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

FINDINGS AND RECOMMENDATIONS

Matter: **Protest of Apptis, Inc.**

Under Solicitation No. DTFAWA-09-R-SE2020-SIR2FO

Docket No.: 10-ODRA-00557

Appearances:

For the Protester:	J. Scott Hommer, III, Esq., Rebecca E. Pearson, Esq., Paul A. Debolt, Esq., James Y. Boland, Esq., Brendan M. Lill, Esq., Mona S.K. Haar, Esq., and Justin J. Wortman, Esq. of Venable LLP
For the FAA Program Office:	Carlos L. Siso, Esq.
For the Intervener:	Thomas P. Barletta, Esq., Peter L. Wellington, Esq., and Michael J. Navarre, Esq. of Steptoe & Johnson, LLP

I. Introduction

Apptis, Inc. ("Apptis") challenges the award to TASC, Inc. ("TASC") of contract number DTFAWA-11-D-00002 ("TASC Contract") under Solicitation No. DTFAWA-09-R-SE2020-SIR2FO ("Solicitation"). The award of the TASC Contract is the second award based on the Solicitation, and Ground A of the protest Apptis filed on October 28, 2010 (the "Protest") asserts that the Solicitation did not authorize multiple awards. *Protest* at 9. Recognizing the potentially dispositive nature of this issue, the Federal Aviation Administration's ("FAA") Office of Dispute Resolution for Acquisition ("ODRA") directed the parties to provide briefing on this matter before addressing other issues raised in the Protest. *See Finding of Fact* ("FF") 20. Based on those briefs and the

record, the ODRA recommends that: (1) the Protest be sustained; (2) the remaining grounds of the Protest be considered moot; and (3) further submissions be required of the parties on the issue of an appropriate remedy under the ODRA Procedural Regulation at 14 C.F.R. § 17.21(b). Additionally, until a final remedy is imposed in this Protest, the ODRA recommends that the Product Team be directed to refrain, in the absence of exigent circumstances, from: (1) awarding additional task orders under the TASC Contract; (2) issuing modifications that add work to the TASC Contract; and (3) awarding additional full and open competition contracts under the Solicitation.

II. Findings of Fact

The present Protest is the second protest that Apptis filed under the Solicitation. The first protest challenged an award to Booz Allen Hamilton, Inc. ("BAH") of Contract Number DTFAWA-10-D-00030 ("BAH Contract"), and was docketed as 10-ODRA-00535 (hereinafter "*Apptis I Protest*"). On the ODRA's recommendation, the Administrator denied the *Apptis I Protest* in its entirety, and the BAH Contract remained in effect. Familiarity with the Findings and Recommendations and the Final Order in the *Apptis I Protest* is presumed.

1. In order to support the FAA's Next Generation Air Transportation System ("NextGen"), the FAA's Systems Engineering 2020 ("SE2020") Program Office provides engineering support to other FAA program offices using established support contracts. *AR* Tab 1, "*Systems Engineering 2020 (SE2020) Business Case*," at 015179.

2. Recognizing that existing support contracts were expiring, the SE2020 Program Office intended to have five new support contracts awarded. Three of these would use identical Statements of Work ("SOW") for research and mission analysis, and two would use another SOW for systems engineering. The Business Case states:

> The SIR 1 - Research and Mission Analysis awards, each with the same Research and Mission Analysis SOW, will be as follows:

- Two (2) Full and Open Competitions; and
- One (1) Small Business Set Aside Competition

The SIR 2 - Systems Engineering awards, each with the same Systems Engineering SOW, will be as follows:

- **One (1) Full and Open Competition;** and
- One (1) Small Business Set Aside Competition

AR Tab 1, "*Systems Engineering 2020 (SE2020) Business Case*," at 015189 (emphasis added). This excerpt clearly shows the SE2020 Program Office's intention to award one contract for the full and open competition for the systems engineering contract.

3. On November 24, 2009, the FAA issued the Screening Information Request ("SIR" or "Solicitation") DTFAWA-09-SE2020-SIR2FO that is the subject of the Protests. *AR* Tab 2. The nomenclature used throughout the record shows that portions of the Solicitation number identify this Solicitation as supporting the Systems Engineering 2020 program ("… -SE2020- …"), containing the second of the two Statements of Work ("…-SIR2…"), and subject to full and open competition ("…FO").

4. The SOW found in the final Solicitation amendment states the contractual purpose:

> The objective of **this contract** is to establish a Cost Plus Fixed Fee, Level of Effort, Task Order, Term Type contract for National Airspace System (NAS) support services that will enable the Federal Aviation Administration (FAA) program offices to accomplish their mission objectives. Since the NAS encompasses far more than the FAA's infrastructure, **this contract** allows for studies of systems that may never be owned by the FAA. The **resulting contract** is designed to provide a broad range of Systems Engineering, Investment and Business Case Analysis, Planning, Forecasting and Business/Financial/Information Management support services. This Statement of Work (SOW) is comprised of specific functional task areas that establish the scope of **this contract.** Specific requirements within the scope of these functional task areas will be identified, defined, and issued under individually funded specific Task Orders.

AR Tab 3(F), § C.1.1 (emphasis added).

5. Section G of the Solicitation addressed the distribution of potential task orders under the contract, and stated in part:

> **G.7 DISTRIBUTION OF TASK ORDER LEVEL OF EFFORT BETWEEN CONTRACTS**
>
> (a) It is the FAA's intent to equitably distribute/issue TOs between up to two (2) SE2020 Systems Engineering and Program Management Support contracts (**1 Full and Open Contract**s [sic] and 1 Set-Aside Contract). However, if the FAA determines that a Contractor is not performing in an acceptable manner, the FAA may reduce utilization of the underperforming Contractor. The FAA will track contractor performance in accordance with Special Provision H.4, Task Order Performance Evaluation.

AR Tab 3(F), § G.7 (underlining and boldface added).

6. The Solicitation did not contain AMS Clause 3.2.2.3-34, "Evaluating Offers for Multiple Award (July 2004)," which is mandatory in multiple award situations. *AR* Tab 3(F), §§ I and L. The provision states:

> **3.2.4-25 Single or Multiple Awards (April 1996)**
>
> The FAA may elect to award a single delivery order contract or task order contract or to award multiple delivery order contracts or task order contracts for the same or similar supplies or services to two or more sources.
>
> (End of provision)
>
> **Prescription**
> **Must be used in SIRs for indefinite quantity contracts that may result in multiple contract awards.** Do not use for advisory and assistance services contracts that exceed 3 years and $10,000,000. Can be modified to specify the number of awards anticipated.

AMS Provision 3.2.4-25, "Single or Multiple Awards (April 1996)" (emphasis added).

7. Section L.1 of the Solicitation incorporated by referenced into the contract AMS Provision 3.2.2.3-19, "Contract Award (July 2004)." That clause reads in pertinent part:

> **3.2.2.3-19 Contract Award (July 2004)**
>
> (a) The FAA (we, us, our) will award **a contract** resulting from this SIR to the responsible offeror whose offer conforms to the SIR and will, as determined by the source selection official, be the best value to us, considering the technical quality, cost or price, and other SIR criteria.

AMS Provision 3.2.2.3-19, "Contract Award (July 2004)" (emphasis added).

8. Also consistent with the overall plan stated in the Business Case to award five contracts, including only one full and open systems engineering contract, the Solicitation in this Protest stated:

> **L.2.1 3.2.4-1 Type of Contract (April 1996)**
>
> The FAA contemplates award of **a** Cost Plus Fixed-Fee, Level-of-Effort, Task Order, Term **contract** resulting from this Screening Information Request.

AR Tab 3(F), § L.2.1 (emphasis added).

9. Although the contemplated contract was a "Task Order" contract, the Solicitation did not contain AMS Clause 3.2.2.3-34, "Evaluating Offers for Multiple Award (July 2004)," which is mandatory for possible multiple awards of task order contracts. *AR* Tab 3(F), §§ I and L. The provision states:

> **3.2.4-25 Single or Multiple Awards (April 1996)**
>
> The FAA may elect to award a single delivery order contract or task order contract or to award multiple delivery order contracts or task order contracts for the same or similar supplies or services to two or more sources.
>
> (End of provision)

> **Prescription**
> **Must be used in SIRs for indefinite quantity contracts that may result in multiple contract awards.** Do not use for advisory and assistance services contracts that exceed 3 years and $10,000,000. Can be modified to specify the number of awards anticipated.

AMS Provision 3.2.4-25, "Single or Multiple Awards (April 1996)" (emphasis added).

10. The general provision in Section M states in part:

> M.2. GENERAL
>
> (a) This acquisition will utilize the Best Value Approach for selecting an Offeror for award. The Best Value Approach is a method of selecting the proposals that represents the greatest value to the Government, based upon the evaluation of cost or price and other factors specified in the solicitation. This approach provides the opportunity for a technical/price trade-off and does not require that the awards be made to either the Offeror submitting the highest rated technical proposal or the Offeror submitting the lowest prices, although the ultimate award decision may be to either of these Offerors.
> …
> (h) The Government reserves the right to:
>
> - Award a contract from the initial submissions without entering into discussions (Offerors are cautioned to submit their best offer with the initial proposal);
>
> - Reject proposals that are unrealistic in terms of program commitments or unrealistically high or low in price, as assessed by the Government, for such proposals may reflect an inherent lack of competence or failure to comprehend the complexity and risks of the program; or
>
> - Make no award if such action is determined to be in the FAA's best interest.

AR Tab 3(F), § M.2.

11. Consistent with the overall plan stated in the Business Case to award five contracts, including only one full and open systems engineering contract, the Solicitation correspondingly provided:

M.3 BASIS FOR AWARD

(a) ***The FAA intends to make one (1) award under this solicitation.*** Offerors must include an offer for each line item requested in Section B, so that all proposals may be properly evaluated. Failure to comply with this requirement may be cause for rejection of the entire offer.

(b) Source Selection will be made on the basis of the evaluation criteria in this Section M.

(c) The Government may award ***a*** contract resulting from this solicitation to responsible ***Offerors***, conforming to the solicitation, that are judged to be most advantageous to the Government, price and other factors considered.

(d) Offerors are cautioned not to minimize the importance of a detailed, adequate response in any area because of its importance, or due to its not being numerically scored.

(e) Prior to the award of any contract, the prospective Contractor must also be determined to be responsible in accordance with AMS 3.2.2.2. To assist in this determination, the Government reserves the right to conduct a pre-award survey of any Offeror, or Offeror's subcontractor(s) if deemed necessary by the Contracting Officer. If a pre-award survey is conducted, it does not necessarily mean that an Offeror has been selected for award.

(f) To be eligible for award, the Offeror must meet all the requirements of the SIR. However, the FAA reserves the right to reject any and all offers, or waive any requirements, minor irregularities and discrepancies, if it would be in the best interest of the FAA to do so.

(g) The FAA ***intends to make an award to those Offerors*** with acceptable and adequate financial and accounting systems (preferably systems that have already been audited by DCAA or other federal Government auditor), which are considered acceptable to support award of a Government cost reimbursable contract. Offerors must provide the name and phone number for the DCAA Audit Office or other federal Government agency that conducted the most recent audit of the Offeror's financial and accounting systems or indicate that they have not yet been through a DCAA audit or other federal Government agency audit. If an Offeror has not yet been audited by DCAA or other federal Government agency, the FAA will request audit(s) prior to award. Should the Offeror not receive an approval prior to award the FAA may consider awarding the contract and allowing interim pricing structures such as Time and Material rates to be used pending the DCAA approval.

AR Tab 3(F), § M.3 (emphasis added).

12. The Solicitation defined the relative importance of the evaluation factors in § M.4:

> **M.4.1. Relative Importance of Award Decision Factors/Criteria/Subcriteria**
>
> (a) The FAA will evaluate each Offeror's submission in total. ***For the award decisions***, the Technical Proposal (Volumes I - V) is greater in importance than the Cost/Price Proposal (Volume VII). The relative weightings of the Technical Proposal (Volumes I - V) criteria Technical Proposals become smaller, the Cost/Price Proposal (Volume VII) results become more important.
>
> (b) The Organizational Conflict of Interest Mitigation Plan (Volume VI) will be determined to be acceptable or unacceptable, and awards will not be made to any Offerors rated as unacceptable. If acceptable with risks, those risks will be evaluated when making an award decision. As a consideration for Best Value determinations, Offeror Binding Signature will be evaluated for completeness. Offerors participating in the FAA Mentor Protégé Program (Volume VIII) will be viewed more favorably. The Small Business Subcontracting Plan (Volume IX) will be determined to be acceptable or unacceptable, and ***awards will not be made to any Offerors rated as unacceptable***. If acceptable with risks, those risks will be evaluated when making an award decision.

AR Tab 3(F) at § M.4.1 (emphasis added).

Award and Protest

13. In a source selection decision dated June 23, 2010, Source Selection Official ("SSO") James H. Williams determined that BAH should be selected for award. *AR* Tab 10, "*SIR2 FO SSO Memo.*" Nothing in this memorandum discussed or otherwise reflected the possibility that a multiple award under the solicitation was being considered.

14. The Contracting Officer executed the BAH Contract, *i.e.*, Contract No. DTFAWA-10-D-00030, on June 29, 2010. That award was the subject of the *Apptis I Protest*, docketed as 10-ODRA-00535. The *Apptis I Protest* was denied in its entirety in FAA Administrator's Order Number ODRA-00578, dated March 31, 2011.

15. On October 18, 2010, during the pendency of the *Apptis I Protest*, the Product Team announced the award of the TASC Contract, *i.e.*, Contract Number DTFAWA-11-D-00002, which was the second contract awarded under the Solicitation. *AR* Tab 10, "*Announcement of TASC Award*," at 1. On that same date, the SSO signed a second source selection decision, which included a discussion regarding how many additional awards were necessary. *Protest*, Exh. A. at 1-2; *see also AR* Tab 10, "*SIR2FO SSO Memo – 2nd Award (10-18-2010)*," at 1-2.

16. In the second source selection decision, the SSO explained that a new contract was required because the contract awarded to CSSI, Inc. under the small business set aside solicitation ("SIR2-SA") had reached capacity. He explained this new requirement by stating:

> The demand for and utilization of the SIR2 contract vehicles has significantly exceeded the FAA's expectations. For instance, in the six months since award of the contract to CSSI under SIR2-SA, CSSI has been awarded a series of task orders that will fully utilize all of the level of effort allocated to the five-year base period of its SIR2contract as well as a significant portion the following three-year option period for that contract. … As a result, the SIR2 contract vehicle awarded to CSSI will have a limited ability to accept additional task orders of the next several years and provide the benefits … that derive for the FAA having access to multiple SIR2 contract vehicles.
>
> After considering all of the foregoing, I find that it is prudent and necessary to award at least one additional contract under one of the SIR2 solicitations in order to provide the FAA with effective access to multiple contract vehicles under the SIR2 portfolio.

Protest, Exh. A. at 1-2; *see also AR* Tab 10, "*SIR2FO SSO Memo – 2nd Award (10-18-2010)*," at 1-2.

17. Despite the new requirement for an additional contract, the Solicitation was not amended to reopen the competition to provide for multiple awards. *See AR* Tab 3(F).

18. The remaining portions of the SSO's second selection decision rely upon the cost and technical evaluations rendered during the initial source selection process that led to the award to BAH. *Protest*, Exh. A. at 3-10; *see also AR* Tab 10, "*SIR2FO SSO Memo – 2nd Award (10-18-2010),*" at 3-10. After comparing the evaluations of the remaining offerors (*i.e.*, omitting BAH), the SSO selected TASC as the best value offeror to receive the second contract under the Solicitation. *Id.*

19. Apptis filed the present Protest on October 28, 2010.[1] *Protest* at 1. Starting at page 9, the Protest raises several separate matters, designated by sections "A" through "G," under the heading "New Protest Grounds of Award to TASC." *Protest* at 9. Section A states:

> **A. The FAA's Award of a Contract to TASC Deviated from the SIR2 Stated Evaluation Criteria and Prejudiced Apptis**
>
> For the reasons stated above in Apptis' second supplemental protest of the award to BAH, the award of a second contract to TASC under SIR2 – which notified offerors that there would only be one award available – deviated from the SIR2 stated evaluation criteria and materially prejudiced Apptis. Therefore, the award of a second contract to TASC was arbitrary, irrational, and prejudicial to Apptis.

Protest at 9.

20. On November 16, 2010, the ODRA advised the parties that it viewed "Ground 'A' under 'New Protest Grounds of Award to TASC' as potentially dispositive of the Protest," and directed the parties to provide briefs on this issue as a preliminary matter. *ODRA Letter* of November 16, 2010.

21. On December 15, 2010, the Product Team filed its Agency Response, in accordance with the ODRA Letter of November 16, 2010. *AR* at 1.

[1] Within the same protest document, Apptis filed a Second Supplemental Protest relating to the *Apptis I Protest.*

22. On December 22, 2010, both Apptis and TASC filed Comments in accordance with the ODRA Letter of November 16, 2010. *Apptis Comments* at 1; *TASC Comments* at 1.

III. Burden and Standard of Proof

As the Protester in this matter, Apptis bears the burden of proof, and must demonstrate by substantial evidence (*i.e.*, by the preponderance of the evidence), that the designated evaluation and source selection officials failed in a prejudicial manner to comply with the Acquisition Management System ("AMS"). *Protest of Adsystech, Inc.*, 09-ODRA-00508. The ODRA, however, will not substitute its judgment for that of the "designated evaluation and source selection officials as long as the record demonstrates that their decisions had a rational basis, were consistent otherwise with the AMS, the evaluation plan, and the award criteria set forth in the underlying solicitation." *Adsystech, supra* (citing *Protest of Ribeiro Construction Company, Inc.*, 08-TSA-031).

IV. Discussion

Apptis argues in Protest Ground A that a second award under the Solicitation was improper. *Protest* at 9, ¶ A. Apptis relies on SIR sections G.7(a) and M.3, which state that the FAA intends to make only one award under the Full and Open SOW. *Protest* at 4; *see also* FF 5 and 11. Apptis asserts that had it known that dual awards were possible, it would have changed the strategy it used when it submitted its proposal. *Protest* at 5-6 (citing [REDACTED] *Decl.* ¶ 4).

The Product Team and TASC argue that certain language in the SIR suggests that multiple awards were permitted, even though the FAA originally did not intend to make multiple awards under the Full and Open Solicitation. *AR* at 14-17; *TASC Comments* at 4-6. Both the Product Team and TASC also argue that the second award was consistent with the AMS. *AR* at 22-27; *TASC Comments* at 6-7. The Product Team further asserts that if there was any question regarding the interpretation of the Solicitation in this

regard, it is the result of a patent ambiguity that should have been raised before submission of the proposals. *AR* at 21-22. Finally, both the Product Team and TASC argue that the second award did not prejudice Apptis. *AR* at 33-39; *TASC Comments* at 7-9.

A. Interpretation of the Solicitation

The rules of contract interpretation are applicable to Solicitations and are well established at the ODRA as they are elsewhere. As we have previously stated:

> The rules of contract interpretation apply to issues that involve construing the terms of a government solicitation. *See Rotech Healthcare, Inc. v. United States*, 71 Fed.Cl. 393 (2006). In such matters, the plain and unambiguous meaning of the solicitation controls, and all of the solicitation's parts must be read together and harmonized if possible, so that no provisions are rendered meaningless. *See Contract Dispute of Strand Hunt Construction, Inc*., 99-ODRA-00142; *Contract Dispute of Globe Aviation Services Corporation v. TSA*, 04-TSA-0007. To that end, the ODRA's review of such matters utilizes an "objective" standard--which focuses on the meaning a reasonable person would ascribe to the disputed solicitation terms. *See Contract Dispute of Huntleigh USA Corporation*, 04-TSA-008, Decision on Motion for Partial Summary Judgment dated May 30, 2006. Solicitation provisions must be read as a whole and the ODRA will favor an interpretation that gives reasonable meaning to all of the solicitation's terms over one that leaves one or more solicitation provisions useless, meaningless or superfluous, *Id.*; *see also Mason v. United States*, 222 Ct.Cl. 436, 445, 615 F.2d 1343, 1348 (1980). No term of the solicitation will be construed as being in conflict with another, unless no other reasonable interpretation is possible. S*ee Protest of Johnson Controls Security Systems*, 05-ODRA-00360; *The Federal Group, Inc. v. United States*, 67 Fed.Cl. 87 (2005). Specific solicitation provisions will take precedence and control over more general ones. *Id*.

Protest of Northrop Grumman Systems Corp., 06-ODRA-00384. Additionally, the language in question "must be given that meaning that would be derived from the contract by a reasonable intelligent person acquainted with the contemporaneous circumstances." *Hol-Gar Mfg. Corp. v. United States*, 169 Ct.Cl. 384, 388, 351 F.2d 972, 975 (1965). Moreover, " … the tribunal should do its best to ascertain the intent of the

parties and enforce it." *Globe Aviation Services Corporation, Contractor, v. Transportation Security Administration*, GSBCA 16565-FAA; (ODRA Docket No. 04-TSA-0007).

Applying these well-established rules of construction to the present controversy necessarily and inescapably requires the ODRA to find that the express intent and language of the Solicitation, as well as the requirements of the AMS, permitted only one full and open, non-small business set aside award, *i.e.*, the award made to BAH. The express intent stated in § G.7 and M.3 the Solicitation is that the FAA would award one contract. FF 5 and 11. Consistent with this clear intent, § L.2.1 uses the singular article ("a"), without any qualifying terms such as "multiple award" or "dual award," to convey that only one contract award would occur under this Solicitation:

> **L.2.1 3.2.4-1 Type of Contract (April 1996)**
>
> The FAA contemplates award of **a** Cost Plus Fixed-Fee, Level-of-Effort, Task Order, Term **contract** resulting from this Screening Information Request.

FF 8 (emphasis added).[2] Similarly, the "Contract Award" provision incorporated in § L.1. uses the singular forms when it states that the FAA "will award **a contract** resulting from this SIR to **the** responsible **offeror** whose **offer** …. " FF 7. In the same vein, § M.2(a) uses the singular article ("an"), when it states, "This acquisition will utilize the

[2] Notably, standard AMS Provision 3.2.4-1, "Type of Contract (April 1996)," is published with blanks into which the "Contracting Officer must insert appropriate information …" As published and prescribed, the provision states:

> **3.2.4-1 Type of Contract** (April 1996)
>
> The FAA contemplates award of a _____ [Contracting Officer insert specific type(s) of contract] contract resulting from this Screening Information Request.
>
> (End of provision)
>
> PRESCRIPTION:
>
> Must be used in SIRs unless it is for information or planning purposes. The Contracting Officer must insert appropriate information in the clause.

AMS Provision 3.2.4-1, "Type of Contract (April 1996)."

Best Value Approach for selecting **an** Offeror for award," and nothing stated in the award-options under § M.2(h) provides for multiple awards. FF 10 (emphasis added).

The Product Team and TASC rely on other language found in Section M of the Solicitation to suggest that multiple awards were possible. Specifically, they point to language in §§ M.3 and M.4.1 as "signal[s] that more than one offeror might be awarded a contract under the SIR." *AR* at 17. For example, the Product Team quotes the statement, "The FAA ***intends to make an award to those Offerors*** with acceptable and adequate financial and accounting systems …," found § M.3 (g), and argues that it means more than one offeror could receive an award. *AR* at 17 (citing Tab 2, SIR § M.3); *see also TASC Comments* at 4. While such language indeed uses a plural for "offerors," the same phrase also refers to "an award." FF 11. Moreover, the quoted language focuses on the adequacy of the accounting systems of the offerors and their "team,"[3] rather than the direct question of how many awards would be made. *Id.*

Although the language of the Solicitation alone justifies sustaining this Protest, the contemporaneous circumstances also show that the Product Team's reliance on stray plurals creates an unreasonable interpretation. *Hol-Gar Mfg. Corp.*, 169 Ct.Cl. at 388, 351 F.2d at 975. Applicable rules and regulations are always considered part of the contemporaneous circumstances when interpreting contractual language. 24 *Corbin on*

[3] Prime Offerors were obliged to submit their proposals electronically for their "team." *AR* Tab 3(F), § L.4(a). The contemporaneous record shows that the Product Team anticipated that offerors would assemble large teams of subcontractors to provide work under the task orders. The SE-2020 Business Plan, for example, states:

> The Systems Engineering 2020 SIRs consists of many activities. In order to provide the full range of capabilities defined in Table 3-20: SIR 1 Requisite Capabilities and Table 3-21: SIR 2 Requisite Capabilities below, the Offerors will be required to team with a range of various businesses. This is anticipated to require a large amount of subcontracting.

AR Tab 1, "Business Case," at 015218. In fact, the solicitation required "Cost/Price" proposals from both prime offerors, and their proposed subcontractors. *See* Table 2, found in § L.4. *AR* Tab 3(F), § L.4(a). In these circumstances, the ODRA finds that phrases like, "Offerors with acceptable and adequate financial and accounting systems," harmonizes with the other portions of the Solicitation when interpreted to reference the multiple accounting systems of an individual team.

Contracts § 24.26, at 271, cited with approval in *Puerto Rico Dept. of Labor and Human Resources v. U.S.*, 49 Fed. Cl. 24, 31 (2001).[4] Accordingly,

> … the parties are presumed to have intended to create a valid, binding contract and the court must dismiss an interpretation which would find that the parties intended to create a contract with even a portion of the contract void. *See Torncello v. United States*, 231 Ct.Cl. 20, 27, 681 F.2d 756, 761 (1982) (citing *Arizona v. United States*, 216 Ct.Cl. at 235-36, 575 F.2d at 863); *Truong Xuan Truc v. United States*, 212 Ct.Cl. 51, 64 n. 11 (1976) (noting that a court should construe contract provisions, "if possible, to be lawful rather than unlawful" and citing *Hobbs v. McLean*, 117 U.S. 567, 576, 6 S.Ct. 870, 29 L.Ed. 940 (1886)).

Puerto Rico Dept. of Labor and Human Resources, 49 Fed. Cl., at 31. In *Triple P Services, Inc.*, B-271629.3, 96-2 Comp. Gen. Proc. Dec. ¶ 30 (July 22, 1996), the Government Accountability Office ("GAO") incorporated this line of reasoning into the interpretation of solicitations. Triple P had challenged a portion of a solicitation that stated the agency "may" conduct discussions. Triple P asserted that this improperly permitted the agency to make an award based on the initial offers without discussions and in the absence of a mandatory provision. The GAO rejected Triple P's interpretation, and explained:

> As the protester correctly points out, FAR § 15.610(a) requires that the solicitation notify all offerors where the agency intends to award a contract without discussions. Since the RFP does not specifically advise offerors that the agency intends to award a contract on the basis of initial proposals without discussions, the agency could not properly award a contract on the basis of initial proposals. Although section M of the RFP quoted above states that "discussions may be held with all offerors . . . ," the gist of this provision is clearly to describe the purpose of the discussions (i.e., "for the purpose of identifying deficiencies in proposals and obtaining clarification"); to explain that offerors would be permitted to "submit [5] revisions to their proposals . . ."; and to describe how BAFOs will be evaluated. ***The protester's contention that the agency improperly intends to award a contract without conducting discussions is not only an unreasonable reading of the RFP, but is contrary to the applicable FAR provisions relating to the award of contracts on the basis of initial proposals; we will not***

[4] Although not bound by either Court of Federal Claims or GAO precedents, the ODRA will consider decisions of these forums as persuasive when the underlying procurement regulations or policies in question are similar. *See e.g., Protest of International Services, Inc.*, 02-ODRA-00224.

> ***assume that the agency will act in contravention to the applicable regulation.***

Triple P Services, Inc., supra (emphasis added).

Triple P is instructive in the present Protest because the Product Team and TASC advocate an interpretation of the Solicitation that is contrary to AMS Policy. When an FAA product team needs the flexibility to make multiple awards under a single solicitation, the AMS mandates express notice to offerors, and specifically states:

> **3.2.4-25 Single or Multiple Awards (April 1996)**
>
> The FAA may elect to award a single delivery order contract or task order contract or to award multiple delivery order contracts or task order contracts for the same or similar supplies or services to two or more sources.
>
> (End of provision)
>
> **Prescription**
> **Must be used in SIRs for indefinite quantity contracts that may result in multiple contract awards.** Do not use for advisory and assistance services contracts that exceed 3 years and $10,000,000. Can be modified to specify the number of awards anticipated.

AMS Provision 3.2.4-25, "Single or Multiple Awards (April 1996)" (emphasis added). The parties do not dispute that the Solicitation does not contain this required provision.[5] FF 6. The ODRA will not find reasonable an interpretation of the Solicitation if the interpretation would sanction a violation of AMS requirements. Accordingly, as in *Triple P*, the ODRA will not interpret the Product Team's "signals" from stray plurals as sanctioning multiple awards in direct contravention of the AMS.

[5] The requirement to include this provision in multiple award scenarios is reiterated in the *AMS Provisions and Contract Clauses Matrix*. The Matrix indicates that this provision and similar provisions (like AMS Provision 3.2.2.3-24, "Evaluating Offers for Multiple Award (July 2004)") are required for all types of AMS contracts if multiple award is contemplated, including cost-reimbursement service contracts and indefinite delivery contracts. This is an important note, given the debate between the parties as to applicability of statements in the *AMS Procurement Guidance* § T3.2.4.A.5(c)(3)(e), which states, "If multiple awards are anticipated, include a notice to offerors." The Product Team argues that "Apptis provides no explanation ... why" this portion of the Guidance applies to the particular CPFF Solicitation in this Protest. *AR* at 26. The *AMS Provisions and Contract Clauses Matrix* and the mandatory prescriptions for these types of clauses foreclose debate. There is no question that the Product Team was affirmatively obligated to advise offerors that multiple awards were possible.

Other circumstances, too obvious to omit, support the Apptis position. Had multiple awards of the full and open competition truly been the intent of the Solicitation and acquisition plan, then it should have been given at least a brief mention in the SSO's decision memorandum pertaining to the BAH award. Unlike the SSO's second decision memorandum, there is no showing that multiple awards were considered prior to the belated award to TASC. *Compare* FF 13 *with* 15. Similarly, no mention is made in the statement of the contractual purpose, found in § C.1.1., that multiple awards are possible for the SIR2FO contract, and to the contrary, the references to the "resulting contract," use the singular form. *See* FF 4.

Based on the foregoing discussion of the record, the ODRA finds that the only reasonable interpretation of the Solicitation is that it did not permit multiple awards. The ODRA therefore need not consider the parties' arguments pertaining to latent or patent ambiguity. *See Protest of E & I Systems, Inc.*, 99-ODRA-00146 ("An ambiguity exists where two or more reasonable interpretations of the terms or specifications of the solicitation are possible.").

B. Authority to Deviate from the Solicitation and AMS

As its fallback position, the Product Team makes the remarkable assertion that unprecedented powers under the AMS and the FAA's acquisition authority permit a Product Team to ignore the Solicitation if a "rational basis" can be stated. The Product Team contends that its actions were fully consistent with the AMS and had a rational basis. *AR* at 22. It argues that AMS "affords the FAA considerable flexibility and discretion in deciding how to best meet its requirements." *Id.*, (citing *Protests of Hi-Tec Systems, Inc., et al.*, 08-ODRA-00459). It also relies on AMS Policy § 3.2.2.2, which it quotes in part:

> The FAA procures products and services from sources offering the best value to satisfy FAA's mission needs. Considering complexity, dollar value, and availability of products and services in the marketplace, FAA has flexibility to use any method of procurement deemed appropriate to satisfy FAA's mission.

AR at 22 (citing *Hi-Tec*, *supra* and *AMS Policy* § 3.2.2.2). The Product Team also quotes a portion of AMS Policy § 3.1.1, which states in part, "Procurement officials should follow the policy and guidance contained herein but, based on prudent discretion and sound judgment, may employ any procedures that do not violate applicable statutes or regulations." *AR* at 22. The Product Team's position is untenable, and the ODRA utterly rejects it.

"In rendering an interpretation of the AMS, the ODRA will favor interpretations that are consistent with applicable statutes, give meaning to all parts, and harmonize separate sections into a coherent policy statement." *Protest of Enterprise Engineering Services, LLC*, 09-ODRA-00490. Starting with the relevant statute, the authority for establishing the AMS is found in 49 U.S.C. § 40110(d), which states in relevant part:

> **(d) Acquisition Management System.—**
>
> (1) In general— In consultation with such non-governmental experts in acquisition management systems as the Administrator may employ, and notwithstanding provisions of Federal acquisition law, the Administrator shall develop and implement an acquisition management system for the Administration that addresses the unique needs of the agency and, at a minimum, provides for—
>
> (A) more timely and cost-effective acquisitions of equipment, services, property, and materials; and
>
> (B) the resolution of bid protests and contract disputes related thereto, using consensual alternative dispute resolution techniques to the maximum extent practicable.

49 U.S.C. § 40110(d) (2010). While the Product Team calls attention to paragraph (d)(1)(a), encouraging "timely and cost-effective acquisitions," the Product Team implicitly assumes that that this deeply embedded statutory phrase is an overriding principle that justifies the second award under the Solicitation. *See AR* at 22. As shown in the quote of paragraph (d)(1), however, the Administrator of the FAA has the obligation to "develop and implement an acquisition management system for the Administration," and all contracting authority in the FAA flows from the Administrator as the "final authority for carrying all functions, powers, and duties" relating to acquisition. 49 U.S.C. § 40110(d); *AMS Policy* § 3.1.4. The AMS flows from this

statutory authority, and "is the collective body of information within the FAA Acquisition System Toolset (FAST)," which includes both policy and guidance. *AMS Statement regarding Policy vs. Guidance*.[6]

The Administrator implements the AMS in part through delegations of authority, first to the Acquisition Executive, and then down the chain of command to individual Contracting Officers under specific warrants. *AMS Policy* § 3.1.4. Contracting Officers are to perform their duties on behalf of the Administrator in a manner that is consistent with both AMS Policy and Guidance. Indeed, "Practitioners shall comply with AMS policy as written unless waivers or deviations are obtained from the FAA Acquisition Executive." *AMS Statement regarding Policy vs. Guidance* § 2. Moreover:

> The following terms, when used throughout AMS, shall be interpreted as follows:
>
> *Shall, Must, and Mandatory*. The terms "shall," "must," and "mandatory" indicate requirements where it is necessary to comply. **Waivers are required from the FAA Acquisition Executive in advance if there is intent to not abide by the requirements.**
>
> *Should.* The term "should" indicates requirements or procedures that allow discretion to adopt different approaches consistent with applicable law and AMS policy. Acquisition personnel are expected to use principles of reasoned decision making and to document, to an appropriate extent, the rational basis for adopting a different approach.
>
> *May.* The term "may" confers authority to exercise full discretion by the user in implementing the applicable part of AMS where the term is used.

AMS Statement regarding Policy vs. Guidance § 2 (italics in the original, boldface added). Thus, as the ODRA previously has stated, "[T]he rule of construction established under the AMS is that the words "shall," "must," or "mandatory," regardless of whether they appear in policy or guidance, signal requirements [that] only the FAA Acquisition Executive may waive." *Protest of Adsystech, Inc.*, 09-ODRA-00508 at n.16.

[6] The *AMS Statement regarding Policy vs. Guidance* is found at http://fast.faa.gov/toolsets/policy.htm.

The foregoing discussion of authority sheds light on the portions of the AMS that the Product Team cites in the present Protest. While the "FAA has flexibility to use any method of procurement deemed appropriate to satisfy FAA's mission" (*AR at 22 (citing Hi-Tec, supra* and *AMS Policy* § 3.2.2.2)), the authority to deviate from mandatory AMS requirements rests with the Acquisition Executive, not the Product Team. Similarly, the general descriptions of authority of procurement officials to deviate from the AMS stated in AMS Policy § 3.1.1 must be read in conjunction with the specific procedures for obtaining pre-approval from the Acquisition Executive authorizing deviations from mandatory requirements. The Product Team in the present matter, therefore, overstates the scope of its authority to deviate from the mandatory requirements of the AMS.

The "Fundamental Principles," stated in AMS Policy § 3.1.3, also support the conclusion that authority to deviate from mandatory AMS requirements rests with the Acquisition Executive, not the Product Team. The publication of AMS Policies and Guidance gives offerors equal information and expectations regarding how a source selection decision will be made. This ensures meaningful competition, which is the preferred method of contracting as stated in both AMS Policy § 3.1.3, and 49 U.S.C. § 40110(c)(4) (2010). Further, publication of procedures – and an expectation of agency compliance – fulfills the stated fundamental principle that the FAA procurement system will "[p]romote open communication and access to information throughout the procurement process …." *Id.* Still further, requiring waivers from the Acquisition Executive in advance of a deviation ensures that "discretion, sound business judgment, and flexibility" can occur "while maintaining fairness and integrity." *Id.* Finally, but certainly not to be minimized, the Product Team's interpretation would render solicitations terms, evaluation criteria, and the bid protest provision nugatory and inconsistent with 49 U.S.C. § 40110(d)(4) and AMS Policy § 3.1.3.

In the present Protest, the ODRA has concluded above that the Solicitation does not provide for multiple awards. *See supra* Part IV.A. As has been shown, this conclusion is supported by the plain language of the Solicitation, and also by the fact that the Solicitation does not include the mandatory, multiple award provision stated in *AMS*

Provision 3.2.4-25, "Single or Multiple Awards (April 1996)." *Id*. The Product Team has not argued (nor shown in the Agency Record) that the Acquisition Executive approved in advance of the omission of the mandatory provision. Furthermore, adding the clause would have required an amendment to the Solicitation, and offerors should have been afforded an opportunity to revise their proposals. *See AMS Policy* § 3.2.2.3.1.2.4. No such amendment was issued. FF 17. Accordingly, regardless of whether the Product Team had a rational basis for awarding the Contract to TASC, the facts show that the Product Team exceeded its authority and acted in contravention of the AMS.

C. Other Matters Raised

In addition to the issues discussed above, the Product Team notes that in the *Apptis I Protest*, Apptis itself requested a dual award as a potential remedy. *AR* at 26. The Product Team believes that "Apptis cannot now credibly argue that the remedy it previously requested is inconsistent with the AMS." *Id.* at 27.

The ODRA Procedural Regulation provides the ODRA with "broad discretion to recommend remedies for a successful protest that are consistent with the AMS and applicable statutes." 14 C.F.R. § 17.21(a). The recommendations are made to the Administrator of the FAA, and if accepted, result in an order from the Administrator.[7] 49 U.S.C. § 46105. The Administrator's authority to order a second award rests entirely on the Administrator's *direct* statutory authority to "develop and implement an acquisition management system for the Administration that addresses the unique needs of the agency." 49 U.S.C. § 40110(d) (2010). By comparison, Product Team officials must rely upon the various delegations found within the AMS and contracting warrants for their authority. As shown above, nothing in the AMS or the existing Solicitation permitted the Product Team to independently award a second contract. Apptis' prayer for

[7] The Director of the ODRA may also issue a final order on behalf of the Administrator if the matter falls within the published delegation of authority. *See Delegation of Authority* dated March 31, 2010, available at http://www.faa.gov/about/office_org/headquarters_offices/agc/pol_adjudication/agc70/delegations/ .

relief in the *Apptis I Protest,* therefore, is not inconsistent with the position it now takes in the present Protest.

The Product Team also asserts that it did not deviate from "evaluation criteria," the term used in Apptis' Protest. *AR* at 27-29. The Product Team asserts that § G(7) pertains to contract administration and in particular, the award of task orders. *AR* at 28 n.9. The Product Team similarly asserts that § M.3(a) merely addresses the "Basis for Award," not "evaluation criteria." But aside from pointing out that Apptis used somewhat technically imprecise phrasing in the statement of the grounds of its Protest, the Product Team does not demonstrate how or why a defense on this point should yield a denial of the Protest. Apptis clearly raised matters of fundamental deviation from the Solicitation that pertain to contract award. Such matters fall squarely within the ODRA's jurisdiction under 49 U.S.C. § 40110(d)(4); 14 C.F.R. §§ 17.11 and 17.13; and Solicitation § L.2.2, which incorporated AMS Provision 3 3.9.1-3, "Protest (November 2002)."

D. Prejudice

The ODRA will only recommend sustaining the Protest if Apptis can demonstrate prejudice, *i.e.*, that but for the Product Team's inappropriate action or inaction, Apptis would have had a substantial chance of receiving an award. *Protest of Enterprise Engineering Services, LLC,* 09-ODRA-00490, citing *Protest of Optical Scientific Inc.*, 06-ODRA-00365*; see also Protest of Enroute Computer Solutions*, 02-ODRA-00220. Furthermore, any doubts concerning the alleged prejudicial effect of the Product Team's action are resolved in favor of the protester. *Protest of Optical Scientific, Inc., supra.*

To fulfill its burden of proof, Apptis relies on the Declaration of [REDACTED], who served as Apptis' "capture manager," and was responsible for:

> … assembling the team, developing the win strategy, and ensured [sic] compliance with the proposal. I developed the budget for the capture effort, determined the value, and assisted in determining the return on investment. Additionally, I reviewed the price proposal.

Protest, Exh. B, [REDACTED] *Decl*. ¶ 3. [REDACTED] and Apptis make three fundamental assertions in the prejudice argument. First, [REDACTED] declares that Apptis developed its proposal strategy by detrimentally relying on the representation in the Solicitation that only one award would be made. *Id.* at ¶ 4. He states more fully:

> Apptis, with my assistance, developed our proposal strategy around the FAA's representation in the SIR that the FAA would make only one award. This representation affected many aspects of our proposal. [REDACTED] Accordingly, the FAA's representation that it would make a single award [REDACTED]. Had we known that the FAA would consider multiple awards, we would have [REDACTED].

Protest, Exh. B, [REDACTED] *Decl*. ¶ 4. Secondly, Apptis asserts that it would have [REDACTED], which would have [REDACTED]. *Id.* at ¶ 5; *see also Apptis Comments* at 22-23. Finally, Apptis cites [REDACTED]'s testimony to claim that it structured its proposal to [REDACTED]. If Apptis had known that multiple awards were possible and would be used for [REDACTED], then it could have proposed [REDACTED], and also could have eliminated [REDACTED]. *See Apptis Comments* at 25-28; *Protest*, Exh. B, [REDACTED] *Decl*. ¶ 6. Apptis asserts that under these circumstances, it has met its burden to show prejudice, and cites to the GAO's decision in *Foundation Health Serv., Inc.; Humana Military Healthcare Servs.*, B-278189.3, Feb. 4, 1998, 98-2-CPD ¶ 51. In that decision, after finding that the agency had changed, without disclosure, equally weighted evaluation factors to widely ranging weighted factors, the GAO stated:

> The protesters assert, and offered testimony to the effect, that they would have allocated their proposal preparation resources differently and would have restructured their proposals, if they had been aware of the actual relative importance of the significant evaluation considerations. Tr. at 12-19, 23-39, 92-114, 123-125, 152-161. *We obviously have no basis for determining the magnitude of any proposal changes, but given that the evaluation scheme is the starting point for the development of proposals, we think it is reasonable to accept that offerors would in fact have formulated their proposals differently in response to reordered evaluation criteria.* Further, we previously have recognized that where an agency fails to advise offerors of the evaluation factors and the relative importance of those factors, there is no assurance that in selecting an offer for award it is obtaining what is most advantageous to the government, all factors considered. Richard S. Cohen, supra, at 6.

Foundation Health, 98-2-CPD ¶ 51 at 11 (emphasis added).

The Product Team characterizes [REDACTED]'s declaration as "generalized assertions," that are insufficient to meet the burden of proof. *AR* at 34. Both TASC and the Product Team argue that Apptis' potential alternative strategy of [REDACTED] would have lowered Apptis' technical scores, but would not have made any significant closure of the $[REDACTED] gap in evaluated costs between Apptis and TASC. *TASC Comments* at 7-8; *AR* at 35-38.

As stated above, the ODRA's standard for prejudice requires that but for the Product Team's inappropriate action or inaction, the protester would have had a "substantial chance of receiving the award." *See Protest of Enterprise Engineering Services, supra.*, and the cases cited therein. The Product Team's action amounts to a cardinal[8] deviation from the Solicitation, and like the reordering of evaluation criteria in *Foundation Health*, there can be little doubt that the preparation of a proposal will vary depending on whether a single or multiple awards will be made. While the Product Team cites several GAO decisions, these decisions generally discuss prejudice in the context of run-of-the-mill problems in the application of evaluation criteria, holding discussions, etc.[9] Unlike both *Foundation Health* and the present Protest, none of these cases involve a wholesale abandonment of fundamental premises in the Solicitation applicable to all offerors such as evaluation weights or the nature of the acquisition itself.

[8] In government contracting terminology, the adjective "cardinal" ordinarily is used in the context of contract administration disputes to describe changes so extensive as be beyond the scope of the contract and the authority under a "changes" clause. *See e.g., Air-A-Plane Corp. v. United States*, 408 F.2d 1030, 1032-3 (Ct. Cl. 1969). The ODRA presently uses the word without reliance on contract administration principles, but rather within the dictionary meaning, *i.e.*, "1. of prime importance; chief, principal: *of cardinal significance*." *Random House Webster's Unabridged Dictionary* 314 (2d Ed. 1998) (italics in the original). The adjective is particularly apt in the present Protest.

[9] The Product Team cites to *Velos, Inc*. et al., B-400500 et al., 2010 CPD ¶ 3 (meaningful discussions allegedly would have resulted in lower offers); *Xtec, Inc.*, et al., B-299744.2, et al., 2007 CPD ¶ 148 (alleged waiver of requirements could not have caused the prejudice claimed); *MCI Constructors, Inc.* B-274347, et all., 96-2 CPD ¶ 210 (alleged ambiguity in distribution of work and costs between CLINs); and *Northrop Grumman Technical Services, Inc. Raytheon Technical Services Co.*, B-291506, et al., 2003 CPD ¶ 25 (January 14, 2003) (no material difference shown between information actually provided versus what would have been provided had discussions been conducted). Unlike the *Foundation Health* matter, these issues were not so fundamental as to "impact the starting point for the development of proposals." *Foundation Health, supra.*

Mindful that any doubts concerning the alleged prejudicial effect of the Product Team's action will be resolved in favor of the protester, the ODRA finds sufficient prejudice such that Apptis had a substantial chance of receiving one of *possibly many awards* available under the Product Team's new approach to the acquisition. If more than one award will be made, the chances of receiving an award increase. Moreover, the AMS Guidance recognizes that in some instances multiple awards may be beneficial to the agency. *See AMS Procurement Guidance* § T3.2.4.A.5(c)(3)(d). This observation lends credence to the [REDACTED] Declaration indicating that the alternative strategy of [REDACTED] could have won task order work even if only in a few key areas. *Protest*, Exh. B, [REDACTED] *Decl.* ¶ 4.

As to the Product Team's argument that the alleged prejudice amounts to generalized assertions and speculation, the ODRA notes the Product Team's own implicit assumption that the bidding strategy of other offerors, including TASC, would have not changed and yielded different evaluation scores. Moreover, the Product Team also implicitly assumes that its newly-found, multiple-award interpretation limits the acquisition to merely two awards, *i.e.*, BAH and TASC. *See AR* at 34 (arguing that Apptis had to "close[] the $[REDACTED] gap in evaluated costs between TASC and Apptis."). No such limitation can be found even if the ODRA were to accept the Product Team's new interpretation.

Finally, the ODRA observes that the prejudice that Apptis experienced in the present circumstances differs little from the prejudice experienced by a qualified potential offeror that has been denied an opportunity to compete in a sole-source or single source award situation. In such circumstances, the prejudice lies in the simple denial of the opportunity to compete. *See Precision Logistics, Inc.*, B-271429, 96-2 CPD ¶ 24 (July 18, 1996). Here, a new requirement arose for additional support services, but rather than conduct a proper competition, the Product Team simply considered previous offerors under a Solicitation that did not define the specific need for multiply-awarded SIR2FO contracts. FFs 16 - 18. While the SSO determined that TASC was apparently a second-best value in the single-award competition environment, neither TASC nor Apptis actually competed for possible multiple awards. Recognizing that no single-source approval

justifies the contract awarded to TASC (*see AMS Policy* §§ 3.2.1.3.7 and 3.2.2.4), Apptis stands in no different shoes than an otherwise qualified supplier denied the chance to compete for an improper single-source award.

Accordingly, the record shows that Apptis developed a proposal based on *the* correct interpretation of the Solicitation, provided a timely proposal, promptly responded to communications, and was never eliminated from the process. Without relaxing the burden imposed on a Protester to demonstrate prejudice, and mindful that any doubts concerning the alleged prejudicial effect of the Product Team's action will be resolved in favor of the protester, the ODRA finds that Apptis had a substantial chance of award had the contract been competed properly as a multiple award acquisition.

The ODRA therefore recommends sustaining the Protest on Ground A. As a result, the other allegations in the Protest, which challenge the evaluation of Apptis' and TASC's proposals as well as aspects of the SSO's Decision, are moot.

IV. Conclusion and Recommendation

For the reasons stated above, the ODRA recommends that Ground A of the Protest be sustained, and all other grounds be dismissed as moot.

Although the ODRA recommends sustaining the Protest based on Ground A, the present record does not provide a sufficient basis on which to recommend a remedy. When creating a remedy, the ODRA is guided by the standards found in its Procedural Regulation:

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

14 C.F.R. § 17.21(b). With this standard in mind, the ODRA recommends that the all three parties be directed to file briefs on the remedy, with any necessary supporting evidence, within **10 business days** of the Administrator's Order in this matter. Thereafter, the parties may file responses to the briefs received from the other parties, no later than **5 business** days after receipt of the initial briefs. The Product Team's brief must include probative evidence on the current status, scope, and anticipated completion dates of all Task Orders assigned to TASC, as well as details of any additional Task Orders that the Product Team currently contemplates awarding under the TASC Contract in the future.

Additionally, until a final remedy is imposed in this Protest, the ODRA recommends that the Product Team be directed to refrain, in the absence of exigent circumstances, from: (1) awarding additional task orders under the TASC Contract; (2) issuing modifications that add work to the TASC Contract; and (3) awarding additional full and open competition contracts under the Solicitation. This recommendation in no way restricts or affects the administration of the BAH Contract.

_____/s/_____
John A. Dietrich
Dispute Resolution Officer
FAA Office of Dispute Resolution for Acquisition

SUPPLEMENTARY STATEMENT OF THE ODRA DIRECTOR

In defending against the instant Protest, the Product Team has argued, *inter alia*, that notwithstanding the express terms of the Solicitation and the Statement of Work, as well as established AMS principles, policies and procedures, the Product Team was authorized to make a second award because it was "rational" to do so. *See* AR at 22 - 24. As is more fully discussed in the Findings and Recommendation, the ODRA utterly rejects this argument. It is well established that, consistent with universally accepted procurement law principles, AMS contracts must be awarded based on, and in a manner consistent with, the underlying solicitation. *See, e.g., Protest of Adsystech, Inc.*, 09-ODRA-00508; *Protest of Evolver, Inc.*, 09-ODRA-00495.

AMS compliant alternatives were available to the Product Team to address the need for additional contract work. The Team could have structured the original Solicitation to expressly authorize additional awards. Alternatively, it could have sought a waiver from the Acquisition Executive. *See* F&R at 19. The Product Team also could have amended the Solicitation so as to accommodate another award. Finally, it could have attempted to justify a single source award based on exigent circumstances. *See* AMS Policy §3.2.2.4. The Product Team chose instead to take an unauthorized shortcut to meet the requirement. It then prolonged the problem by failing to take prompt, voluntary corrective action once the issue was protested to the ODRA.

The FAA's AMS provides significant flexibility and discretion to contracting personnel to meet the Agency's needs. Such flexibility and discretion does not extend, however, to the licensing of actions that are inconsistent with the principles, policies and mandatory procedures of the AMS itself.

_____/s/_____

Anthony N. Palladino, Director