the Phase III OCT, field testing of the proposed equipment at the FAA Technical Center, the OCT Team Evaluation Report dated April 26, 2002 indicates that the team found the Frequentis (Dolphin) system to be "operationally suitable," posing only a "moderate risk," in that it would only require "some modifications" for purposes of FAA use, it found the Northrop/Denro (Bass) system to be "operationally unsuitable," posing a "high risk," and requiring "significant modifications and/or redesign before it could be utilized." The team Executive Summary concluded:

[Deleted]

AR, Exhibit 17, Operational Capability Test Team Evaluation Report dated April 26, 2002, Executive Summary, page v. The OCT Team Evaluation Report provides the following summary of technical difficulties and risks to flight safety, system operability, reliability and security associated with the Northrop/Denro (Bass) system:

[Deleted]

Id., page 5. The Frequentis (Dolphin) system assessment summary was significantly better:

[Deleted]

Id., page 7. Moreover, whereas with the Bass system, the Technical Performance Sub-Team found [Deleted] *Id.*, page 5, ¶2.1.2.1, it found [Deleted] with the Dolphin system that would render substantial benefits to the Government:

[Deleted]

Id., page 8, ¶2.2.2.1. In accordance with the SIR, the OCT was to be used to provide the Product Team with assurance, in terms of assessing potential performance risk, that the technical solution offered in Volume I of the proposal was, in fact, the kind of system that the Offeror would ultimately provide. In this regard, SIR Section L.19.0 reads: "The OCT will also serve as a performance risk mitigator **to verify each Offeror's written proposal.**" (Emphasis supplied). In their assessment of the Bass system, as reflected in the Final SEB Report, the SEB noted that the system Northrop/Denro (Bass) delivered for OCT assessment did not match up with the "mature" system Northrop/Denro purported to be offering in its technical proposal. In addition, the SEB appears to have recognized that problems experienced during OCT were consistent with "failing hardware" problems that the past performance evaluation team had reported and further recognized that, in light of Northrop/Denro's evaluated "marginal" past performance, the differences between what it purported to offer as a technical solution and what, from its OCT, it appeared to be capable of delivering would pose a high risk for the Agency. The SEB also recognized that, although the Technical and Management evaluation sub-teams had assigned strengths to Northrop/Denro (Bass) for "claimed experience," that "experience" was on FAA contracts for which the Past Performance evaluation sub-team had noted serious problems and for which it had given Northrop/Denro a "Marginal" Past Performance rating:

[Deleted]

AR, Exhibit 18, SEB Final Report dated June 18, 2002, pp. v and 6 (Emphasis supplied).

16. Notwithstanding the significant scoring differences that existed between the two companies and the expressions of concern of the various evaluation teams that were summarized in the Final SEB Report regarding the high risks inherent in the Northrop/Denro proposal, including observations of the SEB itself, the Final Report recommended award to Northrop/Denro (Bass).[2] This recommendation appears to be have been based solely on the difference in the two cost/price proposals. The

[2] The record reveals that there was at least one earlier SEB document that had recommended an award to Frequentis (Dolphin). *See* AR, Affidavit of Carol Bell, Exhibit A, document dated June 7, 2002.

recommendation also reflects the SEB's perception (based upon a financial capability review) that, regardless of an apparent Northrop/Denro "buy-in," Northrop/Denro would have sufficient financial capacity to perform at a below-cost price. Further, the recommendation appears to have been based on the SEB's belief that Northrop/Denro would never abandon performance. That belief, in turn, appears to have been grounded on Northrop/Denro's proposal having identified no previous instances where a Northrop/Denro contract had been terminated for default:

[Deleted]

AR, Exhibit 18, pages iii, v and vi.

17. The Source Selection Official ("SSO") adopted the recommendation of the Final SEB Report and provided, as part of her Award Decision document, a very brief explanation for selecting Northrop/Denro. That document – set out below in its entirety – does not in any way address either the perception that Northrop/Denro's proposed cost/price represented a "buy-in" or any of the other risks the evaluation teams found with respect to the Northrop/Denro (Bass) proposal (except to state summarily that the Phase III OCT "reflects risk" for both Bass and Dolphin):

> **Source Selection Official's Decision for Award**
>
> As identified by the screening information request and the source evaluation plan, I considered the final evaluations for the following five areas and used my best judgment to arrive at a best value decision.
>
> - Volume I (Technical) – most important.
> - Volume II (Management and Subcontracting) and Volume III (Past Performance) are equal in weight and follow Volume I in importance.
> - Volume IV (Cost/Price) follows Volumes II and III in importance.
> - Operational Capability Test (OCT) follows Volume IV in importance.
> - As the relative assessment of each Offeror's Volumes I, II, and III responses and the identified discriminators become less

> significant, the importance of Volume IV and the OCT increases.
>
> There is essentially no distinction between the two Offerors for the Phase II Technical results – the most important factor. Phase III OCT reflects risk for both solutions. As a result, the Phase II Management, Past Performance and Cost Assessments provide discriminators between the Offerors in making this best value decision.
>
> I recognize the good management and past performance solution proposed by Dolphin with an evaluated cost of $127 million dollars. I also recognize the satisfactory management and marginal past performance solution proposed by Bass with an evaluated cost of $68 million dollars.
>
> The $59 million dollar difference in prime contract dollars, when considering the other evaluation factors, results in my best value award decision to Bass.

AR, Exhibit 19.

18. On or about June 21, 2002, the Product Team announced the FAA's decision to award the instant Contract to Northrop/Denro. Protest at 1. The Contract (FAA Contract Number DTFA01-02-C-00039) was awarded to Northrop/Denro on June 21, 2002 for the production and delivery of 65 AFSSVSs. AR, Exhibit 21. The Contract is an "Indefinite Delivery/Indefinite Quantity (IDIQ) [contract] for ten (10) years, if all options are exercised" with a twenty-four month base period, followed by four "two year" options. According to the Product Team, the base and option periods are "comprised of Firm Fixed Price (FFP), Time and Materials (T&M), and Cost Plus Fixed Fee (CPFF)" [contract line items (CLINs)]. AR, page 6. A debriefing requested by Frequentis was held with representatives of Frequentis on July 2, 2002. *Id.* Frequentis timely[3] filed its Protest with the ODRA on July 10, 2002, *i.e.*, within five business days of the debriefing, in accordance with the ODRA Procedural Rules, 14 C.F.R. §17.15 (a)(3)(ii). On July 12, 2002, Northrop/Denro timely intervened as an interested party. *See* 14 C.F.R. §17.15 (f).

[3] A Motion to Dismiss for lack of timeliness presented by the Product Team and arguments regarding protest timeliness raised by Northrop/Denro are addressed below. *See* Discussion.

19. In its Protest, Frequentis opens with the following general condemnation of the instant procurement:

> The FAA's award decision cannot be sustained under any rational application of the best value concept or under the evaluation and risk factors set forth in Section M of the SIR. The FAA ignored or improperly leveled the stated evaluation factors; wholly misapplied the risk factors; accepted an admittedly unreasonable and unrealistic price from N-G; accepted a product that was assessed as "high risk" and, therefore, admittedly operationally unsuitable; failed to assess any cost impact attributable to the risk ratings assigned to N-G; and failed to conduct any sustainable trade-off analysis to determine true best value in these circumstances. In sum, the FAA's award decision violates the explicit provisions of SIR Sections L and M, as well as, without limitation, Sections 3.2.2.2; 3.2.2.3.1.2.3; 3.2.2.3.1.2.5; and 3.2.2.3.1.3 of its own Acquisition Management System (AMS) regulations.

Protest, page 2. In terms of specific protest grounds, the Protest challenges: (1) the Product Team's cost/price evaluation; (2) its use of OCT results; (3) its past performance evaluation; (4) its evaluation of the technical and management areas; and (5) its failure to perform a proper "best value" tradeoff analysis when making the ultimate award decision. In terms of the cost/price evaluation, Frequentis urges, the Product Team failed to follow SIR Section M3.2.4, which calls the assignment of a "degree of risk to each cost proposal that will result in the elimination of the Offeror's proposal . . . if the proposal shows evidence of being seriously flawed." Because the cost/price evaluation sub-team had recognized the Northrop/Denro (Bass) proposal as an apparent "buy-in" and had assigned to it a high degree of risk, the Protest maintains, that proposal should have been eliminated even before Phase III of the procurement:

> The FAA manifestly erred in accepting N-G's cost proposal. That proposal was seriously flawed under the FAA's own definition, while also being violative of Section M. The proposal was assigned the worst possible rating that could be achieved—"High Risk." Risk is defined in Section M2.8 of the SIR as:
>
> . . . Risk is defined as the likelihood that the Government will be negatively impacted by the Offeror's failure to meet performance and schedule baselines. This integral component of the evaluation will serve to capture and assess the likelihood that the Offeror's proposed solutions would successfully meet the requirements of this SIR.

Risks identified within any aspect of an Offeror's proposal, and within any of the evaluation factors will be analyzed as to their potential impact on the AFSSVS program (i.e. equipment performance, work performance, program management, schedule and cost) . . . Risk will be assessed as part of the Technical and Management factors.

In short, N-G's seriously flawed cost/price proposal would negatively impact every aspect of the FAA's expected performance on the AFSSVS contract. Yet the FAA never adjusted any of the technical or management scores and never analyzed the cost and schedule impacts of this high risk cost proposal in making its ultimate best value award decision.

In addition to being High Risk, N-G's cost/price proposal was also determined to be an obvious "buy in" by the FAA. For this procurement the FAA established an IGCE (Independent Government Cost Estimate) of $117.5 million. This IGCE was based upon another FAA voice switch program known as RDVS (Rapid Deployment Voice Switch). Ironically, N-G is the incumbent contractor on the RDVS program. Notwithstanding its incumbent status, N-G bid only $68.2 million for AFSSVS (almost 50% below the IGCE). The FAA immediately recognized this as "indicative of a buying-in price" as early as October 2001 and confirmed this conclusion in December 2001 upon receipt of N-G's BAFO.

A buy-in price is, by definition, unreasonable and unrealistic. N-G's price thus violates the explicit criteria of Section M3.2.4 of the SIR which requires that all proposed prices be reasonable, realistic, complete and consistent.

In sum, N-G's cost/price proposal was High Risk—meaning that every aspect (technical, cost, schedule) of the FAA's expected performance under AFSSVS would be substantially and negatively impacted; N-G's cost/price was an admitted buy-in—meaning that the prices are unrealistic and unreasonable under the Section M evaluation factors; and the FAA admitted that N-G's unreasonably low price would result in both late performance and additional oversight being a "high probability" throughout the projected ten year period to complete this program. If all of that is not evidence of a "seriously flawed" cost/price proposal that "will result in the elimination of the Offeror's proposal," Frequentis is at a loss to understand what could possibly meet that standard. The N-G proposal should have been eliminated prior to Phase III. §M3.2.3.

Protest, pages 3-4. Further, Frequentis avers, the purported $59 Million price differential relied upon by the SSO is not a proper assessment of the real cost difference between the two proposals. More specifically, Frequentis argues, the $59 Million figure fails to reflect how those proposals measured up against the "True IGCE" developed by the cost/price evaluation sub-team and does not account for any cost impacts that might be associated with the risks assigned to the Northrop/Denro proposal:

> The FAA itself recognized that the [SIR] price model was flawed. . . . According to the FAA, the model pricing produced "inflated" costs "associated with doing certain activities more often and buying more spares" than would ever be required. SEB Report, at §9.3.1. Thus, during its evaluation, the FAA internally created what it called a "true IGCE."
>
> Under the original pricing model there was a perceived $59 million price differential between the Frequentis and N-G bids ($127 million for Frequentis; $68 million for N-G). Under the "true" IGCE created by the FAA (to reflect a "most likely buy" scenario) the perceived price differential is $28 million ($72 million for Frequentis; $44 million for N-G). Note that this price differential is over a ten year period; is the product of N-G's admitted buy-in; and does not reflect any additional costs associated with N-G's high risk cost proposal; high risk overall proposal; and marginal past performance. Overall, Frequentis' prices were found to be reasonable, realistic and consistent by the FAA. The Frequentis prices were within 10% of the IGCE, both the original or "inflated" version and the "true" version. In fact, the Frequentis prices were 10% lower than the FAA's "true" most likely buy scenario, and its prices for the 65 actual systems were $2 million lower than the government estimate even under the original IGCE. Overall, Frequentis' prices were found by the SEB to be, and in this case were in fact, reasonable, realistic and consistent. By contrast, N-G's prices were not reasonable, realistic or consistent and clearly violated the solicitation regulations of section M2.1, M2.8, M3.2.4.
>
> The SEB and SSO knew or should have known that the real world price differential was significantly less than the price differential produced by the model. The SEB and SSO knew or should have known that to make a "best value" judgment it would need to make a realistic trade-off between cost/price on one side of the scale versus technical, management, past performance and OCT scores and risks on the other side of the scale. What did the SEB and SSO do? They unjustifiably and erroneously based the best value determination on the unrealistic $59 million difference of the model pricing, a difference demonstrably exacerbated by N-G's

> buy-in strategy. The failure of the SEB and SSO to make a proper evaluation leading to a rational best buy determination was an abuse of discretion.
>
> Significantly, neither the buy-in nor the risk attached to N-G's cost/price proposal are mentioned in the SSO's Award Decision. According to the redacted Award Decision provided to Frequentis, the SSO believed there to be a $59 million price differential between the offerors and believed the risks were otherwise the same as between the two final competitors. This critical misinformation, which is at the heart of the SSO's Award Decision, itself invalidates the award to N-G.
>
> * * *
>
> The SEB presented an erroneous and illusory cost differential to the SSO.

Protest, pages 5, 9.

20. As to the OCT results, Frequentis contends, the SEB was required, but improperly failed, to reassess the prior evaluations of the "technical, cost and schedule" areas, in light of Northrop/Denro's poor OCT performance. In so doing, Frequentis argues, the SEB, violated the SIR's "best value" mandate:

> The purpose of any OCT is to determine whether the equipment proposed actually works—as distinct from the "paper" claims in the written proposal submissions. Section M3.3.1 of this SIR described the purpose and objective of this OCT as follows:
>
> The Operational Capability Test (OCT) will place two (2) of the Offeror's proposed voice switches into an operational environment to assess their <u>suitability, functionality and effectiveness</u>…<u>Test results will be used to discern any strengths, weaknesses and risks identified during the OCT for their potential impact to areas of technical, cost and schedule</u>. (Emphasis added).
>
> N-G's OCT rating of "High Risk" translates into "Proposed system requires significant modifications/redesign to be operationally suitable." §M3.3.1. In other words, N-G's offering was found to be <u>not operationally suitable</u>. By contrast, Frequentis received a "Moderate Risk" rating that translates into "Proposed system is operationally suitable with modifications." The SEB final report utterly fails to properly reflect the importance of these OCT findings, made as they were during a six-week hands-on evaluation by the FAA technical team. This failure to grasp and report on the significance of the OCT findings was yet another failure of the

> SEB to evaluate fairly the two competing proposals, particularly when called upon as they were to make a "best value" judgment.
>
> By any standard, N-G's proposed voice switch was a failure during OCT. Its OCT rating of "High Risk" means that N-G's proposed system does not work—it is "operationally unsuitable." §M3.3.1. Upon the finding that the N-G switch was operationally unsuitable, the FAA never revisited or adjusted the "paper" adjectival scores it had earlier assigned to the N-G proposal. These paper ratings were completed in December 2001, and the OCT's were conducted in February/March 2002. By not assessing the impact of N-G's dismal OCT performance against the areas of "technical, cost, and schedule," the FAA violated Section M and undercut the basic concept of a best value award decision.
>
> Once again, it appears that the SSO was never adequately informed about the significance of N-G's poor overall risk assessment. In her Award Decision, the SSO barely mentions the OCT. Even that mention is prejudicially erroneous. Here is the totality of her observation: "Phase III OCT reflects risk for both solutions." This reflects a complete misunderstanding on the part of the SSO as to what actually transpired during OCT and as to the actual rating and performance differences between the two final offerors.

Protest, page 6.

21. Regarding the past performance evaluation, although Frequentis does not challenge the Product Team's assessment of Northrop/Denro's proposal as one having a "high risk," it notes Northrop/Denro's failure to identify the Swedish contract as one that had been terminated for default within the prior 3-year period and maintains that, based on that instance of default termination, and coupled with the "virtually across the board" negative comments received from other contract references that were reported, Northrop/Denro should have been "eliminated from the competition" in accordance with SIR Section M3.2.3 (which, as noted above, specified that an Offeror's record of performance "must show no deficiencies in performance within the last 3 years that would increase the risk of failure in performance of the AFSSVS contract"):

> Under Section L16.0 of the SIR each offeror for this contract was to cite and describe at least three (3) contracts ("Government or non-Government") that have been performed within the past three years "and are of a similar technical nature and complexity to the

AFSSVS effort." N-G apparently did this, and received the unusually low adjectival rating of "Marginal" for Past Performance. In addition, N-G's overall proposal rating (including Past Performance) was rated "High Risk." According to the redacted SEB report received by Frequentis, N-G received substantial and virtually across-the-board negative comments from its current customers, including the FAA itself.

One of the contracts that N-G did not report (and/or that the FAA failed to investigate) was a major voice switching contract for the country of Sweden. That contract, known as TALK, is clearly of "a similar technical nature and complexity to the AFSSVS effort." In fact, N-G's TALK contract was terminated for default by the Swedish CAA [Civil Aviation Administration] on or about August 31, 1999. [Footnote: Frequentis completed the TALK contract in Sweden after N-G was terminated.] The existence of a default, particularly on a voice switch contract such as TALK, as well as the failure to report it, goes to the very heart of an offeror being considered responsible.

Section L, Part IV of the SIR requires, in relevant part, that each:

> Offeror[s] (proposing as Prime Contractors) shall also provide a list of all contracts of $5,000,000 or more that were terminated for default or convenience in the last three years and where such termination actions are still pending . . . .

N-G did not report this to the FAA. Page 3 of the SEB Report's Executive Summary begins ". . . [N-G] has not been terminated . . .," and Page 6 states, " . . . there are no terminations for default in Bass's [N-G's] past performance. . . ."

Under Section M3.2 of this SIR, "the offeror's record of past performance must show no deficiencies in performance within the last 3 years that would increase the risk of failure in performance of the AFSSVS contract." As evidenced by its "Marginal" rating and "High Risk," the FAA has already identified deficiencies in N-G's performance which, by definition, increase the risk of performance failure on AFSSVS. These negative ratings do not even include the default termination of the TALK contract which should have been listed by N-G and/or investigated by the FAA under any reasonable Past Performance review. N-G's proposal should have been eliminated from this competition under SIR §M3.2.3.

Protest, pages 6-7. Frequentis also challenged the Product Team's assessment of Frequentis' past performance record as merely "Good" rather that "Excellent," based on Frequentis' having "installed more than 700 voice switching systems throughout the world" and the Team's receipt of "unanimously positive comments" and "good or better" ratings reports from all 9 customer references provided by Frequentis. *Id.*, page 7.

22. Frequentis is likewise critical of the Product Team's overall evaluation of both Frequentis and Northrop/Denro as "Satisfactory" in the technical area. Frequentis contends that the Team's "arbitrary" assignment of strengths and weaknesses resulted in "unbalanced scoring," and improperly leveled the technical assessment of the two competitors:

> The SEB under-evaluated Frequentis' technical proposal by arbitrarily and capriciously assigning technical strengths and weaknesses to the stated subfactors, resulting in unbalanced scoring. In some instances, cited weaknesses downscored multiple subfactors. This had the overall effect of leveling the technical scores (the single most important factor in the evaluation according to Section M2.3) between the two competitors. But even considering the current scoring, Frequentis rated higher than the competition in seven out of the ten subfactors where the ratings differed between the offerors. Moreover, in two of those seven subfactors, Frequentis was scored higher by two rating levels. Notwithstanding these substantial differences favoring Frequentis, both offerors received the same overall rating of Satisfactory for Technical. The Technical evaluation scoring violated the dictates of Section M.

Protest, page 8. Frequentis' Protest challenges the Product Team's evaluation of the Management factor (*i.e.*, rated as "Good" for Frequentis and "Satisfactory" for Northrop/Denro) as, in its view, "inconsistent" with the "factors and definitions" of SIR Section M:

> The scores given by the FAA for Frequentis' Management proposal subfactors were better than N-G in seven out of ten subfactors, with only three subfactors being equal. In the Management subfactor 4, entitled "Cost, Schedule and Technical Oversight," Frequentis received an "Excellent" rating, whereas N-G received only a "Marginal" rating, indicating that N-G has a high probability or potential of not adhering to anticipated funding, project schedule and specification requirements. The Management

> evaluation scoring is inconsistent with the factors and definitions set forth in Section M.

Id. It also generally objects to the SEB's having "minimized the significant differences between N-G and Frequentis on the . . . high ranking, evaluation factors, including technical, management and past performance." Protest, Section G, page 9.

23. Finally, as to its challenge of the Team's "best value" decision and alleged failure to make a proper trade-off analysis in that connection, the Protest seems to reiterate a number of its earlier statements and concludes by indicating that the Team had improperly abandoned the "best value" concept entirely in favor of opting for an award based on a "technically acceptable, lowest price" criterion:

> [T]he decision violates the very concept of "best value." Apparently no attempt was made to perform a legitimate and realistic trade-off analysis between the technical, management and past performance criteria on the one side, and a realistic assessment of the price differential. Further to the point, the decision is based on inaccurate dollar figures and risk factors. The Award Decision violates Section M2.1 of the SIR as well as sections 3.2.2.2, 3.2.2.3.1.2.3, and 3.2.2.3.1.2.5 of the AMS.
>
> * * *
>
> No apparent trade-off analysis was made to quantify the performance, schedule and cost impacts attributable to N-G's High Risk proposal. No reasonable or coherent "best value" analysis determination was made or attempted in violation of Section M2.1 of the SIR and sections 3.2.2.2 and 3.2.2.3.1.3 of the AMS. Instead, the SEB applied a "technically acceptable, lowest price" criterion in making the award, also in violation of its own SIR.

Protest, pages 8, 9.

24. The Product Team provided the ODRA with an Agency Response ("AR") by letter dated August 6, 2002. In it, the Product Team addressed each of the grounds of Frequentis' Protest. First, as to Frequentis' allegations that its proposal was not given adequate credit relative to that of Northrop/Denro in terms of the technical evaluation, the

Product Team provided the following detailed explanation as to how both proposals received an "OVERALL" rating of "Satisfactory":

> Protester alleges that the FAA "under-evaluated" its proposal by "arbitrarily and capriciously" assigning strengths and weaknesses to the stated subfactors, and that this resulted in "unbalanced" scoring and a "leveling" of the technical scores. Protester also claims that the Product Team acted improperly in assigning its proposal and N-G's proposal an overall Satisfactory technical rating, even though its proposal was rated higher than N-G's in some of the subfactors. Lastly, Protester alleges that the SEB "minimized the significant differences between NG and Frequentis on the…high ranking evaluation factors, including technical…." All of these allegations are without merit, as the record demonstrates.
>
> 1. The Technical Evaluation Factor
>
> The Technical area was the most important of the five evaluation factors. The technical area consisted of five factors. [AR, Exhibit 2, SIR Section M2.3] Those factors were:
>
> 1. AFSS Voice Switch Architecture,
> 2. AFSS Voice Switch Operations,
> 3. Computer Human Interface,
> 4. Offloading/Telecommunications for Offloading Interface, and
> 5. Test and Evaluation and Installation
>
> Of the five technical factors, the first four were the most important, and the fifth was of lesser importance. [*Id.,* Section M3.2.1] Within each of the five factors, there were subfactors that were of equal priority for evaluation purposes.
>
> 2. The Assignment of Strengths and Weaknesses to the Technical Factors and Subfactors
>
> Section M.3.2 of the SIR informed Offerors that an adjectival rating would be derived for each of these five factors, and then an overall adjectival rating for technical would be assigned. Specifically, this section stated, "Judgment will be applied in the evaluation to derive the overall rating." Furthermore, Section M4.0 presented the five adjectival ratings (from Excellent to Unsatisfactory) to the Offerors that would be used during the technical evaluation.

Contrary to what Protester alleges, when adjectival ratings are used, it is perfectly reasonable and appropriate for the agency to assign strengths and weaknesses to arrive at a rating. Protester was placed on notice as early as November 2000 when it received Section M4.0 of the draft SIR that the FAA would be using adjectival ratings for the Technical factor. Protester did not complain at that time. Since the Technical factor consisted of factors and subfactors, it was perfectly reasonable for the Agency to use these ratings for those elements. The General Accounting Office (GAO) has held that where there are several ways in which proposals can be measured against a broadly stated factor, it is up to the agency to determine which measurement or combination of measurements should be used to evaluate the proposals. *NES Government Services, Inc.*, Comp Gen Dec B-248638.3, et al., 92-2 CPD 369. Where evaluator comments are in accord with, or logically related to the evaluation criteria, a protester's objections will be deemed a mere quibble over how the evaluators expressed themselves. *American Computer Educators, Inc.*, GSBCA 10539-P, 90-2 BCA ¶ 22,919 (1990); *System Automation Corp. v. US Nuclear Regulatory Commission*, GSBCA 11962-P, 94-3 BCA ¶ 27,016. Despite Protester's argument that the FAA acted "arbitrarily and capriciously in assigning technical strengths and weaknesses to the subfactors, the facts of this evaluation show Protester's complaints to be no more than "mere quibbles".

Assigning strengths and weaknesses to the subfactors was in accord with, and logically related to, the language in the in the SIR described above. [*Id.*, at Sections Me.2 and M4.0] Furthermore, Protester has completely failed to demonstrate how the assignment of strengths and weaknesses *resulted* in "unbalanced" scoring and a "leveling" of technical scores. Protester's mere disagreement with the Product Team's technical judgment does not demonstrate that the evaluation was unreasonable or prejudicial to the Protester.

3. Technical Evaluation Results

Both the Awardee and Protester received an OVERALL technical rating of Satisfactory. In its protest, Protester states that it was improper for the Product Team to give both proposals the same rating, since Protester was rated higher than N-G in some of the subfactors. As the record shows, the Product Team acted properly and followed Section M of the SIR in assigning both proposals a Satisfactory.

It is well established that courts are at their most deferential in reviewing the technical decisions of agencies that are within their

area of expertise. These determinations will stand unless irrational, arbitrary or capricious. *Marinette Marine v. United States Coast Guard*, 973 F Supp 1 (D DC 1997). As is shown below, the Product Team's assignment of overall technical ratings was neither irrational, arbitrary, or capricious, but rather the result of a logical and reasonable application of the relevant Section M criteria.

a. Factor 1

For Factor 1, AFSS Voice Switch Architecture, there were thirteen (13) subfactors, all of equal importance. [*Id.*, at Section M3.2.1.1] Both Offerors were rated Satisfactory for Factor 1. The results for the thirteen subfactors were as follows:

Subfactor	N-G (Bass) Rating	Frequentis (Dolphin) Rating
1	Satisfactory	Good
2	Marginal	Satisfactory
3	Satisfactory	Satisfactory
4	Satisfactory	Satisfactory
5	Good	Good
6	Satisfactory	Satisfactory
7	Satisfactory	Marginal
8	Satisfactory	Satisfactory
9	Satisfactory	Good
10	Satisfactory	Satisfactory
11	Satisfactory	Satisfactory
12	Good	Good
13	Satisfactory	Satisfactory
OVERALL RATING	SATISFACTORY	SATISFACTORY

Given the breakdown of the subfactor results above, coupled with the fact that all subfactors were of equal importance, it was reasonable for the Product Team to assign a Satisfactory rating for this factor to both Offerors.

[AR, Exhibit 11 at 11-12 and 27]

b. Factor 2

For Factor 2, AFSS Voice Switch Operations, there were three (3) subfactors, all of equal importance. For Factor 2, N-G was rated Good, and Protester was rated Satisfactory. The results for the three subfactors were as follows:

Subfactor	N-G (Bass) Rating	Frequentis (Dolphin) Rating
1	Good	Good
2	Satisfactory	Satisfactory
3	Good	Satisfactory
OVERALL RATING	GOOD	SATISFACTORY

[*Id.* at 14-15, 29]

Given the breakdown of the subfactor results above, and the fact that all three subfactors were of equal importance, it was reasonable for the Product Team to assign a Good rating to N-G, and a Satisfactory rating to Protester.

c. Factor 3

For Factor 3, Computer Human Interface, there were two subfactors, both of equal importance. For Factor 3, N-G was rated Satisfactory and Protester was rated Good. The results for the two subfactors were as follows:

Subfactor	N-G (Bass) Rating	Frequentis (Dolphin) Rating
1	Satisfactory	Good
2	Satisfactory	Excellent
OVERALL RATING	SATISFACTORY	GOOD

[*Id.* at 14-15, 30]

Given the breakdown of the subfactor results above, and the fact that both subfactors were of equal importance, it was reasonable for the Product Team to assign a Satisfactory rating to N-G and a Good rating to Protester. Although Protester received one "Good" and one "Excellent" under this factor, the weaknesses and related impacts identified in the technical report resulted in the overall rating being "Good." [*Id.* at 31]

d. Factor 4

For Factor 4, Offloading/Telecommunications for Offloading Interface, there were four subfactors, all of equal importance. For Factor 4, Both N-G and Protester were rated Satisfactory. The results for the four subfactors were as follows:

Subfactor	N-G (Bass) Rating	Frequentis (Dolphin) Rating
1	Good	Satisfactory

2	Satisfactory	Satisfactory
3	Satisfactory	Satisfactory
4	Satisfactory	Satisfactory
OVERALL RATING	SATISFACTORY	SATISFACTORY

[*Id.* at 15, 31]

Given the breakdown of the subfactor results above, and the fact that all subfactors were of equal importance, it was reasonable for the Product Team to assign a Satisfactory rating to both N-G and Protester.

e. Factor 5

For Factor 5, Test and Evaluation and Installation (of lesser importance than factors 1 through 4) there were two subfactors, both of equal importance. [AR, Exhibit 2, SIR Section M3.2.1] N-G received a Satisfactory rating and Protester received a Good rating. [AR, Exhibit 11at 16, 32] The results for the two subfactors were as follows:

Subfactor	N-G (Bass) Rating	Frequentis (Dolphin) Rating
1	Satisfactory	Good
2	Marginal	Good
OVERALL RATING	SATISFACTORY	GOOD

Given the breakdown of the subfactor results above, and the fact that both subfactors were of equal importance, it was reasonable for the Product Team to assign a Good rating to Protester and a Satisfactory rating to N-G. Although N-G received one Satisfactory and one Marginal rating, the weaknesses and related impacts noted under this factor were not pervasive enough to warrant N-G receiving a less than Satisfactory rating overall. [*Id.* at 16]

4. Discussion of Factor Ratings

Protester argues that since there were subfactors where it received higher ratings than N-G, it should have received a higher rating (presumably at the factor as well as overall level). [Protest at 8] While Protester may have scored higher in some subfactors, *since the subfactors were all of equal importance*, and since Protester was not rated higher then N-G on any *consistent* basis (there were also subfactors where N-G received higher ratings than Protester), the Product Team acted rationally in rolling up the ratings it did. Courts have held that technical ratings are aspects of the

procurement process involving discretionary determinations of procurement officials, which should not be second-guessed, and will be upheld where rational. *Hydro Engineering, Inc. v. United States*, 37 Fed Cl 448 (1997).

As is evident from the chart below, for the first four factors (the most important), both Offerors received three (3) Satisfactory ratings and one (1) Good rating. For the fifth factor (of lesser importance), N-G received a Satisfactory and Protester received a Good rating. Thus, the Product Team acted reasonably, adhered to Section M of the SIR, and acted in good faith in assessing an overall Satisfactory rating for both Offerors.

FACTOR	**N-G**	**FREQUENTIS**
AFSS Voice Switch Architecture	Satisfactory	Satisfactory
AFSS Voice Switch Operations	Good	Satisfactory
Computer Human Interface	Satisfactory	Good
Offloading/Telecommunications For Offloading Interface	Satisfactory	Satisfactory
Test and Evaluation and Installation	Satisfactory	Good
OVERALL RATING	Satisfactory	Satisfactory

With respect to Protester's last allegation that the SEB minimized the significant differences with respect to Technical [*Id.* at 9], the Product Team's position is that there were no significant differences between the Offerors' proposals in Technical, since both received an overall Satisfactory rating. However, to the extent there were differences in the ratings at the subfactor level, when those ratings were rolled up to the factor level, the subfactor differences were consistently reflected in the factor ratings in accordance with the weightings laid out in Section M (i.e., all subfactors were of equal importance).

Protester has failed to demonstrate how the Product Team "violated the dictates of Section M" in performing the technical evaluation. Protester merely disagrees with the Product Team's results, and has failed to meet its burden of showing that the Product Team's evaluation result was clearly erroneous, unreasonable, or an abuse of discretion. *System Automation Corp. v. US Nuclear Regulatory Commission*, Id. Accordingly, this basis of protest must be denied.

AR, pages 5-11.

25. As to Frequentis' challenge to the Product Team's evaluation of the Management factor, the Response offered the following:

> Protester makes two allegations challenging the Product Team's rating of the Management factor. In its protest, Protester asserts that FAA's scoring of management was inconsistent "with the factors and definitions set forth in Section M". [Protest at 8] Then, in Section G of its protest, Protester asserts that the SEB "minimized the significant differences" between the Protester and N-G with regard to high ranking evaluation factors, including Management. [*Id.* at 9] Both of these allegations are completely without merit, as the record reflects.
>
> 1. The Management and Subcontracting Factor
>
> Section M2.3 of the SIR stated that of the five evaluation factors for award, Management and Subcontracting "followed" Technical in importance. Furthermore, Section M3.2 of the SIR stated that an adjectival rating would be derived for this area. Section M.3.2.2 laid out the three factors in the Management area. They were: (1) Program Management; (2) Life Cycle Support Services; and (3) the Subcontracting Plan. [AR, Exhibit 2, SIR Sections M3.2.2.1 through M3.2.2.3] Factors 1 and 2 were of equal importance; Factor 3 was evaluated on a pass/fail basis, and a "fail" would make an Offeror ineligible for award. [*Id.* at M3.2.2 and M3.2.2.4]
>
> Within Factor 1 (Program Management), there were five (5) subfactors, all of equal importance. [*Id.* at M3.2.2.1] Within Factor 2 (Life Cycle Support Services), there were also five subfactors, also all of equal importance. [*Id.* at M3.2.2.2] Factor 3 did not contain subfactors.
>
> 2. Management Evaluation Results
>
> N-G (Bass) received an Overall Management rating of Satisfactory; Protester (Dolphin) received an Overall Management rating of Good. [AR, Exhibit 12 at 3, 21] The results at the factor and subfactor levels were as follows:

FACTOR/SUBFACTOR	N-G (Bass) Rating	Frequentis (Dolphin) Rating
M1-Program Management		
Subfactor 1	Satisfactory	Satisfactory
Subfactor 2	Satisfactory	Satisfactory
Subfactor 3	Satisfactory	Good

Subfactor 4	Marginal	Excellent
Subfactor 5	Satisfactory	Good
Overall Factor 1 Rating	Satisfactory	Good
M2-Life Cycle Support Services		
Subfactor 1	Satisfactory	Satisfactory
Subfactor 2	Satisfactory	Good
Subfactor 3	Satisfactory	Good
Subfactor 4	Satisfactory	Good
Subfactor 5	Satisfactory	Good
Overall Factor 2 Rating	Satisfactory	Good
Overall Factor 3 Rating	Pass	N/A
OVERALL MANAGEMENT RATING	SATISFACTORY	GOOD

[*Id.* at 3, 21]

3. The Inconsistency Allegation

Protester fails to present any evidence from the record that would support a finding of inconsistency in Product Team's rating of Management. Instead, Protester scrapes together two isolated facts about the Management evaluation, hoping those facts, taken out of context, will create an inference in its favor. However, the facts prove only that the Product Team was totally consistent in its evaluation of Management. First, Protester correctly observes that it (Protester) scored better on seven out of ten subfactors. And in fact, the record shows that the Product Team recognized Protester's higher subfactor scores by giving Protester a GOOD on both Program Management and Life Cycle Support Services, and giving N-G a SATISFACTORY on both. By giving the Protester a better total score resulting from better subfactor scores, the FAA was totally consistent with Section M.

Next, Protester correctly points out that in Management subfactor 4 (under Factor 1, Program Management), "Cost, Schedule and Technical Oversight," Protester was given "Excellent" while NG scored "Marginal". [Protest at 8] The Product Team correctly applied these "Marginal" and "Excellent" sub-scores in accordance with Section M. According to Section M3.2.2.1, "All Subfactors within this factor are of equal priority for evaluation purposes." Thus, when N-G's "Marginal" was rolled together with the four other "Satisfactory" subfactor scores for Management, N-G was correctly given a Satisfactory. Similarly, Protester's "Excellent"

was rolled together with two "Satisfactory" and two "Good" subfactor scores and assigned a "Good." Protester has not pointed to any part of the SIR that requires that a "Marginal" in Management be grounds for disqualification or grounds for different treatment than the other Management subfactors.

Moreover, the Evaluation Team Lead fully explained the rational basis for treatment of the N-G "Marginal" score. She stated in the Management Proposals and Subcontracting Plans Evaluation Report that "Bass' (N-G's) rating of Satisfactory for the Program Management factor was supported by Satisfactory ratings in all but one subfactor, Cost, Schedule and Technical Oversight, which received a Marginal rating." [AR, Exhibit 12 at iv] Then, on page 3, in explaining the overall rationale for the N-G management score, the Team Lead stated that, "The Bass Management Proposal was rated "Satisfactory." Bass' response was appropriate and adequately addressed the full range of requirements and work effort and although there may be some areas for improvement, these areas are offset by strengths in other areas." Unless subfactor 4 had been arbitrarily accorded a greater weight than the other four subfactors in Management, there was no conceivable way the roll up score could have been anything but "Satisfactory." There is nothing in the evaluation or the roll up on which Protester can base its inconsistency allegation.

4. The "Minimized Significant Differences" Allegation

In Section G of its protest, Protester alleges that the Product Team somehow minimized the "significant" differences between Protester and N-G in the scoring of Management, along with other factors. The record does not support this allegation. The treatment of all Management factors was set forth in Section M3.2.2, which stated that Factors M1 and M2 were of equal importance. Section M3.2.2.1 stated that all subfactors were of equal importance. The roll up scores for the two management factors show that the evaluation scores are consistent with the equal treatment for all the subfactors. All subfactors had the same opportunity to receive ratings ranging from Excellent to Unsatisfactory. Moreover, the record shows that there was a rational basis provided for each separate subfactor rating. The rational basis is reflected by the strengths, weaknesses and risks found by the evaluators, consistent with the rating descriptions in Section M4.0, which were then translated into adjectival sub-ratings. Section M2.8 specifically put the Offerors on notice that "Explicit in the evaluation of all proposal volumes and OCT is an assessment of risks inherent in the proposal….Risks identified within any aspect of an Offeror's

> proposal, and within any of the evaluation factors, will be analyzed as to their potential impact on the AFSSVS program (i.e. equipment performance, work performance, program management, schedules, a cost)." In short, no sub factors were treated any more important than any of the others. Thus, there is no evidence to show that the SEB "minimized…significant differences."
>
> If Protester objected to the adjectival scheme that was laid out when the SIR was released in February 2001, then Protester had a duty to protest that scheme before the management submissions were due on August 6, 2001. Protester did not do so. The record shows that the Product Team had a rational basis for all of its actions. This basis of protest is without merit and should be denied in its entirety.

AR at 11-13.

26. Regarding the Product Team's evaluation of past performance and Frequentis' contentions relating to Northrop/Denro's failure to identify the termination of the Swedish TALK contract, the Agency Response contains the following argument:

> Protester alleges that N-G should have been eliminated from the competition because it did not report an alleged default termination of the TALK contract (a Swedish contract). [Protest at 7] Protester cites to Section M3.2 of the SIR, which states that "The Offeror's record of past performance must show no deficiencies in performance within the last 3 years that would increase the risk of failure in performance of the AFSSVS contract. N-G did not provide any information on the TALK contract with its submission under L.16.1.
>
> The Product Team does not agree with Protester's interpretation that N-G had to be eliminated because of the cited M provision. Section M of the SIR has to be read consistently with all of the other provisions of the SIR, including Section L. Section L did not require an exhaustive list of references to be provided. It only required three references. Therefore, the "record of past performance" called out in Section M3.2 could only refer to that universe of references selected by N-G, in addition to whatever additional information FAA compiled. To read the sentence otherwise would have made it inconsistent with Section L. The Product Team generated and evaluated enough information to give it a reasonable picture of N-G's ability to perform technical,

> schedule and cost. Thus, the marginal rating for N-G is appropriate and rationally based.

AR, page 14.

27. As to the protest ground relating to the evaluation of cost/price proposals, the Product Team objected to the timeliness of that ground, arguing that, because the so-called "pricing model" had been clearly spelled out in the SIR, any protest challenging the propriety of the "pricing model" should have been raised prior to "the time set for initial proposals" in accordance with the ODRA Procedural Regulations, 14 C.F.R. §17.15(a)(1):

> ODRA's regulations set forth time limits for the filing of protests in 14 C.F.R. 17.15(a)(1) which in relevant part state:
>
> > Protests based upon alleged improprieties in a solicitation or a SIR that are apparent prior to bid opening or the time set for receipt of initial proposals shall be filed prior to bid opening or the time set for initial proposals.
>
> The Product Team issued the SIR on February 28, 2001. Cost Proposals were due on October 19, 2001. Protester filed this protest on July 10, 2002. Section M 3.2.4. of the SIR clearly detailed the methodology to be used to determine the Government's evaluated price. The Protester has not argued that it was unaware of the pricing methodology or that section M was unclear or vague. It is also important to note that Protester did not comment on the price model when it appeared in the draft SIR that was released in November 2000 (Frequentis submitted approximately 377 comments). Instead, Protester now argues that "significant anomalies in the pricing model served to wildly distort the actual price differential between the Frequentis and N-G bids." [Protest at 4-5] Protester is now time barred from arguing either that the pricing model was "seriously flawed" either in its creation or in its application. The pricing model was apparent prior to the time for submission of proposals. Because Protester is unhappy with the results of the FAA's evaluation (that was consistent with the terms of the SIR), it now makes an after-the-fact argument that the model was flawed.
>
> If the Protester believed the "pricing model" to be flawed, it was obligated to protest this prior to submitting its proposal. Protester's cause of action is untimely and must be dismissed consistent with the provisions of 14 C.F.R. 17.15(a)(1).

AR, pages 16, 19.

28. Notwithstanding its objection to protest timeliness, the Product Team furnishes the following substantive response, asserting that it had a rational basis for using the SIR's pricing model in any event:

> Although the FAA firmly believes that Protester is time-barred from asserting any claim relating to the "pricing model," in the interest of completeness, the Product Team will address Protester's substantive allegations regarding the model.
>
> 2. The Price Model
>
> The Protester alleges that the "pricing model" "served to wildly distort the actual price differential… and that the "real world price differential was significantly less", concluding that the SEB and SSO "unjustifiably and erroneously based the best value determination on the unrealistic $59 million difference of the model pricing…." [Protest at 4-5] Notably, the Protester argues that the "real world price differential was significantly less". The "real world" difference or the "true IGCE/ Most-likely buy" as discussed below, determined the difference in Frequentis' and N-G's pricing at $25 million ($72 million vs. $44 million respectively). [AR, Exhibit 18 at 12] This "real world price" which Protester has never asserted to be flawed, and which Protester relies upon to show the alleged erroneously based best value determination, found Frequentis's switch to be priced 64% higher than N-G's price. Either methodology shows an extraordinary difference between the Offerors' pricing.
>
> Protester fails to present any evidence that would substantiate its claims. Instead Protester attempts to convince the ODRA that the cost evaluation was conducted in an irrational or flawed manner but Protester's presentation of incorrect facts is misleading. However, once the true facts are explained below, it is clear that Protester's allegations have no substance and that the Product Team's evaluation was both rationally based and completely consistent with the Section M Cost/Price SIR criteria.
>
> Protester is correct in stating that the FAA required Offerors to price greater quantities of some CLINS than would be ordered. To further clarify the price evaluation methodology, the FAA offers the following description of what was evaluated and how that evaluation was consistent with Sections L17.0, M2.1, M2.3 M2.8 and M3.2.4.
>
> Detailed instructions for completing Section B were included in SIR Section L6.3. The Offerors were only required to price 65 systems

(known as the "notional orders"). The Cost/Price team considered in its evaluation **only** the 65 notional orders in its determination of each Offeror's total evaluated price. The Cost/Price Team evaluated 65 systems only. [AR, Exhibit 2, SIR at Section M3.2.4] Consistent with SIR sections L17.3, M3.2.4, only the supporting contract line items to field and support the AFSSVS program were priced throughout the different ordering periods at maximum quantities. The FAA recognized and stated that it did not know the exact configurations of the voice switches it would require with the exception of Sites 1 and 2. [*Id.*, SIR Section L6.3] Section B reflected different size switch configurations for the installation and survey CLINs, as well as increased hardware for the system and spare CLINs. [AR, Exhibit 2 at B-1] The SIR Section B quantities were derived from the Investment Analysis Report. That report identified between [Deleted] units per ordering period based on the funding allocation projected. [AR, Exhibit 20 at page 30]

The SIR, consistent with the Investment Analysis Report [*Id.*], was structured to allow the Product Team to order the needed quantity of voice switches in either the base period or any option period. Because the Product Team could not predict the size of the switch or in which ordering period it would have funding available to place orders, it required each Offeror to price the maximum quantity of installations, surveys and hardware, and the Product Team evaluated those quantities. Had the Product Team done otherwise, they would not have obtained competitive pricing for the full extent of the ordering quantity within each of the relevant CLINs for each ordering period. In addition, evaluating maximum quantity prices prohibited the Offerors from engaging in unbalanced bidding. In conclusion, as the SIR quantities were based upon the Investment Analysis numbers, and the need for obtaining and evaluating maximum quantities per ordering period was the only way to preserve competitive pricing and prevent unbalanced bidding, the use of these maximums had a rational basis.

Although Protester argues that evaluating maximum quantities throughout each period was an "abuse of discretion", any other approach would have been inconsistent with both the SIR and the Product Team's historical understanding of its contract administration. As such, the methodology used by the Cost/Price Team in determining the evaluated prices was rationally based, consistent with the terms of the SIR, and applied equally to all Offerors.

AR, pages 19-21 (Emphasis in original).

29. The Product Team also argues that no prejudice resulted from its use of the SIR pricing model, in light of the SSO's post-protest determination that the same award decision would have been made, even if the "True IGCE" had been used to evaluate cost/price proposals for purposes of that decision:

> Protester alleges that "the SSO believed there to be a $59 million price differential between the Offerors" and that " [t]his critical misinformation, which is at the heart of the SSO's Award Decision, itself invalidates the award to N-G". [Protest at 5] Although the Agency firmly believes its evaluation was rationally based and consistent with the criteria stated in the SIR, in response to this protest allegation, the SSO re-evaluated the award decision using Protester's assertion that the true differential in cost was in reality $28 million as reflected by the "true IGCE". [Exhibit A, Bell Affidavit at 8] The SSO reviewed the allegations contained in Frequentis' protest. She then considered what the outcome would have been if she had been presented with the cost differential of $28 million ($72 million for Frequentis and $44 million for N-G), and whether that would have altered her original best value award decision. [*Id.* at 8] The SSO considered at the evaluation criteria, specifically noting the evaluation order of importance (Cost/Price followed Technical, Management and Subcontracting, and Past Performance in importance). The SSO considered that the price differential of $28 million still represented a 61% cost delta between the Offerors. Using this information, the SSO determined that the use of the "true IGCE" numbers would not have resulted in her changing the best value award decision. [*Id.*] Relying upon the importance of the evaluation criteria, the "true IGCE" numbers and the recommendations in the SEB Report, the SSO determined in this re-evaluation that she could not justify paying a 64% premium for an offer than was technically equivalent to the other. [*Id.*]
>
> Since this re-evaluation resulted in the same award decision, Frequentis has suffered no prejudice as a result of any alleged evaluation error. *See Protest of E&I Systems, Inc*., 99-ODRA-00146, Findings and Recommendations at 10.

AR, page 25.

30. Finally, the Product Team offers the following in support of its decision to accept what it perceived as a "buy-in" proposal:

> Protester's allegation that N-G's buy-in pricing strategy was not reasonable, realistic or consistent and therefore violated the terms of the SIR is contrary to general principles of government contract law. A solicitation that contains provisions for realistic and

reasonable pricing does not, per-se, prohibit buy-ins, but those two provisions are included to help the Government assess the Offeror's understanding of the work required and to alert the Government to the possible adverse effects of a buy-in. [50 Comp. Gen. 788] In addition, the GAO has recognized that whether a below cost bid should be rejected is a matter of judgment and where the risks have been carefully evaluated and reasonable measures have been taken to protect the Government's interest, GAO will not interfere with a contract award. [Comp. Gen. Dec. B-183816, 75-2 CPD 338]. In fact, when the solicitation includes a provision requiring realistic pricing, the GAO will only, on occasion, review the record to ascertain that the procuring activity has taken adequate measures to analyze the technical and cost risks created by a potential buy-in situation. [50 Comp. Gen. 788, Comp. Gen. Dec. B-199547, 81-2 CPD 178] The Source Evaluation Board (SEB) did just that. In its Final Report to the SSO, the SEB recognized and represented the risks associated with a potential buy-in.

The SEB report states:

> - [N-G's] past performance record reflects a history of paying consideration for schedule delays and reflects a satisfactory cost performance track record. This means that it is expected that the work will be completed at the price negotiated but it may be late and consideration obtained as a result.
> - A "buying-in" contractor also would require increased oversight on the part of the Government to ensure it does not attempt to recover its losses through excessive pricing on change orders and to ensure it takes no technical short-cuts (i.e. first article, program management) with meeting requirements. Since [N-G's] offer is so low there is sufficient funding for additional FAA oversight should that be required. The program is operating to a budgetary forecast at the IGCE level and not the [N-G] price baseline which is significantly less.
> - In addition, though every attempt has been made to ensure that the terms and conditions of the contract are clear to prevent cost growth, there is no guarantee that no changes or clarifications will arise. The Government is of the opinion that there is a low risk of potential cost growth from change orders and as noted previously has identified the magnitude of the cost plus fixed fee effort on this procurement. [AR, Exhibit 18 at vi]

The Protester alleges that N-G's buy-in price "exponentially increased the perceived price differential…" [Protest at 5] This statement purposely attempts to confuse ODRA into believing that the FAA's evaluation created the difference in pricing between Protester and N-G. What Protester deliberately ignores is that a buy-in is a pricing strategy used to obtain the award of a government contract by offering a below profit price in order to place that Offeror in a position of competitive advantage. Regardless of the methodology used by the FAA to determine the evaluated cost, a buy-in will always create a larger than expected differential in the final evaluated price. In reality, Protester's grievance is not with the FAA's evaluation but with a competitor's pricing strategy that the Protester could not compete with.

There is no legal principle that permits disturbance of an award merely because the low bidder submitted a price less than the Government estimate. [Comp. Gen. Dec. B-184408, 76-1 CPD 3, Comp. Gen. Dec. B-198565, 80-1 CPD 325] In fact, the mere possibility that a buy-in has taken place is not sufficient to render an award improper. [Comp. Gen. Dec. B-198883, 79-2 CPD 41] The FAA recognized the potential of a buy-in. [AR, Exhibit 18 at iii] Understanding that no legal impediment existed to prevent considering a buy-in offer, the SEB followed the guidance set forth in the FAA Acquisition Management System Toolset. [*Id.*] The SEB report states:

> [t]hat guidance indicates that a "buy-in" does not mean that the IPT should refuse to award a contract to such an Offeror. It states that "The IPT should evaluate the attendant risks of costs escalating out of control or the contractor not being able to successfully complete performance. The FAA reserves the right to make an informed judgment and decide whether to award or not based on downstream consequences emanating from potential change orders, etc." [*Id.* at iv]

The SEB Final Report then discusses the potential impact to the cost plus fixed fee line items and concludes that "[c]ost escalation for these line items is always a concern for the Government but in the case of this procurement, this concern is not any greater for Bass (N-G) than for Dolphin (Frequentis) as both have proposed very low prices as compared with the IGCE." [*Id.*]

Protester asserts "a buy-in price is, by definition, unreasonable and unrealistic" and "N-G's price violates the explicit criteria of

Section M3.2.4. of the SIR which requires that all proposed prices be reasonable, realistic, complete and consistent. [Protest at 5] Protester again deliberately misrepresents the terms of the SIR. It is correct that the FAA Cost/Price Team determined N-G's offer to be unreasonably low and unrealistic in five of the twelve evaluated areas and overall determined the offer to be high risk. However, the SIR does not require elimination, of an Offeror if their prices were found to be unreasonable, unrealistic or high risk.

Section M3.2.4 of the SIR stated that:

> The price for all base and option years will be evaluated for:
>
> 1. Reasonableness – Acceptability of the cost or price estimating methodology – review of rationale and supporting data for proposed costs.
> 2. Completeness – Responsiveness in addressing all SIR requirements – review of the proposal to ensure data provided is sufficient to allow a complete analysis and evaluation of the costs or prices delineated in Section B and includes all information and exhibits required by Section L.
> 3. Realism – Compatibility of the cost/price and scope of work and traceability of the estimates; assessment of the level of confidence and reliability in the estimating methodologies employed by the Offerors and whether they produce realistic proposed costs based upon the Government's requirements and contractor proposed performance.
> 4. Consistency/traceability – How well the Offeror's proposed costs and prices match the labor categories and support levels proposed, the method of accomplishing the work described in the technical capabilities proposal, and the Offeror's past experience for similar work.

Section M3.2.4 of the SIR further stated that "The Government may also assign a degree of risk as appropriate to each cost proposal that will result in the elimination of the Offeror's proposal if the … proposal shows evidence of being seriously flawed." Section L17.5 of the SIR stated that "[u]nrealistically low proposed prices … may be grounds for eliminating a proposal from competition on the basis that the Offeror lacks understanding of the requirement." [AR, Exhibit 2, SIR Section L17.5] The SEB concluded that N-G understood the AFSSVS requirements, basing

> its conclusion on the fact that "[r]eview of the management and technical proposals resulted in satisfactory ratings for both the technical and management areas and which specifically mention that [N-G] is very familiar with FAA voice switch requirements and is presently performing several ongoing contracts." [AR, Exhibit 18 at iii] The N-G proposal was found to be "complete" in all twelve of the evaluated areas, in that the proposal submission addressed all SIR requirements and contained sufficient data to allow a complete analysis of the prices as delineated by Section B and included all information as required by Section L. [AR, Exhibit 14 at 12, 13, 14, 16, 20, 21, 22, 23, 24, 25, 26] Because the SEB evaluation concluded that N-G "has not misunderstood the AFSSVS requirements", and N-G's proposal addressed all SIR requirements, N-G's proposal was not "seriously flawed" under the terms of the SIR as defined in L17.5.
>
> Although Protester alleges that the FAA never analyzed the cost and schedule impacts of the high risk rated proposal, the record refutes this baseless assertion. The SEB explicitly recognized and presented the following analysis to the SSO - "Bass' overall price is considered…a high risk to the Government. The high risk designation indicates to the Government that there is a potential impact to the technical oversight and schedule requirements imposed by the SIR that would require additional oversight by the FAA." [AR, Exhibit 18 at iv]
>
> The SEB appropriately identified the potential buy-in and carefully analyzed the impact it could cause the program. The Protester is unable to point to any provision of the SIR that would require elimination of a proposal simply because it was a suspected buy-in. A proposal cannot be rejected simply on this basis. The SEB carefully considered and documented the risks associated with a buy-in strategy. The SEB's actions were rationally based, and well within the terms of the SIR, FAA policy, and principles of government contract law. Protester's allegations relating to a buy-in fail for lack of substance.

AR, pages 21-24.

31. The Product Team also took issue with Frequentis' allegations regarding its treatment of the OCT results:

> The Protester makes numerous allegations regarding the OCT, its objective, and the use of the OCT results in the final award decision.

None of Protester's allegations are supported by either the terms of the SIR or the record.

1. The Objective of the OCT

Protester alleges that "[t]he purpose of **any** OCT is to determine whether the equipment proposed actually works – as distinct from the 'paper' claims in the written proposal submissions." (Protest at 6, emphasis added) The Agency cannot speak to Protester's generalized understanding of OCTs, as Protester's generic understanding of OCTs is not relevant to this protest. What is relevant is what the objective of this OCT was as defined in the SIR for this procurement. Protester took their generalized understanding of how, "any" OCT should operate and applied it to this procurement without determining if such action was appropriate. In preparing its proposal and determining what the focus of its submission should be, Protester failed to understand how the OCT would be used in this procurement and its relative evaluation importance. OCT was the least important evaluation factor. [AR, Exhibit 2, SIR Section M2.3] Protester's allegations in this evaluation area are based upon this fundamental misunderstanding of the use and objectives of the OCT. The objectives of the OCT were clearly stated in the SIR. [*Id.*, SIR Sections L19.0, L-4, and M3.3.1] Protester now tries to turn its mistake into broad-based allegations of improper evaluation on the Agency's part.

Protester states that the FAA erred in taking the OCT results and "never revisiting or adjusting the "paper" (Phase II) adjectival scores it had earlier assigned to N-G's proposal. [Protest at page 6] Protester's objections to the process laid out in the SIR are untimely. Section M of the SIR, released on February 28, 2001, laid out the three phases of the procurement, and did not indicate that OCT results would be used to adjust the Phase II ratings. If Protester believed that the OCT (Phase III) results should be used to adjust the Phase II ratings, Protester was required to raise this basis of protest prior to the time set for receipt of proposals (April 20, 2002). ODRA's regulations set forth time limits for the filing of protests in 14 C.F.R. 17.15(a)(1) which in relevant part states:

> Protests based upon alleged improprieties in a solicitation or a SIR that are apparent prior to bid opening or the time set for receipt of initial proposals shall be filed prior to bid opening or the time set for initial proposals.

It is well established under ODRA decisions that a protest must be timely filed in order to be considered, and that the time limits for filing a protest will be strictly enforced. *Protest of Bel-Air Electric Construction, Inc*. 98-ODRA-00084, *Protest of Boca Systems, Inc*., 00-ODRA -00158. As such,

Protester's allegations regarding how the FAA used the OCT results are required by the above regulation to be dismissed.

If, however, the Product Team had re-evaluated the completed Phase II results as Protester suggests, such action would have been completely improper under the terms of the SIR. The terms of the SIR do not give the Agency the authority or discretion to re-rate Offerors' completed Phase II results. The Product Team did what the terms of the SIR allowed. It appropriately assessed the risks associated with the Offerors' performance during OCT. Those assessments were then used by the SSO to determine the best value award decision.

2. The Risk Ratings

The Agency expected, and the conduct of the OCT confirmed that expectation, that both Offerors would require further development to provide a fully operationally suitable voice switch. In fact, the SIR stated that "[t]he FAA understands that features may not be fully developed in the Offeror's product at the commencement of OCT." [AR, Exhibit 2, SIR Section L.19] OCT was meant to assess the maturity of the voice switch *at the time of OCT*. The results showed that N-G's switch was less stable and would need more development to complete than Frequentis' switch. [AR, Exhibit 17 at v] However, both systems required modifications after award in order to satisfy all requirements. [AR, Exhibit 18 at v]

Also, contrary to what Protester states, N-G did not "fail" the OCT. The OCT was not conducted on a pass-fail basis, but on a risk assessment basis. N-G received a High risk, and Protester received a Moderate risk. [AR, Exhibit 17]

The SIR required OCT "test results [to] be used to discern any strengths, weaknesses and risk identified during the OCT for their potential impact to areas of technical, cost and schedule. [AR, Exhibit 2, SIR Section M3.3.1] The OCT was to be used not just to support the Government's "Best Value" determination but most importantly its objective was to be a "**risk mitigation and not a requirements compliance and verification activity"**. [*Id.*, SIR Section L-4, page 1 (emphasis added)] Despite Protester's allegations that neither the SEB nor the SSO appropriately assessed the OCT's impact and that error undercut the best value award decision, the record shows otherwise.

The SEB's Final Report clearly shows that the Agency's actions were consistent with the SIR requirements to assess the risk impact concerning the OCT results. [AR, Exhibit 18 at v] Specifically, the Final Report states in relevant part:

> Paragraph 2.8 of the SIR identifies that the risk assessment inherent in the evaluation of all proposal volumes and OCT is an integral component of the evaluation… The SEB wants to specifically identify at this point risks that are due to inconsistencies and discrepancies between various volumes of each Offeror's proposal.
>
> Bass [N-G] offered a mature system for the Phase II Technical solution but provided an incomplete and problematic system for Phase III OCT. Both of these findings reiterate the high risk solution proposed by Bass. (The SEB is of the opinion that this risk translates to a likelihood that the Government will be negatively impacted by the Offeror's failure to meet schedule baselines.) [*Id.*]
>
> The SSO, in making the award decision, reviewed the SEB Final Report, as well as the OCT Team Evaluation Report. Prior to the best value award decision to select N-G, she undertook an in-depth review of all the information that was provided to her. [Exhibit A at 3, 4] That information included the SEB's detailed analysis of the OCT results. [*Id.* at 4]
>
> The above SEB assessment and SSO consideration shows the Agency's actions to be consistent with the SIR's requirements to assess OCT risk for impact to other areas of the program. As such, the award decision is a rationally-based one.
>
> In all, the Protester's allegations are without merit, and are not supported by the record. Accordingly, this basis of protest should be dismissed.

AR, pages 25-27 (Emphasis in original).

32. Finally, the Product Team offers the following rebuttal in response to Frequentis' contention that its "best value" award decision was made without a proper trade-off analysis:

> Protester claims that the Source Selection Official's (SSO's) award decision was "irrational and inconsistent" with the criteria and standards set forth throughout Section M. Protester also claims that the decision violated the "best value" concept, because "apparently no attempt was made to perform a legitimate and realistic trade off analysis between the technical, management and past performance on one side, and a realistic assessment of the price differential." [Protest at 8] The Product Team's position is that the evaluation results the SSO received from the SEB in each evaluation area were accurate, complete, consistent with the Section M criteria and were rationally based. The SEB presentation to the SSO summarized but did not alter that information. As such, the SSO's resulting award based on the underlying documentation as presented was consistent with the standards set forth in Section M and therefore

rationally based. The SSO did perform, in fact, a proper "best value" analysis in accordance with these standards.

It is well established that procurement officials have substantial discretion to make a best value source selection. *ITT Federal Services Corp. v. United States*, 45 Fed Cl 174 (1999). In this case, the SSO provided a coherent and reasonable explanation of her exercise of this discretion. The Product Team's overall record clearly documents the evaluation results, the Product Team's rationale and reasoning, and the selection of the N-G as the most advantageous under the announced selection factors.

The SSO decision [AR, Exhibit 19] lays out the five evaluation factors, and their order of importance, as stated in Section M. [AR, Exhibit 2, SIR Section M2] In order of importance, the factors are: Technical, followed by Management and Subcontracting, and Past Performance (both of equal weight), followed by Cost/Price, and then OCT. Section M2.3 of the SIR also stated that as the relative assessment of the Offerors' Technical, Management and Subcontracting, and Past Performance responses and the identified discriminators become less important, the importance of Cost/Price and the OCT would increase.

The SSO, having read and considered the factor evaluation reports and the SEB report, stated that "there is essentially no distinction" between the two Offerors for Technical, the most important factor. This statement was based on the fact that both Offerors were rated overall Satisfactory for Technical. [Exhibit A, 4] Next, the SSO noted that OCT (the least important factor) reflected risk for both solutions, which it did—Protester (Dolphin) received a Moderate risk, and N-G (Bass) received a High Risk. The SSO did not believe these risk differences to be significant [*Id.]*, especially since OCT was the least important evaluation factor. Furthermore, the SSO agreed with the SEB finding that "both systems required modifications after award in order to satisfy all requirements. [N-G] has a high risk in that it has more work to do. Dolphin has a moderate risk which translates into less work to do." [AR, Exhibit 18 at v]

The SSO then considered the Management and Subcontracting, Past Performance and Cost/Price results. She recognized Protester's (Dolphin's) Good ratings in Management and Subcontracting and Past Performance, at an evaluated cost of $127 million. She also recognized N-G's (Bass') Satisfactory rating for Management and Subcontracting and Marginal rating for Past Performance, at an evaluated cost of $68 million.

Given these evaluation results, and the $59 million difference (86% differential) in the Offerors' proposals, the SSO determined that the best value award decision was to award to Bass (N-G). In other words, given the evaluation results, the SSO could not justify paying a $59 million

> premium, for technically equivalent proposals (the most important factor) with two second tier higher ratings and a reduced risk rating for OCT, the least important factor. The SSO's trade-off between the evaluated factors was appropriate.
>
> In reaching this decision, the SSO relied heavily on the recommendations in the SEB report, and adopted the SEB's recommendation to award to NG (Bass). GAO has held that where a source selection authority adopts the findings and recommendations of proposal evaluators, this action can properly reflect that official's exercise of independent judgment. *International Data Products Corp*., Comp. Gen. Dec. B-274654, 97-1 CPD 34.
>
> GSBCA has stated that "there is no formulaic methodology for conducting a best value determination; the key is whether the award is consistent with the RFP terms and that any price premium is justified by specific technical enhancements" *Grumman Data Systems Corp. v. Department of the Air Force*, GSBCA 11939-P, 94-2 BCA ¶ 26,822. In this case, the SSO adhered to the order of importance of the factors stated in Section M2.1, acting reasonably in electing NOT to pay a $59 million premium for an offer that was technically equivalent to the other. Even in the areas apart from technical, the differences in scores for the Protester, to the selecting official, were not of such a magnitude to justify paying the $59 million premium.
>
> Based on the above, Protester's assertion that the SSO's award decision was irrational and inconsistent with the SIR's Section M language must be denied.

AR, pages 29-30.

33. The Agency Response was accompanied by two affidavits, the first from the SSO and the second from the SEB Chair. In her affidavit, the SSO describes what she did in making her award decision. She notes that she reviewed Sections L and M of the SIR, the evaluation plans and evaluation sub-team reports for each of the evaluated areas, the Phase II SEB Report, and the Final SEB Report. She states that, in her analysis of the information she "determined that for the Technical evaluation, which was the most important Volume, there was essentially no distinction between the two offerors." As to the Phase III OCT results, she states, "neither [proposal] reflected a low risk solution … both solutions had been evaluated as either 'moderate' or 'high' risk." In her mind, the

"discriminators between the offerors in making [the] best value decision" were provided by the "Phase II Management, Past Performance, and Cost Assessments." Bell Affidavit, ¶4. Although the affidavit acknowledges that the award decision was based on the $59 Million differential in "evaluated costs," from her "detailed review of the SEB Report and underlying Phase II Cost/Price Evaluation Report," the SSO states, she "had knowledge of … both the 'Inflated IGCE' and the 'True IGCE' analysis." In addition, the affidavit states, "[i]n response to Frequentis's protest," the SSO "re-evaluated the award decision using the Frequentis assertion that the true differential in cost was in reality $28 million as reflected by the 'True IGCE'." The SSO says that she "considered whether [her] conclusion would have been different if [she] had been initially presented with the cost differential of $28 million ($72 million for Frequentis and $44 million for Northrop Grumman) as reflected in the 'True IGCE' numbers." In this regard, the SSO avers: "I determined that the 64% cost delta that existed between the offerers . . . would not have altered my original best value award decision. . . . I determined in my re-evaluation that I could not justify a 64% premium for an offer tha[t] was technically equivalent to the other as the discriminating strengths for Frequentis could not outweigh the cost differential regardless of the cost comparison method used." *Id.*, ¶¶7-8. Appended to the SSO's affidavit was a draft "minority report" of SEB members who at one stage were in favor of recommending an award to Frequentis rather than Northrop/Denro. (The Final SEB Report was submitted unanimously by the SEB.) The SSO indicates with respect to that draft that, had she been presented with it at the time she made her award decision, the decision would not have been any different. *Id.*, ¶9. Also, the SSO, in her affidavit, indicates her awareness at the time of the award decision that the SEB had assessed the Northrop/Denro price proposal as "indicative of a 'buying-in' price." In this regard, she states:

> Existing laws do not preclude companies from 'buying-in' to a contract. I also noted and understood that if a 'buying-in' offeror has the financial capability of absorbing the loss and the low price is not based on a misunderstanding of the requirements, then award to the offeror is permissible. Northrop Grumman was determined to have the financial resources to perform this work and past performance, while indicative of poor schedule and technical performance, has not resulted in any termination of contractor work. As for misunderstanding of requirements,

> Northrop Grumman received a satisfactory rating . . . for both their technical and management proposals.

Id., ¶10.

34. The second affidavit accompanying the Agency Response, that of the SEB Chair, provides some additional explanation for the pricing criteria in SIR Section M (and, it seems, the use of an "inflated IGCE"):

[Deleted]

Little Affidavit, ¶4.

35. Frequentis and Northrop/Denro both furnished the ODRA with comments on the Agency Response on August 15, 2002. In its Comments, Northrop/Denro asserts that Frequentis has failed to adequately plead, let alone prove, its Protest contentions regarding Phase II scoring of the Technical and Management factors, and that, accordingly, those grounds of the Protest ought be dismissed:

> *Technical and Management* – The Protest devotes one short paragraph apiece to Frequentis' objections to the FAA's evaluation of the Technical and Management areas, providing little or no factual or legal support. Protest at 8. Because these broad, non-specific conclusions offer nothing on which to comment, they are inadequate as a matter of law and should be dismissed.

Northrop/Denro Comments, page 2. Regarding Past Performance and more specifically, the issue as to whether Northrop/Denro was required to identify in its proposal the Swedish TALK contract termination, Northrop/Denro argues that: (1) the TALK contract rescission was neither a termination for default nor one for convenience; and (2) because the matter was no longer "pending," it would not have been required to report the termination in any event. In this latter connection, Northrop/Denro reads the language of SIR Section L.16 as pertaining only to terminations that are still "pending":

> The . . . reporting requirement in SIR § L16.0 states—
>
> > Offerors (proposing as Prime Contractors) shall also provide a list of all contracts of $5,000,000 or more that

> were terminated for default or convenience in the last three years *and where such termination actions are still pending.* The basis for the termination shall also be provided.

SIR § L16.0 (emphasis added). Under this Section, offerors were to provide information for contracts where, *inter alia*, (1) the contract was terminated for default or convenience *and* (2) the termination action is still pending. The TALK contract does not meet either of these conditions.

The TALK contract was not terminated for default or convenience. "Termination for default" and "termination for convenience" are terms of art in government contracts. *Appeal of Unfoldment, Inc.*, DCCAB No. D-1062, 2002 WL 1839996; Scott W. Woehr, Agency Cancellation of Federal Contracts for Fraud and Conflicts of Interest, 16 Pub. Cont. L.J. 386, 388 (1987). They refer to methods of discontinuing contract performance pursuant to particular contract terms to which specific procedures and remedies are applicable. *See* Federal Acquisition Regulation Part 49. They are not, however, the exclusive methods by which parties may cease contract performance; contract terms and equity may also permit parties to rescind a contract. *See, e.g., Seneca Timber Co.*, AGBCA No. 83-228-1, 86-1 BCA ¶ 18,518 (discussing various remedies available under contract terms and in equity); *PAVCO, Inc.*, ASBCA No. 23783, 80-1 BCA ¶ 14,407 (granting rescission instead of a default termination to excuse the contractor from the consequences of such a termination).

The TALK contract did not include a "termination for default" clause. It did include "Article 16 - Rescission" and "Article 29 - Termination for Convenience." *See* Tab 2 (TALK Contract table of contents and clauses).

* * *

Under the Rescission clause, if Denro's performance or economic condition was deficient in certain respects, LFV was entitled to rescind the contract. In appropriate circumstances, LFV could also have terminated the contract for convenience. LFV chose to rescind the contract and did so. *See* Tab 3 (Declaration of Asif Moosa); Tab 4 (Correspondence relating to rescission of contract). LFV did not terminate the contract for default or convenience; it did not have the right to do the former and did not exercise its right to do the latter. Northrop Grumman was not required to report rescinded contacts under this SIR provision.

Additionally, even if the TALK contract rescission could be considered a "termination action" – which is not supported by the express terms of the contract – Denro still would not have been required to identify the TALK

> contract under SIR § L16.0. That section required offerors to provide information where the "termination actions *are still pending*." LFV and Denro, however, had settled all outstanding issues on the TALK contract on February 25, 2000, more than a year and a half before Northrop Grumman submitted its AFSSVS proposal. *See* Tab 3 (Declaration of Asif Moosa). The TALK contract actions, therefore, were no longer pending.
>
> All three of the SIR contract reporting requirements clearly identified the circumstances that the offerors were to cite and describe in their proposals. The TALK contract did not fall within any of those requirements. Northrop Grumman was under no obligation to include information on the TALK contract in its proposal.

Northrop/Denro Comments, pages 11-13 (emphasis in original). Further, in its Comments, Northrop/Denro argues, even if the TALK contract had been identified, the FAA would not have eliminated Northrop/Denro:

> The Protest asserts that the Product Team would have been required to eliminate Northrop Grumman – or at least lower its Past Performance evaluation – had it known about the TALK contract. Protest at 7. Frequentis cites SIR § M3.2.3 as the legal basis for this claim, which states in relevant part:
>
> > The Offeror's record of past performance must show no *deficiencies* in performance within the past 3 years *that would increase the risk of failure in performance of the AFSSVS contract*. A past performance deficiency that is currently pending and not yet resolved will be counted as a current deficiency. The FAA will not hold the Offeror responsible for failures or *deficiencies that were beyond the Offeror's control*. . . .
>
> (emphasis added.)
>
> To prevail, Frequentis must prove both (1) that the rescission of the TALK contract constitutes a "deficiency . . . that would increase the risk of failure in performance of the AFSSVS contract," and (2) that the deficiency was not beyond Northrop Grumman's control. *Protest of Information Systems and Networks Corp.*, 98-ODRA-00095 (ODRA reached same conclusion interpreting nearly-identical clause).
>
> Frequentis, however, does not plead *any* facts on these issues, and thus utterly fails to state a claim upon which relief can be obtained. *See* 14 C.F.R. §17.19(a). Moreover, as described in the correspondence at Tab 4, the circumstances surrounding the rescission of the TALK contract were

> the subject of disagreements between the parties in 1999 regarding responsibility for the events leading to the rescission that were ultimately resolved by a bilateral Settlement Agreement entered into in February 2000. These circumstances could not have increased Northrop Grumman's risk of failure in performing the AFSSVS contract.

Northrop/Denro Comments, page 15. Moreover, Northrop/Denro argues, the contentions regarding the TALK contract are "untimely," since Northrop/Denro knew or should have known, even prior to the award of the instant FAA contract, of the facts relating to any failure by Northrop/Denro to disclose the circumstances relating to the termination of the TALK contract, *inter alia*, because it knew Northrop/Denro had not been eliminated from, but was instead included in, the Phase III competition and because there are former Northrop/Denro personnel currently on staff at Frequentis. *Id.* at 16. As to the Protest allegations relating to the Product Team's evaluation of Northrop/Denro's cost/price proposal, Northrop/Denro argues that: (1) the Product Team was not required to eliminate the Northrop/Denro proposal, even though it was considered "high risk"; and (2) the Product Team would not have been authorized to re-score the Technical and Management factors based on the "high risk" assessment of the Northrop/Denro cost/price proposal. As to the Frequentis assertion that the Northrop/Denro cost/price proposal represented an "admitted 'buy-in'," Northrop/Denro makes clear that it never admitted to a "buy-in" (and indeed furnishes an affidavit from its cost/pricing consultant, Mr. Jimmy Jackson, in an effort to demonstrate that its pricing was not a "buy-in") and posits that, even if, *arguendo*, it were a "buy-in," nothing would legally preclude the Product Team from accepting the Northrop/Denro proposal:

> Buying-in is defined as the practice attempting to obtain the award of a Government contract by knowingly offering a price less than anticipated costs. James P. Gallatin, Jr., Buying-In, 84-3 Briefing Papers 1 (March 1984). The GAO has held that an allegation of a buy-in provides no basis for protest: *The allegation that a below-cost offer has been submitted does not in itself provide a basis to challenge the validity of contract award. This is so because below-cost pricing is not prohibited and the government cannot withhold an award from a responsible offer merely because its low offer is below cost. Knights' Piping, Inc.*, B-290398.2, 98-2 CPD ¶ 91; *Norden Sys., Inc.*, B-227106.9, 88-2 CPD ¶131; *RMS Information Systems, Inc.*, B-280521, 98-2 CPD ¶ 113. Simply put, below-cost pricing is not prohibited and the government cannot withhold

> award from a responsible offer merely because its low offer is below cost. *RMS Information Systems, supra.*
>
> The legality of buy-ins is also confirmed in the FAA Procurement Toolbox Guidance Section T.3.2.3 and FA 3.501-2.
>
> The ODRA has follow[ed] the Comptroller General's lead in finding buying-in to be legal:
>
> > There is nothing that precludes a prospective bidder from offering a price or prices that are below cost, and there is no evidence in the record (other than [the protestor's] unsupported arguments) that would indicate [the awardee] cannot perform the contract at the prices it bid, e.g. that its financial capacity is so limited that the bidding structure offered will throw it into bankruptcy. The AMS requires that an "affirmative determination of responsibility" be made prior to any contract award. AMS §3.2.2.7.2. The ODRA ordinarily will not question a Contacting Officer's affirmative determination of contractor responsibility, absent fraud or bad faith on the part of the Contracting Officer, or other unusual circumstances. . .
>
> *Protest of Rocky Mountain Tours, Inc.,* 01-ODRA-00183.

Id., page 21 (emphasis in original).

36. Next, as to the allegations pertaining to the Product Team's treatment of the OCT results, Northrop/Denro urges that, contrary to Frequentis' argument, there is nothing that required the Product Team to revisit its Phase II scoring of the Technical and Management factors subsequent to the OCT:

> The Protest argues that the Product Team should have "revisited or adjusted the 'paper' adjectival scores" from Phase II based on the results of the Phase III OCT evaluation. Protest at 6. The Protest cites no legal basis for this claim.
>
> * * *
>
> Furthermore, as the PRT noted, such action would have been completely improper under the SIR. PRT at 26. SIR Section M establishes an evaluation process with three distinct phases. SIR § M 3.0. The Technical, Management, Past Performance, and Price/Cost factors were to be evaluated in Phase II prior to the commencement of the Phase III OCT

> tests. *Id.* Additionally, SIR § M2.1 establishes the basis for "Award Selection." It describes the consideration to be given to the Phase II evaluation factors and then states "For the OCT area, the results of the test will be used to determine the strengths, weaknesses and operational risk of the Offeror's solution." SIR § M2.1. Nothing in either section or any part of the SIR supports reopening the Phase II evaluations after they have been completed.

Northrop/Denro Comments, pages 23-24. As to the ultimate award decision, Northrop/Denro states:

> The record makes clear that the SSO based her best value award decision on accurate and complete information from the SEB. The trade-off analysis was both legitimate and realistic. There is no basis for finding the award decision irrational, arbitrary, capricious, or an abuse of discretion. It must be upheld.

Id., page 28.

37. Frequentis, in its Comments, voices substantially different views:

> The facts underlying this protest are unusual, and may be unprecedented. The FAA has awarded a major voice switch contract to an offeror—Northrop Grumman (NG)—whose evaluation scores are more akin to those given to a company that has been eliminated from the competitive range. Frequentis is aware of no other FAA procurement, indeed no other federal procurement, where the awardee on a major contract received the following evaluation scores:
>
> - NG's overall proposal adjectival rating was Marginal. AR Vol. VII, Ex. 15 at 7 § 6.0.
>
> - NG's overall proposal risk rating was High Risk. Id. at 5.
>
> - NG's rating for Past Performance was Marginal, and this rating did not even include the termination of a major voice switch contract in Sweden which NG did not report to the FAA. AR Vol. VII, Ex. 18 at i; AR Vol. VI, Ex. 13 at 4 *et seq.*; AR Vol. VII, Ex. 15 at 7, 8 § 6.3.
>
> - NG's rating for the six week, hands-on, Operational Capability Test (OCT) of its proposed equipment

received the worst possible grade of High Risk. AR Vol. VII, Ex. 18 at i and 23-24; Ex. 17 at § 2.1.

- NG's cost proposal also received the worst possible grade of High Risk. The FAA specifically found that NG's prices were unreasonable, unrealistic and unreliable. AR Vol. VII, Ex. 18 at 49; Ex. 14 at 10 § 2.5.1.

Somehow, despite the ratings cited above, NG wound up with the award of this important AFSSVS contract. How this happened is well documented within the AR, as will be discussed at some length below. The FAA simply ignored the evaluation criteria and the best value concept and bought into NG's acknowledged "buy-in" price. The FAA let the buy-in concept trump everything else in this procurement.

The FAA accepted a price from NG which the FAA knew to be unreasonable, unrealistic and unreliable. The FAA itself evaluated NG's price as a buy-in and a High Risk proposition. NG's cost/price proposal should have been rejected outright by the FAA as violative of the SIR's explicit provisions. Yet, the FAA accepted this price virtually without question.

The FAA seems to think that the black letter proposition that a buy-in is not per se illegal ends the inquiry. See, AR narrative pp. 23, 24. This singular line of defense from the FAA entirely misses the basic point of the subject protest. A buy-in has nothing to do with the concept of "best value." It certainly does not override or eliminate the best value criterion in this or any other procurement.

Even if one accepts the notion that NG's price could have been considered and not rejected, that is only a starting point. The FAA was still obligated to make some effort to quantify the costs that necessarily attach to NG's proposal ratings. If it were otherwise, there would be little point to the entire evaluation and competitive process which, in this case, consumed more than a full year.

NG's proposal was rated as High Risk overall and High Risk in the areas of OCT and Cost. It is difficult to imagine worse ratings. These risk ratings carry with them necessary cost and schedule consequences for the agency. Yet there is not a single piece of paper in the entire AR where the FAA even attempted to quantify the impacts that necessarily attach to NG's High Risk proposal. It is impossible to do a legitimate best value analysis without such an effort.

The underlying evaluation documents recognize the obvious. NG's proposal will entail certain schedule delays and will require additional

government oversight. See e.g., AR Vol. VII, Ex. 18 at vi (bullet no. 3). Yet these factors are not quantified, nor is there even an attempt made at quantification. Likewise, there is no attempt made to quantify the cost savings that will result from the timely fielding of the new voice switches, such that the FAA can realize the benefits of offloading and the clustering of flight service stations. These savings, which alone eliminate any cost delta between Frequentis and NG, are identified in the FAA's own Investment Analysis for the procurement. AR Vol. VII, Ex. 20. The specifics of the cost savings identified by the FAA itself will be discussed more fully below.

In addition to the cost and schedule consequences, as well as the lost clustering or offloading savings, the FAA also failed to consider or quantify critical intangible "costs" that necessarily attach to NG's proposal. This is an ATC procurement and human safety considerations are always paramount. On this point, here is the finding by the OCT technical sub-team on NG's performance at the OCT:

> The Sub-team determined that integration of the Offeror's OCT system into the National Airspace System (NAS) would, without significant modifications and/or redesign, adversely affect flight safety, AFSS operability, AFSS service reliability, and system security.

AR Vol. VII, Ex. 15, p.5.

In the Final Report of the Source Evaluation Board, the FAA had considerable difficulty in coming to grips with NG's "buy-in" price. After acknowledging that "Bass' [NG's] overall price is considered unreasonably low and unrealistic and a high risk to the Government," the FAA then offered up this "rationale" for nonetheless accepting that price:

> There is very low risk that this company [NG] would not complete the contract. There are no terminations for default in Bass' past performance record. Late performance is a high probability but failure to perform is not.

AR Vol. VII, Ex. 18, p. vi; emphasis added.

Indeed, in the SSO's second or revisited decision in this case, Ms. Bell justifies the award and the acceptance of NG's buy-in price as follows:

> Northrop Grumman was determined to have the financial resources to perform this work and past performance, while indicative of poor schedule and technical performance, has not resulted in any termination of contractor work. As for misunderstanding of requirements, Northrop Grumman

> received a satisfactory rating for both their technical and management proposals.

Affidavit of Carol Bell, ¶ 10 (attached to AR narrative; emphasis added.)

But the critical underpinning of "no terminations" as justification for accepting NG's price can now be conclusively demonstrated to be incorrect. Exhibit 1 hereto speaks for itself. This exhibit (produced by NG) is the formal and final "Settlement Agreement" between Litton/NG and the Swedish government on the TALK contract—a major voice switching contract for Sweden. This document flatly and unequivocally states that the TALK contract was terminated by the Swedish LFV on August 31, 1999.

Specifically, the preamble to the Settlement Agreement states: "Whereas Contract No. LFV 1996-1-09AN dated January 1997 (the 'Contract') was terminated by LFV on 31 August 1999.…" Emphasis added. The Settlement Agreement then goes on to require Litton to remove all equipment previously delivered (¶ 1) and to pay the Swedish LFV the sum of $1,250,000 "USD" as damages (¶ 2).

For its part, the AR narrative responding to the protest concedes that NG never reported the TALK termination. "N-G did not provide any information on the TALK contract with its submission under L.16.1." AR narrative, p.16. The FAA then goes on to proffer this quizzical "rationale" on the topic of past performance references:

> The Product Team does not agree with Protester's interpretation that N-G had to be eliminated because of the cited M provision. Section M of the SIR has to be read consistently with all of the other provisions of the SIR, including Section L. Section L does not require an exhaustive list of references to be provided. It only required three references. Therefore, the 'record of past performance' called out in Section M3.2 could only refer to that universe of references selected by N-G, in addition to whatever additional information FAA compiled. To read the sentence otherwise would have made it inconsistent with Section L. The Product Team generated and evaluated enough information to give it a reasonable picture of N-G's ability to perform technical, schedule and cost. Thus, the Marginal rating for N-G is appropriate and rationally based.

AR narrative, p. 16, emphasis added.

It is respectfully submitted that the foregoing argument from the FAA makes a mockery of the SIR and of common sense. Under the FAA's

theory a company could have 100 contracts, of which 97 were terminated. As long as that company reported only the 3 contracts that were not terminated, that would be fine with the FAA and consistent with its "interpretation" of the SIR.

Sections L and M of this procurement are straightforward, explicit and not open to subjective "interpretation." Section L16.0 of the SIR plainly states that "Offerors (proposing as Prime Contractors) shall also provide a list of all contracts of $5,000,000 or more that were terminated for default or convenience in the last three years…." Section M3.2.3 is likewise crystal clear and not subject to interpretation. This provision provides "The Offeror's record of past performance must show no deficiencies in performance within the last 3 years that would increase the risk of failure in performance of the AFSSVS contract." Emphasis added. In this context, it is impossible to conceive of a "deficiency" more relevant than a termination for failure to perform, especially one on a major voice switch contract.

Moreover, even without the TALK termination, NG's proposal should have been eliminated. As noted, NG was already rated as Marginal for Past Performance and High Risk overall. Under the definitions used during the evaluation process, a Marginal adjectival rating means "Offeror's response is deficient in several areas with no corresponding offset in other areas." AR Vol. VII, Ex. 15, p. 6 (Phase II SEB Report) (emphasis added). Similarly, this FAA report defines the term "Deficiencies" as follows: "Any part of a proposal that fails to meet the Government's requirements, as established in the RFP and renders the proposal unacceptable…." Id. (emphasis added). Thus, NG's proposal for Past Performance was both "deficient" and "unacceptable" under the SIR definitions even without the unreported TALK contract termination.

Section M2.8 of the SIR defines the risk concept as follows:

> Risk is defined as the likelihood that the Government will be negatively impacted by the Offeror's failure to meet performance and schedule baselines. This integral component of the evaluation will serve to capture and assess the likelihood that the Offeror's proposed solutions would successfully meet the requirements of this SIR. Emphasis added.

Under this definition, NG's overall proposal risk rating of High Risk necessarily means that there is little likelihood that NG would ever successfully complete the AFSSVS contract. Stated differently, the FAA's own rating results impeach the rationale for accepting NG's buy-in price. Recall that the SEB report says that although "Late performance is a high probability, there is very low risk that this company would not

complete the contract." AR Vol. VII, Ex. 18, p. vii. This FAA conclusion is directly contradicted by its own rating of NG. Again, the High Risk rating given to NG means just that—there is a high risk, and a very low probability, that NG would ever complete the contract.

[Footnote: Also contradicting the FAA on this point are its own conclusions as contained in the SEB reports. The Phase II SEB report states: "The SEB, based on the above considerations, has substantial doubt that Bass could perform the required effort." AR Vol. VII, Ex. 15, p. 10 (emphasis added). The Final SEB report states: "When considering these weaknesses… contractual non-performance and schedule delays are likely." AR Vol. VII, Ex. 18, p. 6 (emphasis added).]

In addition to the "no terminations" rationale advanced by the SSO, the FAA's other logic, such as it is, is that—well—we can accept the buy-in because NG at least understands the work. See Bell affidavit, ¶ 10; SEB Final Report, AR Vol. VII, Ex. 18, p. iii. But, once again, this generalization is refuted by the FAA's own evaluation results, which the FAA never bothered to correlate in this procurement. The Management Evaluation Team (MET) concluded that NG, the incumbent, did not understand that this AFSSVS procurement was different.

> However, in relying on its experiences on prior FAA programs, Bass [NG] did not demonstrate a full understanding of how the AFSSVS program is different from the other FAA programs.
>
> * * *
>
> The Offeror did not consider that the AFSSVS program includes a development activity for human factors, INFOSEC, and offloading that was not part of the other programs, or that the AFSS is a different environment and facility from the other programs.

AR Vol. VI, Ex. 12, pp. 3, 4.

The Final SEB Report also notes that NG does not have a full understanding of the required work. Here is how that Report articulated the issue:

> In addition, Bass did not demonstrate that it understood the management of the AFSSVS development effort. The weaknesses raise the risk of cost and schedule delays. For example, delays in fielding the Bass system could reduce the value of cost avoidance introduced by the offloading feature. Also, late performance could contribute to the

> need to extend the contract beyond the present period of performance.
>
> AR Vol. VII, Ex. 18, p. 1.
>
> The "prongs" underpinning the FAA's decision to accept NG's buy-in price—no terminations in NG's record; NG is likely to complete the project, albeit late; are refuted by the existing record. The FAA's award decision is illogical and irrational by its own contemporaneous evaluation results.
>
> In the SEB Final Report the FAA makes another surprising assertion which, in itself, negates virtually everything done to date in this procurement. Here is the FAA's proposition that is referred to:
>
> [Deleted]
>
> AR Vol. VII, Ex. 18, p. vi (emphasis added).
>
> What the FAA states here is astounding. The FAA does not know what the NG costs will be; does not know what the FAA's costs will be; but it doesn't care. The FAA is operating at the IGCE funding level, not the NG price. Therefore, as long as all program costs stay within the funded IGCE level, the FAA is unconcerned. This "rationale" undercuts the entire purpose of this AFSSVS best value competition. The FAA is willing to take a High Risk, unrealistic and unreasonable price at the expense of everything else in the SIR. Simply put, NG's buy-in price trumped every other aspect of this procurement—rendering them meaningless—and this is shown by the FAA's own documented thought process.
>
> In sum, this is a procurement run amok. NG received evaluation scores which should have eliminated them from the competition. The FAA simply ignored the rules and definitions it established for this competition. The FAA accepted a bogus, illusory price; reported it to the SSO as real, and avoided the consequences of its own evaluation results as they apply to NG. Frequentis won every element of this competition. The results were not close. Frequentis should be awarded the AFSSVS contract.

Frequentis Comments, pages 1-7 (emphasis in original).

38. By letter dated August 23, 2002, the Product Team filed a motion to dismiss ("Motion") with respect to specific "protest grounds" it believed had been untimely raised by Frequentis. First, the Product Team notes, its Agency Response had raised two objections to lack of timeliness, one relating to Frequentis' allegations concerning the

"pricing model" and the second concerning the use of OCT results. In both instances, the Product Team characterizes Frequentis' allegations as being challenges to the provisions of the SIR:

> If the Protester believed the "pricing model" to be flawed, it was obligated to protest this prior to submitting its proposal. Protester's cause of action is untimely and must be dismissed consistent with the provisions of 14 C.F.R. 17.15(a)(1).
>
> * * *
>
> Section M of the SIR, released on February 28, 2001, laid out the three phases of the procurement, and did not indicate that OCT results would be used to adjust the Phase II ratings. If Protester believed that the OCT (Phase III) results should be used to adjust the Phase II ratings, Protester was required to raise this basis of protest prior to the time set for receipt of proposals (April 20, 2002). ODRA's regulations set forth time limits for the filing of protests in 14 C.F.R. 17.15(a)(1) which in relevant part states:
>
> > Protests based upon alleged improprieties in a solicitation or a SIR that are apparent prior to bid opening or the time set for receipt of initial proposals shall be filed prior to bid opening or the time set for initial proposals.
>
> It is well established under ODRA decisions that a protest must be timely filed in order to be considered, and that the time limits for filing a protest will be strictly enforced. *Protest of Bel-Air Electric Construction, Inc*. 98-ODRA-00084, *Protest of Boca Systems, Inc*., 00-ODRA -00158. As such, Protester's allegations regarding how the FAA used the OCT results are required by the above regulation to be dismissed.

AR, pages 17, 24-25. Because Frequentis' Comments did not respond to either of the Product Team's contentions, the Product Team argues in its Motion, the two "grounds" must, by default, be dismissed as untimely:

> Frequentis' Comments failed to respond to the Agency's motion to dismiss the protest Cost/Price and OCT grounds as untimely. It is well-established that, where an agency specifically addresses an issue raised by the protester and the protester fails to rebut the agency response in its reply, the ground will be deemed abandoned and received no consideration. [Citations omitted.] This principle is fully applicable to the case in which a party fails to reply to a motion to dismiss, as that failure will constitute a waiver of those claims. [Citations omitted.] Accordingly, the Cost/Price and OCT grounds of the initial protest must be dismissed in their entirety.

Motion, page 2. In addition, the Motion sought to dismiss as untimely "two new protest grounds relating to the FAA's consideration of the offerors' price differential in the 'best value' trade-off analysis." *Id.* The first of these "new grounds," the Product Team elaborates, relates to Frequentis' arguments regarding "potential cost savings described in the FAA's Investment Evaluation Report ('IAR')" appearing at pages 19 through 20 of the Frequentis Comments. The Product Team goes on to state:

> These arguments are based on the proposition that the Product Team should have, and could have, considered the results of the IAR in its trade-off analysis. However, Frequentis knew or should have known about the FAA's cost saving estimates when the IAR was published on the FAA web site in September 2000. [In September 2000 the FAA posted a redacted version of the IAR on the Product Team website. That document has remained on the website since that time. The redacted version contained the information relied upon by Frequentis in its Comments to the Agency Product Team Response.] It also knew that SIR Section M did not include the IAR among the criteria for the Cost/Price evaluation or the Basis for Award. *See* SIR §§M2.0 and M3.2.4. To the extent Frequentis believed the IAR results should have been considered in the trade-off decision, it was required to protest that alleged solicitation defect well before contract award. Even if Frequentis contends that this argument relies on the FAA's actual lack of consideration of the IAR (and not a solicitation defect), this protest ground is untimely; Frequentis received redacted versions of the Cost/Price evaluation report and SEB Final Report disclosing this fact on June 27, 2002. [The Product Team forwarded to Frequentis by overnight delivery redacted versions of multiple documents including the Phase II Cost/Price Evaluation Report and the Source Evaluation Final Report on June 26, 2002.]

Motion, page 3. The second "new argument" addressed by the Motion relates to "Frequentis' claims that the trade-off analysis failed to quantify and to consider the cost of additional Agency oversight 'from Northrop's failure to meet schedule and performance milestones.'" In this regard, the Product Team urges, Frequentis "should have raised this protest ground when it received the SIR, as Section M did not include such costs as criteria for the Cost/Price evaluation or the Basis for Award." In the alternative, the Product Team argues, Frequentis is untimely in raising this "protest ground," since the "very latest" Frequentis "knew such costs were not considered" was

"when it received redacted versions of the Cost/Price evaluation report and SEB Final Report disclosing this fact on June 27, 2002." *Id.*, pages 3-4.

39. Although the Protest letter had requested a hearing, Frequentis and the other parties all subsequently advised the ODRA that a hearing would not be needed, and the ODRA concluded that the record did not require supplementation through live testimony. The ODRA did, however, ask the parties to furnish some additional information in the form of affidavits:

> More particularly, from Northrop/Denro, we need clarification as to precisely what sort of "business unit" Denro Systems is, including its relationship to Northrop/Denro Grumman Systems Corporation and Northrop/Denro Grumman Corporation. From the Product Team, we need additional information regarding what specific steps were taken to verify that Denro has adequate financial capacity in terms of the perceived (albeit contested) "buy-in."
>
> In its comments, Northrop/Denro seems to be presenting a motion to dismiss for lack of timeliness regarding its alleged failure to identify the Swedish contract in response to the SIR requirement for information concerning prior terminations. Prior to making any determination regarding timeliness, the ODRA will need from Frequentis additional information regarding how and when Frequentis first learned about Northrop/Denro's not having identified the Swedish contract. The protest letter seems to indicate that this fact was gleaned from a redacted copy of the SEB Report that was furnished to Frequentis during its post-award debriefing. This is not clear and must be confirmed.

ODRA Letter to the parties dated August 20, 2002.

40. The parties provided the requested information. By letter dated August 21, 2002, Frequentis furnished the ODRA with the Affidavit of David L. Mahan, President of Frequentis USA. From that affidavit, it appears that the first indication Frequentis had that Northrop/Denro may not have provided the Product Team with information regarding the TALK contract termination was on June 27, 2002, when it received a redacted version of the Final SEB Report. This indication, according to Mr. Mahan, was confirmed for Frequentis during its July 2, 2002 debriefing:

> 6. One of the redacted reports we received on June 27 was the Final Report of the Source Evaluation Board. At page iii of that report, the FAA

> states that although Bass' (NG's) past performance was "poor," this "has not resulted in any termination of contractor work." Also at page vi the Report stated, "There are no terminations for default in Bass' past performance record."
>
> 7. We (Frequentis) believed that these statements, quoted above, were factually incorrect. We knew this because the TALK voice switch contract in Sweden had been terminated by the Swedish LFV in 1999. Frequentis succeeded to the TALK contract, and successfully completed performance, after the termination of Litton/Denro.
>
> 8. Thus, having read the redacted SEB Report, and knowing of the TALK termination, we went to the debrief session seeking to reconcile the obvious conflict between what we knew to be true (TALK termination) and what the FAA was reporting (no terminations) as a basis or justification for its award decision.
>
> 9. During the debriefing, which I attended, we specifically inquired of the Contracting Officer whether the FAA during its Past Performance reviews had investigated any foreign voice switch contracts performed by Denro/Litton/NG. The Contracting Officer responded that no such investigation of foreign voice switch contracts had been conducted. After the debrief and prior to filing our protest letter, we concluded that NG must not have reported the TALK termination.

Mahan Affidavit, ¶¶6-9.

41. Next, by letter dated August 23, 2002, the Product Team furnished the ODRA with the Affidavit of Cynthia Valdes, the Contracting Officer. That affidavit describes in detail the kinds of items analyzed to determine the Offeror's financial capacity and states that the analysis was done on the Northrop Grumman Corporation: "A Financial Capability analysis in support of the AFSSVS evaluation was performed on the Northrop Grumman Corporation (NGC) in order to make a judgment whether the Offeror has adequate financial resources to perform the contract." Valdes Affidavit, ¶5.

42. By letter of August 29, 2002, Northrop/Denro furnished the Affidavits of Daniel R. Roth, Business Manager for Denro, and Frank C. Marshall, Jr., Vice-President, Assistant General Counsel and Sector Counsel of Northrop Grumman Corporation's Electronic Systems Section. The letter and affidavits make clear that the company whose financial

records were analyzed by the Product Team for purposes of determining financial capacity (records for 1996-2000 that were submitted with the Northrop/Denro proposal) was what was earlier the Northrop Grumman Corporation and what is now the Northrop Grumman Systems Corporation. More specifically, they explain: (1) that in 2001, a new holding company named "Northrop Grumman Corporation" was established in connection with the acquisition of Litton Industries, Inc., in order to hold both Litton Industries, Inc. and "the previously existing Northrop Grumman Corporation, which was renamed 'Northrop Grumman Systems Corporation.'"; (2) that "prior to June 3, 2002, the Denro Systems business unit was an unincorporated operating unit of Litton Advanced Systems, Inc., a subsidiary of Litton Systems, Inc."; and (3) that "[o]n June 3, 2002, Litton Advanced Systems, Inc., and as a result, the Denro Systems business unit, was merged into the larger Northrop Grumman Systems Corporation." *See* Marshall Affidavit, ¶¶4-5.

43. The Northrop/Denro letter of August 29, 2002 also sought leave to clarify its earlier timeliness arguments and provided the following information together with a supporting Declaration of Jack A. Crifasi:

> The Frequentis' TALK contract-related protest ground relies on four allegations of fact:
>
> (1) The TALK contract had been "terminated;"
>
> (2) SIR §L16.0 required Northrop Grumman to report the "termination;"
>
> (3) SIR §M3.2.3 required Northrop Grumman to be eliminated from the competition during Phase II as a result of the "termination;" and
>
> (4) Northrop Grumman had not been eliminated during Phase II.
>
> *See* Northrop Grumman's August 15, 2002 Comments at 16. All four alleged "facts" were either known to, or believed to be correct by, Frequentis *well before contract award.* Specifically, Frequentis claims to have learned of the first "fact" based on its role as Denro's successor on the TALK contract. That occurred in 1999. The second and third "facts" rely upon Frequentis' interpretation of SIR §§L.16.0 and M3.2.3, both of which Frequentis necessarily believed to be true when it received the SIR in 2001. Frequentis became aware of the fourth fact when its

> representatives encountered Northrop Grumman's representatives during the Phase III OCT at the FAA's Technical Center in New Jersey, beginning in January, 2002. This fourth fact was learned six months prior to contract award. *See* Declaration of Jack A. Crifasi (Tab 4). Northrop Grumman's timeliness argument does not depend upon when and how Frequentis "first learned about Northrop's not having identified the Swedish contract," but when Frequentis had actual possession of all the facts needed to file its protest argument. [Footnote: The General Accounting Office has found a protest ground to be untimely in almost identical circumstances. *Women's Energy, Inc.*, B-258785, 11 Comp. Gen. ¶108,779 (protester believed prior to award that a competitor had an organizational conflict of interest requiring its elimination from the competition, and knew prior to award that the competitor had not been eliminated because the competitor was represented at the pre-award conference); *See also Digital Equipment Corp.*, GSBCA No. 13242-P, 95-2 BCA ¶27,730.

44. The ODRA, by letter dated August 29, 2002, advised the parties that Frequentis would be provided an opportunity to respond to Northrop/Denro's clarification of its timeliness argument, that the response would be due by September 4, 2002, and that, at that time, the record in this matter would be closed. The parties were also advised that timeliness issues would be addressed as part of the ODRA Findings and Recommendations and the Administrator's Order in this Protest.

45. By letter to the ODRA dated September 3, 2002, Frequentis responded to the Northrop/Denro clarification regarding timeliness as follows:

> NG felt it necessary to clarify its previous timing argument even though it was not requested to do so by the ODRA. NG's clarified argument is without merit, as will be explained below.
>
> For obvious reasons, NG treats the fact of the TALK termination very gingerly. NG's wont is to place quotation marks around the word "termination" every time it is used, as though the termination didn't occur. The TALK contract was in fact terminated, and this fact was not reported to the FAA as NG was required to do.
>
> NG's clarified argument misreads §L.16.0 and §M3.2.3 of the SIR. NG's argument assumes that every termination must result in an automatic disqualification. This is not what the SIR says, nor is it what Frequentis has ever contended. SIR §L.16.0 requires the disclosure of all terminations, but §M3.2.3 provides the offeror an opportunity to explain

why the termination was "beyond the offeror's control." It is then the responsibility of the FAA to weigh the disclosure and the response to determine, in light of all the facts, whether the termination amounts to a disqualifying deficiency.

ODRA's decision on NG's earlier disqualification motion accurately describes the process set forth in the SIR:

> Under solicitation Section M3.2.3, had such a termination been identified, the Product Team would have been required to evaluate whether the termination posed a risk to the current contract and whether any deficiency was beyond the control of the terminated party. The Product Team was required to complete such an evaluation as part of its past performance evaluation.

ODRA Decision and Order, August 13, 2002, p. 6.

> Under a proper reading of Sections L and M, there was nothing particularly significant, from a timing perspective, in Frequentis' awareness that NG was also participating in the Phase III OCT. As far as Frequentis knew, NG had reported the TALK termination and the FAA had concluded that it was not a disqualifying circumstance in light of all of the facts and whatever explanation NG had provided. There is simply no timing issue here.
>
> As it turned out, NG did not report the TALK termination. Frequentis' protest argument is simply that this unreported termination, coupled with the uniformly negative comments NG received on every contract it did report, should have resulted in the disqualification of NG from any award considered.
>
> NG's "clarified" motion should be denied.

Frequentis Letter dated September 3, 2002. With receipt of Frequentis' letter, the record closed.

46. The ODRA prepared Findings and Recommendations with respect to the Protest, and the Administrator, by FAA Order No. ODRA-02-229 dated October 1, 2002, adopted those Findings and Recommendations, sustained the Protest and directed the Product Team forthwith to terminate its contract with Northrop/Denro for convenience of the Government and award a contract under the Solicitation to Frequentis.

47. By letter to the Administrator from counsel for Northrop/Denro dated October 4, 2002, Northrop/Denro sought a stay of the directed termination and award pending its submission and the Administrator's consideration of an anticipated motion for reconsideration. The Northrop/Denro letter, as justification for the stay request, raised a perceived error in the ODRA Findings relating to the ODRA's interpretation and application of certain language of the Solicitation at issue (the "SIR") regarding the use of results of the Operational Capabilities Assessment ("OCA") under Phase II of the procurement, *i.e.*, that such language was read improperly as applying to the use of results of the Operational Capabilities Test ("OCT") conducted during Phase III. Finding 3 within the ODRA's Findings and Recommendations had read, in pertinent part:

> Finally, as to the OCT results, the SIR stated that, while the OCT would not be separately rated, "the information gathered at the OCA [Operational Capability Assessment] will be factored into the Volume I and Volume II ratings." *Id.* [AR, Exhibit 2, SIR, Section M2.1]

In fact, the quoted SIR language was directed to how the results of the Operational Capability Assessment ("OCA"), a Phase II activity, would be used in conjunction with the Phase II scoring of Volume I (Technical) and Volume II (Management), and not to how OCT results were to be used. The ODRA had been mistaken in citing such language in support of its analysis. Northrop/Denro claimed that this "incorrect finding" regarding OCT "poisoned" the entirety of the ODRA's "analysis of the SSO's discretionary determinations," and indicated that its significance would be addressed by Northrop/Denro's forthcoming motion for reconsideration. Northrop/Denro Letter of October 4, 2002, page 2.

48. The ODRA, by letter to the parties dated October 4, 2002, established a briefing schedule with respect to the request for stay as well as to the motion for reconsideration. Frequentis and the Product Team both provided responses to the Northrop/Denro stay request by letters dated October 7, 2002. Northrop/Denro furnished a reply by letter dated October 8, 2002.

49. On October 10, 2002, Northrop/Denro filed with the ODRA its Motion for Reconsideration. In it, Northrop/Denro reiterates the arguments set forth in its stay request, urging that the ODRA's erroneous reliance on language relating to the OCA permeated the entirety of the original Findings and Recommendations and was prejudicial. Northrop/Denro argues in the alternative that, "even if there was no misinterpretation of the SIR, . . . the ODRA . . . has substituted its 'best value' judgment for that of the Product Team, in violation of the standard of review to which it must adhere." Northrop/Denro Motion, page 12.

50. The Product Team, by letter of October 10, 2002, submitted to the ODRA its own Motion for Reconsideration. The Product Team in that Motion similarly asserts that the ODRA had issued "clearly erroneous findings of fact," by citing and relying upon the aforesaid SIR language pertaining to OCA to support its conclusions regarding the use of OCT results, and that, by reason of this erroneous interpretation, the ODRA effectively elevated the status of OCT results to that of a "super evaluation criter[ion]." The Product Team, in its Motion, maintains that its "best value" determination was appropriate and consistent with the requirements of the SIR. *See* Product Team Motion.

51. Frequentis, by letter of its counsel dated October 17, 2002, submitted its Response to Motions for Reconsideration. In it, Frequentis argued that: (1) regardless of the ODRA's error in citing to a SIR provision relating to OCA, there is even stronger language within the SIR pertaining to the OCT that fully supports the ODRA's finding that OCT results were to be incorporated into the final technical evaluation and source selection process; (2) rather than "substituting its judgment" for that of the Product Team, the ODRA, in recommending a directed award to Frequentis, was merely exercising the broad discretion it has under its regulations to formulate appropriate remedies; and (3) neither the Product Team nor Northrop/Denro has satisfied the standards established for reconsideration, *i.e.*, neither has established clear prejudicial errors of fact or law in the Administrator's decision and neither has presented previously unavailable information warranting reversal or modification of that decision. *See* Frequentis Response.

52. On October 22, 2002, the Product Team and Northrop/Denro both furnished replies to the Frequentis Response. Both argue that the SIR contains no requirement for the OCT results to be factored into the Phase II scoring and urge upon the ODRA the language of SIR Attachment L-4, paragraph 1.2, regarding the OCT being a "risk mitigation" activity and not "a requirements compliance and verification activity." Product Team Reply, page 3; Northrop/Denro Reply, pages 6-9. Both also assert that the interpretation of the SIR advocated by Frequentis would cause the ODRA to ignore improperly the Cost/Price factor and the $59 million price differential between the two offers. Product Team Reply, page 5; Northrop/Denro Reply, pages 11-13. Northrop/Denro, in its Reply, reiterates its contentions regarding the ODRA improperly usurping the discretion of the SEB and SSO and substituting its judgment for theirs. Northrop/Denro Reply, pages 13-16.

53. These Amended Findings and Recommendations are being issued in response to the points raised by Northrop/Denro and the Product Team within their respective Motions for Reconsideration and take into account all arguments raised by the parties regarding those Motions.

III. Discussion

A. Timeliness Issues

The ODRA does not accept the Product Team's technical defense that, because Frequentis failed to reply to timeliness arguments in the Agency Response, two "protest grounds" should be dismissed for default. Neither the ODRA Procedural Rules nor prior ODRA case precedent indicate that failure to respond to such timeliness arguments presented in a Product Team Response automatically will work a relinquishment of the grounds being challenged for lack of protest timeliness. The GAO case precedent urged upon the ODRA as persuasive authority, precedent that involves failure to respond to motions to dismiss, is inapposite.

Moreover, the Product Team's timeliness assertions relate to Frequentis' post-award challenges to the Government's implementation of the SIR's evaluation and source selection criteria, rather than to challenges concerning the formulation of such criteria. Where a post-award debriefing has been conducted, the ODRA Procedural Rules clearly call for a post-award protest to be filed within five (5) business days of the debriefing.

A protest that is not challenging the terms of a solicitation need not be filed earlier, even if the protester is aware of the basis for the protest prior to the debriefing. *See* 14 C.F.R. §17.15(a)(3)(ii)[4]; *see also Protests of Camber Corporation and Information Systems & Networks Corporation*, 98-ODRA-00079 and 98-ODRA-00080 (Consolidated) (Decision on the Motion to Dismiss the Protest of Camber Corporation). The sound policy behind the Rule is to permit parties the possibility of resolving their differences and averting potential protests by means of debriefings. Here, Frequentis may well have been aware of certain information in advance of the July 2, 2002 debriefing, by reason of its having been furnished redacted documents several days earlier in preparation for the debriefing. Requiring it to file a protest based on the timing of its knowledge rather than on when the debriefing was conducted, however, would be inconsistent with this policy and with the ODRA Procedural Rules, 14 C.F.R. §17.15(a)(3).

As to timeliness of the Protest, insofar as it pertains to the alleged "termination" of the TALK contract, there are two separate arguments advanced by Frequentis. The first argument relates to the language of SIR §M3.2.3 requiring that there be "no deficiencies" in past performance. More specifically, Frequentis argues, Northrop/Denro should have been eliminated during the Phase II evaluation and should not have proceeded into the

[4] 14 C.F.R. §17.15(a)(3) provides:

> (3) For protests other than those related to alleged solicitation improprieties, the protest must be filed on **the later of** the following two dates:
>
> (i) Not later than seven (7) business days after the date the protester knew or should have known of the grounds for the protest; or
>
> (ii) If the protester has requested a post-award debriefing from the FAA Product Team, not later than five (5) business days after the date on which the Product Team holds that debriefing.

(Emphasis added).

Phase III competition, having been found "Marginal" and "High Risk" and thus necessarily unacceptably "deficient" in terms of its past performance history. This finding, Frequentis notes, was arrived at, even without the evaluators' knowledge of the prior "termination" of the TALK contract. With consideration of the TALK "termination," Frequentis implies, Northrop/Denro's proposal most certainly should have been eliminated. *See* Protest at 7; Finding 21.

The fact that Frequentis may have been aware in early 2002 that Northrop/Denro had been permitted to participate in Phase III of the instant procurement does not render this argument untimely. As Frequentis correctly observes:

> As far as Frequentis knew, NG had reported the TALK termination and the FAA had concluded that it was not a disqualifying circumstance in light of all of the facts and whatever explanation NG had provided. There is simply no timing issue here.

Frequentis Letter of September 3, 2002, page 2. In any event, this first Frequentis argument regarding the TALK contract is addressed below and rejected on its merits.

The second Frequentis argument relating to the TALK contract pertains to the Product Team's perception of Northrop/Denro as having never previously been terminated for default and the relationship of that perception to the Team's willingness to accept what it considered a "buy-in" by Northrop/Denro. Protest at 9; Frequentis Comments at 4. With respect to this second argument, when and how Frequentis "first learned about Northrop's not having identified the Swedish contract" is relevant to the ODRA's determination as to the timeliness of Frequentis' argument. In that regard, the undisputed facts are that Frequentis did not learn of Northrop's failure to identify the TALK contract until after contract award and either just before or at the post-award debriefing. *See* Finding 40. Under those circumstances, raising the argument in the current Protest was not untimely, as the Protest was filed within five business days of the debriefing. Nevertheless, for the reasons explained below, this second argument is not relevant or critical to the disposition of the Protest.

B. Protest Merits -- General

The ODRA will not recommend that the Administrator overturn Agency actions that 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, however, an FAA Product Team, in the context of a "best value" procurement, fails to make a source selection decision in consonance with the FAA's AMS and specified Solicitation evaluation and award criteria, and thus has acted without a rational basis, the ODRA will recommend that appropriate corrective action be directed. *Protest of Danka Office Imaging Company,* 98-ODRA-00099; *Protest of Informatica of America, Inc.*, 99-ODRA-00144.

C. The Product Team Evaluation Process Under Phases II and III Was Proper And Consistent With The SIR

The ODRA finds that, up to the final evaluation and source selection stage, the Product Team's conduct of the instant AFSSVS procurement was proper and consistent with the provisions of the SIR.

1. Technical and Management Factors

Frequentis has failed to establish that the Phase II evaluations of the Technical and Management Volumes of its proposal and that of Northrop/Denro lacked a rational basis. In terms of the Technical factor, Frequentis has failed to sustain its burden of proof with regard to its allegations of impropriety relating to the assignment of strengths and weaknesses and to the "roll up" of individual sub-factor scores into overall adjectival ratings of "Satisfactory" for the two proposals. The Product Team demonstrated a rational basis for its scoring and that the scoring was accomplished consistently with the SIR evaluation criteria. *See* Finding 7. Similarly, Frequentis has failed to explain adequately, let alone prove, how the Management evaluation scoring was "inconsistent with the factors and definitions set forth in Section M." Frequentis' allegations to the

contrary constitute mere disagreement or quibbling with unfavorable results and provide no basis for sustaining its Protest on this point. *See Protest of Universal Systems & Technology, Inc.*, 01-ODRA-00179.

2. Past Performance

As to the Past Performance factor, Frequentis' challenge to the Product Team's assignment to it of a "Good" rather than an "Excellent" adjectival rating likewise is merely a disagreement with the Team's judgment, which has not been shown to have lacked a rational basis. Thus, that aspect of the Protest fails as well. *Id.*

Regarding Northrop/Denro, the assignment of an adjectival rating of "Marginal" for its Past Performance record was consistent with the SIR evaluation criteria and had a rational basis, ***at least with respect to the information contained in the Northrop/Denro proposal***. *See* Finding 9. By the same token, the ODRA does not agree with the Product Team's statement that "N-G complied with the SIR in submitting past performance information." *Id.* In the ODRA's view, Northrop/Denro was required, but failed, to identify in its proposal the termination of its TALK contract with the Swedish Government. In this regard, the interpretations of SIR Section L.16.0 advanced by the Product Team and Northrop/Denro, respectively – *see* Findings 26 and 35 – cannot be squared with the plain language and obvious intent of the clause. In addition to requiring that the Offeror "briefly describe" as contract references "at least three (3) contracts … of a similar technical nature and complexity," that provision clearly called for the Offeror to "**also** provide a list of **all** contracts of $5,000,000 or more that were terminated . . .," and not merely to identify which of the three contracts provided as references had been terminated. Further, contrary to Northrop/Denro's assertion, the provision does not limit the listing of terminated contracts to those where the termination actions are still "pending." The obvious purpose and intent of the provision was to assure that the Product Team evaluators are fully aware of any problems or deficiencies in terms of an Offeror's past performance history. Thus, the only reasonable interpretation of the wording of Section L.16.0 is that Offerors must provide a list of all contracts of

$5,000,000 or more performed within the preceding 3 year period that either (1) already have been terminated for default or convenience ("were terminated"); or (2) are in the process of being terminated, *i.e.*, situations where the termination action is "pending."

With respect to the TALK contract termination (referred to expressly as a "termination" by the Settlement Agreement – *see* Finding 12.f), notwithstanding the absence of a clause entitled "Termination for Default," the language of the "Rescission" provision clearly contemplates termination action based on circumstances that would fall within what ordinarily could be considered contract default – circumstances that expressly are termed "Default" by the Rescission clause. *See* Finding 11. Further, the Rescission provision requires a form of "cure notice" similar to that provided for in connection with default terminations effected under the standard U.S. Government "Termination for Default" clause. In this case, prior to terminating the TALK contract, the Swedish LFV furnished Litton/Denro (Northrop/Denro's predecessor) with such a notice, by letter dated May 11, 1999. *See* Finding 12.a. The LFV also characterized Litton/Denro's actions, including its unilateral decision to abandon further performance, as contract "breaches." *See* Finding 12.e. In the ODRA's view, the undisputed facts surrounding the "rescission" of the TALK contract, coupled with the plain language of that contract, demonstrate that the contract was "terminated" within the meaning of SIR Section L.16.0. The ODRA therefore finds that Northrop/Denro was required to, but did not, identify that termination as part of its AFSSVS proposal.[5]

As noted above, Frequentis raises two arguments relating to the TALK contract. First, it takes the position in terms of the Phase II evaluation process that Northrop/Denro should have been eliminated from the Phase III competition, even without reference to the TALK contract termination, by reason of the evaluators' having assigned Northrop/Denro "Marginal" and "High Risk" ratings for its past performance history. Frequentis bases this assertion on the language of SIR Section M3.2.3 that requires: "The Offeror's record

[5] The ODRA agrees with Northrop/Denro that, even though the Product Team reserved the right to pursue its own inquiries regarding Offeror past performance history, the Product Team was not legally obligated to initiate an investigation that might have unearthed facts concerning the TALK contract. *See* Northrop/Denro Comments at page 14. There is no support for Frequentis' allegation that the Product Team erred in not conducting such an investigation.

of past performance must show no deficiencies in performance within the last 3 years that would increase the risk of failure in performance of the AFSSVS contract." The Product Team might have had a rational basis had it elected to eliminate Northrop/Denro from the Phase III competition on this basis. The SIR language, however, does not clearly define what would constitute a "deficiency" or what would "increase the risk of failure in performance." Moreover, the provision does not indicate that elimination from Phase III competition would be mandatory and that the Product Team would be without discretion to opt to allow an Offeror the opportunity to compete notwithstanding evidence of deficiencies in past performance. *See Protest of Haworth, Inc.*, 98-ODRA-00075 (protest regarding elimination from competition sustained where Solicitation failed to indicate clearly that non-attendance by offeror representatives at pre-proposal conference would automatically result in disqualification). Thus, with or without reference to the TALK contract termination, the ODRA cannot say that the Product Team was acting without a rational basis, or that it departed from the terms of the SIR by permitting Northrop/Denro to be included in the Phase III competition.

The second Protest argument presented by Frequentis related to the TALK contract deals with the Product Team's conclusions regarding Northrop/Denro's "no terminations" status and its willingness, in light of that perceived status, to accept what it considered to be a "buy-in" cost/price proposal from Northrop/Denro. The ODRA finds that the consequences of Northrop/Denro's failure to identify the TALK contract termination in terms of the final evaluation and award process, and the Product Team's treatment of the "buy-in," are irrelevant to the disposition of this Protest (*see* Section D below).

3. Cost/Price Proposals

Frequentis does not challenge the Product Team's derivation of the respective "evaluated cost" figures of $127 Million and $68 Million for its cost/price proposal and that of Northrop/Denro. Nor does it contest as lacking a rational basis the assignment of a "High Risk" rating to the Northrop/Denro proposal. Rather, the focus of Frequentis' protest ground relating to the evaluation of cost/price proposals is its contention that the Product Team should have, but did not, eliminate Northrop/Denro from the competition based on

its "High Risk" cost/price proposal. The SIR language giving rise to this contention, found at SIR Section M3.2.4, reads as follows:

> The Government **may** also assign a degree of risk as appropriate to each cost proposal that will result in the elimination of the Offeror's proposal if the Offeror's . . . proposal shows evidence of being seriously flawed.

(Emphasis added). The ODRA finds such language did not clearly require elimination under the present circumstances. The term "seriously flawed" is not defined. Further, there are no definitions or descriptions of adjectival risk ratings for evaluation of the cost/price proposals as there are for OCT evaluation. *See* SIR Section M3.3.1. Frequentis argues that the assignment of a "High Risk" rating for the Northrop/Denro cost/price proposal necessarily means that the proposal was found to be "seriously flawed" by the evaluators and that, under such circumstances, SIR Section M3.2.4 mandated that the "High Risk" assignment "result in the elimination" of that proposal. There is little question that elimination of the Northrop/Denro's proposal could have been justified on that basis, had the Product Team chosen to take that action. Nevertheless, SIR Section M3.2.4 does not eradicate all discretion on the part of the Product Team to elect to continue considering a proposal, notwithstanding a "High Risk" rating having been assigned for cost/price. The use of the word "may" in the above-quoted language would underscore the Team's discretion in connection with cost/price evaluation, and, in this instance, Frequentis has failed to establish that allowing the Northrop/Denro proposal to proceed into Phase III in this case amounted to arbitrary, capricious action and a clear abuse of that discretion.

Frequentis' Protest also takes issue with the comparison of "evaluated costs" and with the distortion brought about by reason of the "pricing model" being inconsistent with what was actually anticipated in terms of ordering quantities. *See* Protest at 4-5. That, however, was a challenge to the trade-off analysis and the ultimate source selection decision and was not aimed at the Product Team's Phase II cost/price evaluation process. Even though the "pricing model" may not have tracked what the Product Team itself recognized were its realistic ordering expectations, the Product Team's explanation demonstrates a rational basis for using the SIR "pricing model" to evaluate Phase II

cost/price proposals. *See* Finding 28. Further, the record contains substantial evidence that the Phase II cost/price evaluation process was accomplished properly and in a manner consistent with the SIR.

4. Operational Capability Testing (OCT)

In terms of the Phase III OCT, the Protest does not challenge the conduct of OCT evaluation or the results of that evaluation. Rather, the challenge raised by Frequentis relates to how the SEB and the SSO utilized those OCT results in the context of the final evaluation and source selection decision. The ODRA's review of the OCT sub-team report reveals that the Phase III evaluation was performed properly and in accordance with the SIR.

D. The Final Evaluation and Source Selection Lacked A Rational Basis, Deviated From the SIR, And Were Not Supported By Substantial Evidence

As noted in the above Findings, source selection for the instant "best value" procurement was to be accomplished in accordance with evaluation and source selection criteria specified under SIR Section M. The AMS expressly requires that source selection adhere to criteria specified in the Agency's solicitations. (AMS §3.2.2.2: "All SSO selection or screening decisions shall be based on the evaluation criteria established in each SIR.") Here, the Product Team failed to adhere to the evaluation criteria of the instant SIR in terms of the final technical evaluation and source selection decision. More particularly, the ODRA finds that the SEB and SSO: (1) had no rational basis for equating the two companies' proposals in terms of Operational Capability Test (OCT) results; (2) failed to incorporate OCT results properly into the ultimate evaluation of the proposals; (3) lacked a rational basis for finding the Frequentis and Northrop/Denro proposals to be technically equivalent; (4) assigned weight and significance to the differences in the two companies' cost/price proposals in contravention of the SIR evaluation criteria; and (5) lacked a rational basis for considering and accepting what the SEB acknowledged to be an unreasonable, unrealistically low, "buy-in" cost/price proposal from Northrop/Denro.

1. Improper Leveling of OCT Results

The record contains no justification for the SEB and SSO leveling the OCT results – equating the "high risk" rating of Northrop/Denro to the "moderate risk" rating assigned to Frequentis, and thus ignoring entirely the serious concerns that had been voiced by the evaluators:

[Deleted]

Finding 15, quoting from AR, Tab 17, OCT Team Evaluation Report, Executive Summary (Emphasis added). The Final SEB Report itself makes clear that, notwithstanding that the system of neither competitor was ready for immediate installation and use, the OCT evaluators had many more concerns regarding the Northrop/Denro system:

[Deleted]

AR, Tab 18, Final SEB Report, ¶6.1, Summary OCT Analysis, pages 23-24 (Emphasis added). The OCT evaluators found specifically that the Northrop/Denro system did not measure up to the mature system portrayed by Northrop/Denro in its Technical proposal volume and that, in contrast to [Deleted] offered by the Frequentis system, the Northrop/Denro system possessed "[Deleted]." *See* Finding 15. Perhaps more importantly, whereas the OCT evaluators found that "integration of [Northrop/Denro's] OCT system into the National Airspace System (NAS) would, without significant modifications and/or redesign, adversely affect flight safety, AFSS operability, AFSS service reliability, and system security," no similar cautionary statement was made with respect to Frequentis' system. *Id.* There is no evidence in the record contradicting the evaluators' clearly articulated findings. Thus, there was no justification for the SEB to have ignored the obvious differences between the two systems and to have declared: "Phase III OCT results reflect risk with both solutions and identified both systems required modifications after award in order to satisfy all requirements." Similarly, the well-documented OCT evaluation results were distorted and discounted without justification by the SSO's statement: "Phase III OCT reflects risk for both solutions." Finding 17.

2. Improper Failure to Incorporate OCT Results As Part of the Final Evaluation and Improper Conclusion That Technical Results Were "Essentially Equivalent"

Contrary to the Product Team's impression that the SIR did not require the Team to revisit its Phase II evaluation of the Technical and Management elements of the competitors' proposals once Phase III OCT was completed, *see* Finding 31, the SIR clearly required that risks identified during OCT be considered as part of the "overall risk assessment," SIR Section M2.0, BASIS FOR AWARD, ¶M2.1, Award Selection, and that the OCT results were to be "integral" to the [final] "technical evaluation and source selection process," AR, Exhibit 2, SIR Attachment L-4, Operational Capabilities Test – Information for Offerors, ¶1.0 Introduction, and were to "support" the "Best Value" determination, *Id.*, ¶1.2; Finding 3. Rather than following the SIR requirements, the Product Team, erroneously believing that it had no choice but to rely solely on the Volume I (Technical) scoring previously obtained as part of Phase II evaluations, maintained that the two competitors' proposals in this case were "essentially equivalent" in terms of their Technical merit. This notion was evident in both the SEB's Final Report as well as in the SSO's award decision justification document. *See* AR, Tab 18, page v ("The Phase II technical results, while offering different strengths and weaknesses for each Offeror, are essentially equivalent . . . ."); Tab 19 ("There is essentially no distinction between the two Offerors for the Phase II Technical results . . . .").

By not taking into consideration as part of their ultimate (post-Phase III and pre-award) assessment of Volume I (Technical) the clear technical differences in the two systems demonstrated through the OCT process, the SEB and SSO improperly leveled the technical merits of the two competitors' proposals, thus effectively eliminating what under the SIR was to have been the "most important factor" in terms of source selection. This failure clearly was prejudicial to Frequentis. *See Protest of A&T Systems, Inc.,* 98-ODRA-00097.

As noted above (Finding 15), the SEB itself recognized that, although the Technical and Management evaluation sub-teams had assigned strengths to Northrop/Denro (Bass) for "claimed experience," that "experience" was on FAA contracts for which the Past Performance evaluation sub-team had noted serious problems and for which it had given Northrop/Denro a "Marginal" Past Performance rating. As to the OCT results, the SEB specifically noted that Northrop/Denro had failed to [Deleted], in accordance with OCT guidelines, for providing "[Deleted]" within its system after contract award. *Id.* Yet, contrary to the provisions of SIR Section M, ¶¶2.1 and M2.8, neither the SEB nor the SSO factored such information into their "overall risk assessment" such that it would be reflected in their ultimate evaluation of Volume II, Management for Northrop/Denro, apparently incorrectly believing they had no choice but to make the final source selection recommendation and decision based solely on the "Satisfactory" Management rating achieved by Northrop/Denro in connection with Phase II evaluations. This likewise was violative of the SIR and prejudicial to Frequentis.

3. Improper Departure From The SIR's Evaluation Criteria Weighting Scheme In Terms Of Treatment Of Cost/Price Proposals

The manner in which the Product Team treated the cost/price proposal differences vis-à-vis differences in the other proposal elements also was not consistent with the SIR and was prejudicial. As noted above (Finding 3), the SIR indicates that the importance of Cost/Price would only increase "as the relative assessment of each offeror's Volume I, II, and III [Technical, Management, and Past Performance] responses . . . becomes less significant." AR, Tab 2, SIR Section M2.3.

In this case, the Product Team treated cost/price differences as paramount, regardless of the differences noted with respect to Technical, Management and Past Performance. The Product Team seems to have assumed that, if the total cost it perceived might be necessary for assuring equivalent performance[6] were exceeded by the difference between

[6] Although increased Government oversight of Northrop/Denro's contract administration might help alleviate some risks associated with a "buy-in" cost/price proposal (*see* Finding 16), no attempt was made

the two offerors' cost/price proposals and could be funded within the IGCE amount,[7] then the Agency could proceed to accept the lower cost/price proposal, notwithstanding the extent of any evaluated qualitative differences between the two proposals. This approach did not reflect the sort of "best value" decision making contemplated by the instant AFSSVS Solicitation. Under the SIR evaluation and award scheme, cost/price differentials were not to play such a vital role in source selection, at least not unless and until differences in other evaluated proposal elements were relatively insignificant, which was not the case here.[8]

4. Improper Consideration Of A Perceived "Buy-In"

Here, the differences between Frequentis and Northrop/Denro with respect to all three volumes, Technical, Management, and Past Performance were, and should have been recognized and evaluated as being, significant and especially pronounced once OCT results were taken into consideration. Under those circumstances, for the Product Team

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to show how increased oversight could remedy the serious technical deficiencies and risks associated with the Northrop/Denro system that had been noted by the Product Team's evaluators. Further, as Frequentis points out in its Comments, the Product Team's trade-off analysis takes no account of the cost savings that the Investment Analysis Report (IAR) projected as a result of installation of the new voice switches and makes no attempt to quantify what its anticipated delay in Northrop/Denro's performance might mean in terms of lost savings, when the switches are not installed when scheduled. *See* Frequentis Comments at pages 19-20. Although the Product Team's Motion seeks to dismiss as speculative and dependent on "fluid variables" the IAR projections, clearly the Agency relied upon those multi-million dollar savings projections when it effected the instant procurement.

[7] *See* Finding 16 – The Product Team, in attempting to justify its "buy-in" decision, states: "A 'buying-in' contractor also would require increased oversight on the part of the Government to ensure it does not attempt to recover its losses through excessive pricing on change orders and to ensure it takes no technical short-cuts (i.e., first article, program management) with meeting requirements. Since Bass' offer is so low there is sufficient funding for additional FAA oversight should that be required. The program is operating to a budgetary forecast at the IGCE level and not the Bass price baseline which is significantly less."

[8] Although OCT was listed as fifth in order of importance, where, as here, the Phase II Volume I (Technical) scoring yielded no significant differences in terms of paper assessment of the two technical proposals, the "real world" OCT results would have to figure more prominently in the final "technical evaluation" and the ultimate source selection, since, per the SIR, OCT was to be "integral" to the "technical evaluation and source selection process" and to "assist the FAA in selecting the most technically qualified product for the AFSSVS." AR, Exhibit 2, SIR Section L19.0, ¶1.0 and Attachment L-4, ¶1.2; Finding 3. Under the circumstances here, the OCT results should have been applied as a "tie breaker" in terms of the final technical evaluation, not as a "super evaluation criter[ion]." *See* Product Team Motion for Reconsideration, page 6.

even to consider accepting a risky "buy-in"[9] cost/price proposal was at odds with the SIR's evaluation and award criteria and was violative of AMS §3.2.2.2.[10] Hence, the ODRA need not reach the question of whether Northrop/Denro could have withstood any loss associated with the perceived "buy-in" (when measured against either the "inflated IGCE" or "true IGCE").[11] Further, we need not address other ancillary issues, such as: (1) the impact of considering the TALK contract termination in conjunction with the SEB's final evaluation of past performance and the SSO's ultimate source selection decision[12]; and (2) whether that termination is to be considered beyond the control of Northrop/Denro's predecessor, Litton/Denro, in accordance with SIR Section M3.2.3.[13]

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[9] The ODRA does not mean to imply that consideration and acceptance of what is perceived to be a "buy-in" would be improper *per se*. Under appropriate circumstances, an FAA Product Team would be authorized to award a contract, even based on a below cost proposal. *Protest of Rocky Mountain Tours, Inc.*, 01-ODRA-00183; AMS Procurement Guidance, T3.2.3, Cost and Price Methodology, ¶A.1.j (4).

[10] Regardless of the amount of purported cost savings that might have been realized by acceptance of the Northrop/Denro proposal, that proposal was evaluated by the cost/price evaluation sub-team as an unreasonably low and unrealistic "buy-in." AR, Tab 14, Cost/Price Evaluation Report, page 10.

[11] *See* Northrop/Denro Letter to ODRA of August 29, 2002, Tab 3, Affidavit of Barbara A. Niland.

[12] The record is clear that one of the major underpinnings of the Product Team's decision to proceed with acceptance of a perceived "buy-in" in this case – the Northrop/Denro "no terminations" status – was a fiction. The emphasis on Northrop/Denro's "no termination" status appears repeatedly in connection with the written justification offered by the SEB in connection with its final evaluation and recommendation and by the SSO in connection with the ultimate award decision ("Northrop Grumman was determined to have the financial resources to perform this work and ***past performance***, ***while indicative of poor schedule and technical performance, has not resulted in any termination of contractor work.***" AR, Bell Affidavit, ¶10 (Emphasis added)).

[13] The panoply of issues surrounding the TALK contract termination is, in the final analysis, irrelevant to the ODRA's determination that the Product Team acted without a rational basis, deviated from the SIR and awarded the contract to the wrong Offeror. Were those issues important to the resolution of this case, which they are not, the record does contain some indication that the TALK contract termination was **not** beyond Litton/Denro's control. For example, Litton/Denro implicitly acknowledged at least partial responsibility for the lengthy delay that was experienced on the TALK contract contract – *see* Finding 12.f ("the responsibility for Litton/Denro's performance delay to the program **partially** rests with LFV") and conceded that it had taken unilateral action to abandon performance, action that, as noted previously, the Swedish Government deemed a "clear breach" by Litton/Denro (*see* Findings 12.c and 12.e).

E. The Appropriate Remedy

Had the Product Team accomplished the final evaluation and source selection in accordance with the specified evaluation and source selection criteria, it would have noted that: (1) although both proposals initially had received overall Technical ratings of "Satisfactory" as part of the Phase II evaluation process, the OCT results proved that the two proposals were not technically "essentially equivalent," but were instead quite distinct, with that of Frequentis representing a more mature system having numerous strengths and fewer "anomalies" and one that would pose a lower degree of risk and require significantly fewer modifications to satisfy the Agency's requirements; (2) the initial difference noted between the two proposals in terms of Management ("Good" for Frequentis and "Satisfactory" for Northrop/Denro, per the Phase II evaluations) was, in reality, even wider, given that Northrop/Denro's "Satisfactory" rating had been assigned based on experience on prior FAA contracts that had given rise to a "Marginal" rating by the Past Performance evaluation sub-team; and (3) whereas Northrop/Denro's cost/price proposal had been evaluated as unreasonable, unrealistic, and likely a "buy-in" proposal, the Frequentis cost/price proposal was determined by the Cost/Price evaluation sub-team to have been both reasonable and realistic, in conformance with the SIR cost/price evaluation criteria, and in line with the Government's own pricing, when gauged against both the "inflated IGCE" and "true IGCE."

Applying the SIR evaluation and source selection criteria to the extensive record developed by the various evaluation sub-teams, the conclusion is inevitable: Frequentis won the competition and is entitled to an award of the AFSSVS contract. There is nothing in the record to indicate that a Frequentis takeover of this multi-year IDIQ contract (*see* Finding 18) would be impracticable at this stage. Under such circumstances, the appropriate remedy would be for the Administrator to direct a termination of the Northrop/Denro contract for the Government's convenience and to direct a contract award to Frequentis. *Protest of Informatica of America, Inc., supra.*

Contract award should be implemented at the earliest time permissible in accordance with applicable FAA policy.[14]

F. The Reconsideration Motions and Impact of the Erroneous Finding

In its original Findings and Recommendations, the ODRA had concluded that the Product Team violated the requirements of the SIR in failing to factor into its final (pre-award) technical evaluation of the two proposals and into the source selection process the findings of the OCT evaluators. In support of that conclusion, as noted above, the ODRA erroneously cited to SIR language that pertained not to OCT results, but rather to the results obtained during the Operational Capabilities Assessment (OCA) performed during Phase II of the procurement: "the information gathered at the OCA [Operational Capability Assessment] will be factored into the Volume I and Volume II ratings." Northrop/Denro and the Product Team both correctly point out this error in their respective Motions for Reconsideration, and, by these Amended Findings and Recommendations, the error has been eliminated. *See* amended Finding 3 above. The ODRA finds that, notwithstanding this citation error, the SIR clearly required that the OCT results were to be factored into[15], *i.e.*, taken into consideration in conjunction with, the final evaluation of the relative technical merits of the two proposals and the Product Team's ultimate source selection decision.[16]

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[14] The Product Team, as part of its October 8, 2002 response to an ODRA inquiry of October 7, 2002, asserts that, pursuant to FAA policy, any award to Frequentis may have to be reviewed and approved by the Air Traffic Services Subcommittee of the Management Advisory Council established under Section 302 of Public Law 106-181, 49 U.S.C. §106(p).

[15] The term "factor in" is defined as "to be included as a contributing element." Webster's Collegiate Dictionary (Random House 1995) at 477.

[16] Contrary to the contention of Northrop/Denro (*see* Northrop/Denro counsel's letter to the Administrator dated October 4, 2002, page 2, and Northrop/Denro Reply at page 5), the original ODRA Findings and Recommendations did not suggest that the Phase II scoring had to be redone or that the OCT results had to be "factored . . . into the Phase II Technical and Management evaluations." What the ODRA said in those Findings and Determinations is that the Product Team improperly failed to "factor OCT results into the ***ultimate*** evaluation of the Technical and Management proposals" Findings and Recommendations, page 90, and that by not "factoring" into their "***ultimate (post-Phase III and pre-award)*** assessment of Volume I (Technical) the clear technical differences in the two systems demonstrated through the OCT process, the SEB and SSO improperly leveled the technical merits of the two competitors' proposals, thus effectively eliminating what under the SIR was to have been the 'most important factor' in terms of source selection."

Both Sections L and M of the SIR made plain that the OCT results were to be an ***integral*** element of the final technical evaluation and source selection process.[17] *See* Finding 3 above. For example, the language that provides for OCT as a means to "verify each Offeror's written proposal" (SIR Section L.19.0) would be meaningless,[18] unless OCT results were to be taken into consideration in the final analysis of the technical merits of the proposals. Likewise, unless the OCT results were taken into consideration in the final stage of the procurement (*i.e.*, final evaluation of technical, cost and schedule elements of the proposals and their associated risks, and the ultimate source selection), the language describing the "objective" of the OCT as an exercise "to assist the FAA in selecting the most technically qualified product for the AFSSVS" (SIR Attachment L-4, ¶1.2) would be meaningless, as would the language of SIR Section M3.3.1 that speaks of OCT "test results" being "used to discern any strengths, weaknesses and risk identified during the OCT for their potential impact to areas of technical, cost and schedule" and the language of SIR Section M2.1 that the OCT test results would be "considered as part of the overall risk assessment."

Both the Product Team and Northrop/Denro place great emphasis on the language of the SIR describing the OCT as "a performance risk mitigator" and as a "risk mitigation" activity and not as "a requirements compliance and verification activity." Reply of

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Id., page 93 (emphasis added). That analysis was correct and, accordingly, has been included as part of these Amended Findings and Recommendations.

[17] Northrop/Denro, in its letter to the ODRA of October 8, 2002, implies that language cited by Frequentis with respect to this point should not be controlling, since it emanates from Section L of the SIR, rather than Section M. Northrop/Denro Letter of October 8, 2002, page 2. The ODRA cannot accept such an argument. The Product Team itself cites to language of Section L and declares: "What is relevant is what the objective of this OCT was as defined in the SIR for this procurement." *See* Finding 31 above. As the Product Team stated in another context: "Section M of the SIR has to be read consistently with all of the other provisions of the SIR, including Section L." AR, page 14. Moreover, in this case, Section M contains language that indicates that the OCT results were to be part of the "overall risk assessment," *i.e.*, the assessment of overall technical, cost and schedule risk that should be accomplished as part of final source selection. *See* AR, Exhibit 2, SIR Section M, ¶¶M2.1 and M3.3.1.

[18] It is a fundamental principle of contract interpretation that documents are to be read as a whole, so as to give meaning to all provisions, if possible. No provision should be rendered meaningless or superfluous**.** *Hol-Gar Manufacturing Corp. v. United States*, 351 F.2d 972 (Ct. Cl. 1965); *Kiewit/Tulsa-Houston v. United States*, 25 Cl. Ct. 110 (1992).

Product Team, page 3; Reply of Northrop/Denro, pages 6-8. The sections of the SIR read, in pertinent part, as follows:

> SIR §L19.0:
>
> The OCT will be operational in nature, assess functionality, effectiveness and operational suitability in the AFSS environment, and include Air Traffic specialists and Airway Facility Maintenance personnel. The OCT will serve as a performance risk mitigator to verify each Offeror's written proposal. . . . .
>
> SIR Attachment L-4, ¶1.2 (Objective of the AFSSVS OCT):
>
> The objective of the OCT is to assist the FAA in selecting the most technically qualified product for the AFSSVS. During the OCT, the Government will assess the strengths and weaknesses of each proposed system and identify risks associated with each. The OCT results will support the Government's "Best Value" determination. The OCT will be a risk mitigation and not a requirements compliance and verification activity.

The SIR conveys that: (1) in the context of a specially designed operational test involving Air Traffic specialists and Airway Facility Maintenance personnel, the Agency was to assess whether the switches being offered would perform in the manner advertised within each offeror's written proposal, *i.e.*, in an operationally suitable and effective manner, or whether, instead, the actual performance would deviate from the operational capabilities portrayed in the proposals, such that they would pose an operational and safety risk to the air traffic control system; and (2) although not intended to serve as a check on compliance with specific requirements of the SIR's technical specifications for switches, the OCT's objective was to be an activity aimed at identifying potential operational strengths, weaknesses and risks, such that the OCT results would figure into and support the ultimate "Best Value" determination and source selection. Here, the OCT demonstrated that the Northrop/Denro system, without a total redesign or major modifications, was operationally unsuitable and would pose a high risk to air traffic safety. These OCT results in no way "support[ed]" the SSO's "Best Value" determination. Such results were not taken into account in the manner contemplated by the SIR, so as to ensure that the FAA selected the most technically qualified product for the AFSSVS. Thus, in the final analysis, the ODRA's earlier incorrect citation to SIR

language relating to the Phase II OCA was of no consequence either to the ODRA's finding that the SEB and SSO failed to follow the SIR requirements or to its recommendation to the Administrator that the Protest be sustained.

G. The Cost/Price Factor Argument

The Product Team, in its Reply to the Frequentis Response, states:

> Frequentis' argument [regarding the use of the OCT results] completely brushes aside the requirement that the SEB consider the enormous price disparity between the Offerors. It would have been in contradiction to the express terms of SIR section M2.3 for the SSO to have ignored a $59 million (86%) price differential. Section M2.3 expressly states that Volume IV (Cost/Price) is a more important evaluation factor than the OCT. As the Volume IV and the OCT importance increases, they increase consistent with their placement within the stated evaluation order of importance. To brush aside and ignore the enormous price differential not only contradicts the express terms of this SIR, it is also inconsistent with the FAA's Acquisition Management System which states that "Cost or price considerations shall be a factor in all selection decision[s]." (AMS Section 3.2.2.2.)

Product Team Reply, page 5. Northrop/Denro puts forth a similar argument:

> [T]he Cost/Price factor cannot be ignored as a matter of law. The SIR requires that it be considered. *See* SIR §§ M2.1, M2.3. Similarly, AMS § 3.2.2.2 states "*Cost or price considerations shall be a factor* in all selection decisions." (emphasis added). . . . The Product Team considered Frequentis' better scores in the Management, Past Performance, and OCT areas, but did not believe those relative advantages to be worth the evaluated $59[million] cost differential. The SEB and SSO exercised their discretion by weighing the evaluation criteria and finding the Northrop Grumman proposal to be the best value to the FAA. Frequentis cannot change this result by having the ODRA ignore one of the five evaluation criteria.

Northrop/Denro Reply, pages 12-13. Even aside from the fact that the price differential in this case was not nearly as "enormous" as represented by the Product Team and Northrop/Denro, based on the Government's own "true" estimate of its needs over the contract life, what the Product Team did in this case was itself ignore what the SIR required in terms of the evaluation of the Cost/Price factor. More particularly, SIR §M3.2.4 expressly required that the price for all base and option years be evaluated for reasonableness, completeness, realism and consistency/traceability. In this regard, the

Cost/Price evaluation subteam specifically found as to the Northrop/Denro Cost/Price Proposal:

> This Offeror [Northrop/Denro] submitted a complete but overall unreasonably low and unrealistic cost/price proposal. The detailed analysis reflects that of the twelve proposal areas analyzed, the following five areas are considered unreasonably low and unrealistic:
>
> - First Articles
> - Production Systems (Notional Orders 3-65)
> - Program Management, Configuration Management, Test Program, Security Program Interfaces
> - Integrated Logistics Support
> - Training to include Simulator
>
> **The cost/price proposal is considered a high risk to the Government. This risk translates to potential impact for the technical solution proposed and schedule requirements imposed by the SIR.**

AR, Exhibit 14, Cost/Price Evaluation Report at 10 (emphasis added). The Northrop/Denro proposal was deemed unrealistically low, regardless of whether it was measured against the "inflated IGCE" or the "true IGCE."[19] *Id.* As noted above (Finding 14), the subteam evaluators also found that proposal to represent a "buy-in". *Id.* In contrast, the subteam found the Frequentis Cost/Price Proposal to be "a complete, generally reasonable and realistic cost proposal." *Id.*, at 11. Thus, based on the evaluation criteria of the SIR for the Cost/Price factor, Frequentis won on that basis as well. Although, as the ODRA has observed, a Product Team theoretically is not precluded from accepting a "buy-in" price proposal under appropriate circumstances, such proposals, by their nature, carry risk and thus are not favored. In the present case, where Frequentis' proposal had prevailed based on all of the evaluation criteria, including the criteria specified for the Cost/Price factor, it was improper for the Product Team even to have considered the Northrop/Denro "buy-in."

H. The "Substitution of Judgment" Argument

[19] In comparison with the "true IGCE" of $80 million, the Northrop/Denro price proposal was evaluated at only approximately 50% of that Government estimate amount, *i.e.*, $40 million. Finding 14.

The only other point raised by Northrop/Denro in its Motion for Reconsideration[20] and in its subsequent Reply to the Frequentis Response, *i.e.*, its alternative argument that the ODRA erred in not referring the matter back to the Product Team, thereby effectively "substituting its judgment" for that of the Team, is likewise without merit. Although the ODRA frequently refers matters back to Product Teams for further analysis and decision, such referrals are made when it is unclear what the Product Team will decide and where there could be a rational basis for more than one course of action. In the *Protest of Enroute Computer Solutions*, 02-ODRA-00220, for example, a Product Team had awarded a contract based, in part, on the erroneous belief that a key employee had certain qualifications that, in fact, she did not have. The ODRA sustained the protest in part and referred the matter back to the Product Team to correct the qualifications error and to re-accomplish the final evaluation and source selection, based on that correction. It was unclear from the record what the Team's ultimate decision would be, and there was a possibility that the Team could have a rational basis for more than one course of action. Here, in contrast, the ODRA found and reiterates its finding, based on the record, that there would be no rational basis to support an award other than to Frequentis, and that there would be no point to requiring the Product Team to perform a re-evaluation under those circumstances.

In support of its alternative argument regarding alleged "usurpation" of the Product Team's discretion and "substitution of judgment," Northrop/Denro attempts to analogize the resolution of bid protests under the FAA Dispute Resolution Process to review of agency actions by administrative and judicial forums:

> Where the administrative protest authorities have too eagerly been willing to find agency decisions lacking a rational basis, the courts have made it clear that those authorities do not function, and will not be permitted, to substitute their judgment for that of the source selection officials. *See, e.g., B3H Corp. v. Dept. of the Air Force,* GSBCA No. 12813-P, 94-3 BCA ¶27,068, *rev'd,* 75 F.3d 1577 (Fed. Cir. 1996); *Unisys Corp. v. Dept. Of the Air Force,* GSBCA No. 13129-P, 95-2 BCA ¶27,622, *rev'd* 98 F.3d 1325 (Fed. Cir. 1996).
>
> * * *

[20] This alternative argument is not raised by the Product Team.

> This limited standard of review also implicates the remedies that can appropriately be recommended by the ODRA, who stands in the same role as the Court of Federal Claims or the district courts in reviewing contract awards. Those tribunals have defined a demanding standard before a court can order the termination of an incumbent's contract and the award of the contract to the protester. *Scanwell Laboratories, Inc. v. Shaffer*, 424 F2d 859 (D.C. Cir. 1970)("It is undisputable that the ultimate grant of a contract must be left to the discretion of a government agency; the courts will not make contracts for the parties."). In *Delta Data Systems, Inc. v. Webster*, 744 F.2d 197, 204 (D.C.Cir. 1984), then Judge, now Justice, Scalia stated: "a court may not order award of a contract unless it is clear that, but for the illegal behavior of the agency, the contract would have been awarded to the party asking the court to order the award," . . . .

Northrop/Denro Motion, page 13, Footnote 5, page 17, Footnote 6. In this regard, Northrop/Denro is plainly wrong. The FAA Dispute Resolution Process culminates in final agency action by the Administrator of the FAA. Unlike either (1) the General Services Administration Board of Contract Appeals ("GSBCA") – which at one time had authority to review agency decisions in bid protest proceedings involving certain categories of procurements, pursuant to the now-defunct Brooks Automatic Data Processing Act[21] – or (2) a court, it cannot said that the Administrator has no authority to direct a contract award or to substitute her judgment for that of an FAA Product Team. In this case, the ODRA specifically found that, but for the Product Team's failure to adhere to its stated solicitation criteria, the instant contract would have been awarded to the party asking for that award – Frequentis. *See Delta Data, supra.* The Administrator adopted the ODRA's findings as her own and ordered the award to Frequentis in accordance with the ODRA's recommendation. Herein, the ODRA continues to find, based on the language of the SIR and the results of evaluations contained in the record, that there would have been no rational basis for an award other than to Frequentis. Should the Administrator choose to adopt these Amended Findings and Recommendations, it would be the Administrator, and not the FAA Product Team or the ODRA, who would be exercising final authority in this procurement matter on behalf of the Agency. Congress granted the Administrator that authority in 49 U.S.C. §106(f)(2). Where the Administrator exercises her authority and judgment and takes action on behalf of the Agency that she deems in the public interest, the appellate courts, when reviewing

[21] 40 U.S.C. §759 (repealed).

that action, have said that they will apply a "highly deferential" standard of review – *i.e.*, absent a finding that the action was "arbitrary and capricious," they will not substitute their judgment for that of the Administrator. *J.A. Jones Management Services v. Federal Aviation Administration, et al.*, 225 F.3d 761 (D.C. Cir. 2000).[22]

IV. Recommendation

Based on the foregoing, the ODRA recommends that the protest be sustained and that the Administrator direct the Product Team to terminate the Northrop/Denro Contract for the Government's convenience forthwith and to award a contract to Frequentis under the instant Solicitation at the earliest time permissible in accordance with applicable FAA policy.

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

APPROVED:

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

[22] Because the Motions for Reconsideration have been addressed herein, Northrop/Denro's request for a stay pending reconsideration is now moot.

Supplementary Statement Of The ODRA Director

A fundamental principle of all Federal procurement systems, including the FAA's Acquisition Management System ("AMS"), is that contract award decisions must be made based on a solicitation's stated evaluation criteria. Under the AMS, FAA Product Teams have substantial latitude and discretion, both to designate the criteria to be used for a particular procurement, and to exercise sound judgment in evaluating proposals in light of those criteria. A team's discretion, however, is not unlimited. In evaluating proposals, a team may not abandon or alter the relative importance of criteria that it has established for a particular procurement. Moreover, the award decision must be rationally based and supported by substantial evidence.

In this case, up to the final source selection stage, the evaluators' actions were consistent with the stated criteria of the Solicitation and were amply supported by substantial evidence. In that final stage, however, as the above Findings and Recommendations explain, the Product Team failed to incorporate the results of the Operational Capability Test ("OCT")[23] properly into the ultimate evaluation of the technical merits of the proposals; and reached an unsupported conclusion that the proposals of Frequentis and Northrop Grumman/Denro were technically equivalent.

The ODRA maintains broad discretion to develop an appropriate remedy when it recommends that the Administrator sustain a bid protest. The ODRA is mindful that recommending the termination of a contract and a directed award of that contract to the protester is a significant remedy.[24] Nonetheless, a remand to the Product Team for a re-

[23] As stated in Findings 49 and 50 above, the ODRA received Motions for Reconsideration from both Northrop/Denro and the Product Team on October 10, 2002. The Motions correctly indicate that the ODRA, in its original Findings and Recommendations, had inaccurately cited to SIR language pertaining to the Operational Capabilities Assessment ("OCA") in support of its conclusions regarding the use of Operational Capabilities Test ("OCT") results. The foregoing Amended Findings and Recommendations correct that error, specifically citing to SIR language pertaining to applicability of the OCT results. The ODRA's analysis and ultimate conclusions remain unchanged. The Order of the Administrator has been modified, however, to reflect new information furnished by the Product Team affecting the implementation of an award to Frequentis. *See* Footnote 14, *supra.*

[24] The ODRA Procedural Regulations expressly permit the ODRA to recommend a directed award, among other possible protest remedies. *See* 14 C.F.R. §17.21(a)(6).

evaluation in this case would serve no purpose since, by operation of the Solicitation's evaluation criteria, there would be no rational basis for an award to any Offeror other than Frequentis.

/s/
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