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

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

FINDINGS AND RECOMMENDATION

Matter: Protests of Camber Corporation and Information Systems &

Networks Corporation (Consolidated)
Under Solicitation No. DTFA01-98-R-11087;
Intervenor's Motion for Reconsideration of
FAA Order No. ODRA-98-79

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

Appearances:

For Protester, Camber Corporation[1]: Alan M. Grayson, Esq. and Ira E. Hoffman, Esq., Grayson and Associates, P.C.

For Protester, Information Systems & Networks Corporation[2]: Kenneth D. Brody, Esq., McMahon, David & Brody

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

For the Agency Program Office: Emmett Fenlon, Esq. and Robert Zuckerman, Esq.

I. Introduction

On September 3, 1998, the Administrator issued FAA Order No. ODRA-98-79 ("Order") adopting the Findings and Recommendations of the Office of Dispute Resolution for Acquisition ("ODRA") and sustained the protests of Camber Corporation ("Camber") and Information Systems & Networks Corporation ("ISN") in ODRA Docket Nos. 98-ODRA-00079 and 98-ODRA-00080 (Consolidated) (hereinafter the "Consolidated Protests") against the award of a GPS Technical Assistance Contract (the "GPS TAC Contract") to intervenor, Advanced Management Technology, Inc. ("AMTI"). The Consolidated Protests were sustained on a single ground; and the FAA GPS Product Team was directed to conduct a re-competition (the "Recompetition") of the GPS TAC

procurement. The Administrator's Order permitted AMTI to participate in the Recompetition.

In its Motion for Reconsideration ("Motion"), AMTI asserts that the finding of a "bait and switch" in the Consolidated Protests was erroneous, and that the Administrator's Order should be reversed. As discussed below, the ODRA finds the information provided by AMTI in support of its Motion does not justify a reversal of the Order and thus recommends that AMTI's Motion be denied.

II. Findings of Fact

1. The Consolidated Protests at issue[3] were filed by Camber and ISN on June 18, 1998 and June 22, 1998, respectively. On September 3, 1998, the Administrator issued the Order adopting the Findings and Recommendations ("F&R") of the ODRA and sustaining the Consolidated Protests based on the single ground of alleged "bait and switch" by AMTI.

2. AMTI filed an appeal from the Administrator's Order to the United States Court of Appeals for the D.C. Circuit (the "Appeal"), pursuant to 49 U.S.C. §46110. While the Appeal was still pending, AMTI's counsel, by letter dated March 26, 1999, moved the ODRA to reconsider the Order and the finding of a "bait and switch", based on new information purportedly obtained by AMTI in connection with a related lawsuit in a Virginia state court ("Virginia litigation") between AMTI and its former teammate for the GPS TAC procurement proposal, Overlook Systems Technology Incorporated ("Overlook"). The AMTI Motion challenges a purported ODRA "key finding" relating to the existence of a written teaming agreement between AMTI, Overlook, and a third company, Innovative Solutions International ("ISI"), for the submission of a proposal on the GPS TAC procurement. The ODRA's F&R had observed that a May 27, 1996 teaming agreement (the "Teaming Agreement") had long been superseded by the time the team headed by AMTI as prime had submitted its proposal on the GPS TAC procurement in January 1998. (F&R, page 66). The ODRA also found that it was the only written teaming agreement between AMTI and any of the companies on its GPS TAC proposal team and one that contemplated a team headed by Overlook as prime contractor with AMTI and ISI as subcontractors. *Id.* Pointing to pleadings filed by AMTI and Overlook in the Virginia litigation, in which both parties appear to invoke and rely upon the Teaming Agreement, AMTI's Motion contends that the ODRA "finding" regarding the status of the May 1996 Teaming Agreement was erroneous, that such a "finding" was material to the ultimate conclusion regarding a "bait and switch," and that such a conclusion must therefore be reversed:

> The FAA sustained the Protest on the single ground that an impermissible "bait and switch" occurred when AMTI submitted its proposal to the FAA. That conclusion was based primarily on one key finding that AMTI did not have a "teaming agreement" with Overlook at the time it submitted its proposals to the FAA's Program Office or at the time the Contract was awarded. The ODRA found, without any support in the record, that the

> May 1996 Teaming Agreement (the "Teaming Agreement") had been "long superceded." Accordingly, the ODRA concluded that AMTI negligently proposed key personnel that it could not be reasonably certain would be available. As discussed further below, however, subsequent proceedings related to the initial Protest clearly demonstrate AMTI and Overlook considered the Teaming Agreement to be valid and enforceable. In fact, both parties have filed claims against each other seeking to enforce the terms of that agreement. Thus, AMTI could properly and reasonably rely on the Teaming Agreement to propose Overlook's personnel for the Contract.
>
> Pursuant to the terms of the Teaming Agreement, the parties negotiated the terms of a subcontract for Overlook during the month following award. The Contracting Officer even attempted to act as a mediator in those negotiations to help resolve what she considered to be small differences between the parties' proposals. Despite AMTI's last offer to give Overlook everything it wanted in the subcontract, Overlook "walked off the job."
>
> In light of these recently confirmed facts, which are contained in sworn documents now available to the ODRA, the ODRA's conclusion that a bait and switch occurred must be considered to be in error. Therefore, the F&R sustaining the Protest should be reversed and the Order adopting the F&R should be withdrawn.

3. The AMTI March 26, 1999 letter further states in this regard:

> If the Teaming Agreement was valid, then AMTI was permitted to propose to use the personnel of the team members to perform the Contract. Moreover, it could reasonably conclude that those personnel would be available to perform the Contract if awarded. On this basis, it was reasonably foreseeable to AMTI that Overlook's personnel would be available to perform. Therefore, the evidence before the ODRA clearly shows that the first element of the protester's bait and switch claim, *i.e.*, an intentional or negligent misrepresentation of the availability of personnel, does not exist in this case.

4. The AMTI letter asserts that the ODRA erred in concluding that an April 16, 1998 letter from Overlook to AMTI transmitting revised rates for purposes of a Best and Final Offer (BAFO) to the FAA "conditioned" the use of those rates on AMTI's allocation of 33% of the contract work to Overlook. AMTI claims that it was fully authorized to utilize those rates, regardless of the allocation of contract work.

5. AMTI, in its reconsideration Motion, also quotes extensively from an affidavit of the FAA Contracting Officer, Ms. Sandra Harrelson, submitted to the ODRA in connection with its consideration of a Camber application for attorney's fees and costs under the Equal Access to Justice Act ("EAJA")[4]. That affidavit, in part, indicates that on June 29,

1998, some 27 days after the GPS TAC contract had been awarded to AMTI and immediately prior to Overlook deciding to part ways with AMTI and to "walk off" the GPS TAC project, there was a meeting among AMTI, Overlook, and FAA representatives. According to the affidavit, Ms. Harrelson called for the meeting after learning on the morning of June 29, 1998 that Overlook intended to withdraw from the project. Theretofore, AMTI and Overlook had been engaged in subcontract negotiations. The matter of labor rate negotiations between AMTI and Overlook was discussed at the meeting and the parties seemed to Ms. Harrelson to be approaching a settlement of their differences. However, after a caucus of the two Overlook representatives, Overlook affirmed its decision to "withdraw" from the GPS TAC contract. The affidavit reads as follows in this regard:

> I learned of Overlook's intent to leave the technical assistance contract early on the morning of June 29, 1998. I requested a meeting that same morning with both Overlook and AMTI to resolve differences between the companies. The lengthy meeting was attended by Mr. Ray Roddy [Overlook's Vice President] and Mr. Michael Sorrentino [Overlook's President & CEO] for Overlook and Ms. Anita Talwar [AMTI's president & CEO] for AMTI. Also in attendance were the Business Manager for the [FAA] Product Team and a representative of FAA's Office of Chief Counsel. Mr. Roddy and Mr. Sorrentino described several areas in which they believed AMTI had not afforded them due respect, such as the manner in which the award had been announced, lack of communication from AMTI on pending protests, and disruptive personal behavior by AMTI's vice president. The labor rate negotiations were also discussed. Mr. Roddy stated that during negotiations he had calculated rates that were within [Deleted] of the targets requested by AMTI. The statement indicated to me that price differences at that point were not insurmountable. I asked Ms. Talwar if she could accommodate all Overlook employees at rates agreeable to Overlook in the composite rate structure. She stated that she could do so. I offered to facilitate the earliest possible agreement and assured both parties that I would see that the proposed [Deleted] management structure was strictly adhered to [in order] to avoid future conflict. Mr. Roddy and Mr. Sorrentino broke from the meeting to consider the discussion and reconsider their position. When they returned, however, they affirmed their resolve to "withdraw from the TAC." They gave as the particular reason that the negotiations with AMTI to date had been "stressful" both to their families and to their employees. They did not want to continue stressful negotiations or remain in a relationship with AMTI, particularly for a seven year period. Mr. Sorrentino stated that Overlook had other business opportunities for all of its employees.

6. The affidavit continues with Ms. Harrelson's statements that, at the time of the meeting, she regarded the AMTI-Overlook rift as merely a "post-award breakdown of a business relationship, with individuals from both parties at fault" and that she was not

aware at the time of the June 29, 1998 meeting of the "April 16 correspondence." The ODRA takes this allusion to "April 16 correspondence" as a reference to the Overlook letter of April 16, 1998 to AMTI that forwarded Overlook's revised labor rates for use by AMTI in its May 1998 Best and Final Offer ("BAFO"). The ODRA has previously found that the letter, which AMTI omitted from its BAFO submission to the FAA, "conditioned" the use of those revised rates by AMTI on Overlook being allocated approximately 33% of the overall work on the GPS TAC contract. (F&R, Finding 59). AMTI's Motion for Reconsideration takes issue with this finding as well. *See* Finding 4 above. Notwithstanding AMTI's assertions, the April 16, 1998 letter states the following:

> These rates are based on Overlook being awarded a subcontract of approximately 33 percent of the prime contract award by each fiscal period.

Overlook letter to AMTI dated April 16, 1998. The language of the letter expressly tied the use of those revised rates to Overlook's obtaining an overall share of approximately one-third of the contract work. The letter is consistent in this regard with the express terms of the Teaming Agreement, which provided, *inter alia*:

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

7. By letter dated April 7, 1999, counsel for Camber filed an opposition to the AMTI Motion. In that letter, Camber questioned the jurisdiction of the ODRA to consider the Motion, in light of AMTI's prior appeal of the Administrator's Order to the United States Court of Appeals for the D.C. Circuit and emphasized the language of 49 U.S.C. §46110(c) calling for the court to have "exclusive jurisdiction to affirm, amend, modify, or set aside any part of the order." In addition, Camber argued that the Motion did not satisfy the criteria for reconsideration previously established by the ODRA in a July 17, 1998 Decision on Reconsideration of Denial of Admissions to Protective Order. Also in response to AMTI's Motion, Camber provided the following wording from the counterclaim filed by Overlook in the AMTI Virginia litigation:

> [W]ithout Overlook's knowledge or approval, AMTI removed the [April 16, 1998] cover letter from Overlook that conditioned the rates upon receiving 33 percent of the contract work. Instead, without Overlook's knowledge or approval, AMTI bid Overlook in substantially fewer position[s] tha[n] either the original GPS TAC Cost Proposal or the number of incumbent positions held by Overlook. Overlook was not informed of the change or of the fact that revised cost information had been requested, and submitted to the FAA. Overlook was not given a copy of the revised cost information submitted by AMTI at the time of

submission. [Footnote 6: Overlook's Counterclaim at ¶22, AMTI v. Overlook, *supra*.]

8. On April 9, 1999, the parties to the AMTI appeal filed a Joint Motion with the United States Court of Appeals for the D.C. Circuit asking that the Court remand the record to the ODRA and suspend the briefing and argument schedule in the appeal, pending the ODRA's ruling on the AMTI Motion for Reconsideration and the award of a new GPS TAC contract, pursuant to the Recompetition.

9. On April 13, 1999, in response to the aforesaid Joint Motion, the United States Court of Appeals for the D.C. Circuit vacated its earlier order establishing a briefing and argument schedule in the AMTI appeal, deferred ruling on the request that the record be remanded to the ODRA, ordering *sua sponte* that AMTI show cause within 30 days why the appeal should not be dismissed for lack of jurisdiction "in light of the Motion for agency reconsideration filed on March 26, 1999."

10. By letter dated April 15, 1999, the ODRA notified the parties that it would hold AMTI's Motion for Reconsideration in abeyance pending a ruling by the Court. The letter also stated that the ODRA considered the Motion fully briefed, but that it would permit the parties the opportunity to submit supplemental briefs at an appropriate time, based on further developments.

11. Counsel for Camber, by letter bearing a date of April 29, 1999, advised the ODRA that Camber would no longer be participating in the protests and would be returning protected documents to the parties who had generated those documents (in accordance with the ODRA Protective Order).

12. By Order filed on May 28, 1999, the Court discharged its earlier order to show cause and dismissed the AMTI appeal as "incurably premature," citing to its decision in *Wade v. FCC*, 986 F.2d 1433 (D.C. Cir. 1993)(per curiam).

13. By letter dated June 7, 1999, counsel for AMTI filed a supplement to the Motion for Reconsideration, reiterating a number of the arguments previously raised by AMTI and forwarding for the ODRA's consideration, as Exhibit 1, an undated Overlook document -- which AMTI claims is dated July 1, 1998 -- entitled "FAA Summary." The document appears to be Overlook's chronological summary of events relating to the GPS TAC procurement. AMTI urges that the document "clearly indicates that Overlook believed there was a valid, enforceable Teaming Agreement between it and AMTI." In this regard, AMTI provides the following quote from that document:

> Late January Boeing withdrew. USG allowed a 3-day extension for proposal submittal and any member of the team to be prime.
>
> **Team members' size had changed during 2-year period - felt best AMTI be prime. Time did not permit formally updating teaming**

> **agreement, but members verbally agreed to adhere to the agreement in place with the changed prime.** (emphasis added).

Reed Smith Shaw & McClay June 7, 1999 letter, page 4 (emphasis in original). AMTI also introduced this document to attempt to substantiate its earlier claim that it had been unable to clear with Overlook its BAFO submission, because Overlook officials were unavailable for consultation. *See* F&R, Finding 61. In this connection, the June 7, 1999 letter states:

> When Overlook submitted its rates to AMTI, Overlook informed AMTI that both Mr. Roddy and Mr. Sorrentino would be unavailable to discuss those rates. Because the rates proposed by Overlook were still much higher than the parties had orally agreed to, and what they thought would be reasonable for the Government to accept, AMTI made a business decision in order to win the contract for the team. In fact, the "FAA Summary" (Exhibit 1) indicates that Mr. Roddy was "out of touch" 4/18/98 through 5/4/98 and that Mr. Sorrentino was also unavailable from 4/18/98 to 4/27/98, clearly substantiating AMTI's claim that it could not consult with Overlook about its proposal.

Reed Smith Shaw & McClay June 7, 1999 letter, pages 5-6.

14. The June 7, 1999 letter goes on to assert:

> In addition, AMTI was free to propose those rates or any rates it chose for the use of Overlook's personnel on the Contract as long as AMTI was financially able to do so. The rates proposed by Overlook were to be paid to Overlook by AMTI. Thus, regardless of the rates proposed by AMTI to the Government, AMTI was free to pay the proposed rates to Overlook that they ultimately negotiated. In other words, AMTI was free to propose lower rates to the Government for Overlook personnel and pay higher rates to Overlook through the subcontract. Ultimately, that is what would have occurred had Overlook not walked off the job.

Id., page 6. Then the letter proceeds again to invoke the above-quoted Harrelson affidavit:

> As previously discussed in AMTI's Motion for Reconsideration, when Overlook informed AMTI that it would not perform under the GPS TAC, the parties met with the Contracting Officer to attempt to resolve the differences between the parties. The affidavit of the Contracting Officer, submitted in connection with Camber's EAJA fee application, unmistakably proves that AMTI offered to provide Overlook with all of the positions it wanted, at the full rates it wanted. Overlook declined and refused to perform under the contract. Thus, even with the prices they wanted and assurances from the Contracting Officer that she would take

> steps to prevent problems in the future, Overlook walked away. These events show that AMTI exhausted all possibilities to keep Overlook on the team and that Overlook's decision to keep its key personnel from performing the Contract was not the responsibility or intent of AMTI.

15. The Overlook "FAA Summary" indicates that, in June 1998, following award of the GPS TAC to AMTI, Overlook attempted, as part of subcontract negotiations, to secure from AMTI a commitment to implement "the team concept," including the formation of an "Executive Group" (purportedly consisting of officials from all team members, in order to manage the GPS TAC), the retention, as a minimum, of all 11 of the employees Overlook had working for the FAA Satellite Program Office, and the expansion of Overlook's level of participation on the GPS TAC as soon as possible. According to the "FAA Summary," Overlook proposed a subcontract provision to signify such a commitment, but this proposal was ignored by AMTI. Also, from the "FAA Summary," it appears (1) that Overlook asked to see the prime contract and specifically the staffing section; (2) that it was given a copy of the prime contract and the composite labor rates contained in that contract; (3) that it was told by AMTI that it had to conform its rates to those composite rates; (4) that it calculated that it would need 17 Overlook employees on the project to achieve those rates; and (5) that it so informed AMTI. In addition, the "FAA Summary" indicates that AMTI did not respond to this information, but instead merely offered to employ the 5 key Overlook employees at the revised BAFO rates that Overlook had offered AMTI in April 1998. The "FAA Summary" recites these details in the following manner:

> MID JUNE: Overlook was provided a pro forma subcontract. This did not specify
>
> > Overlook's level of participation nor did it address the team concept of:
> >
> > > -- Executive Group
> > >
> > > -- Overlook's 11 staff members or the approach to add additional staff as specified in the proposal.
> >
> > Overlook was requested to review it and comment. Overlook within a day provided AMTI with a request to insert a provision, which read as follows:
> >
> > > The subcontractor shall provide an INDEFINITE QUANTITY of support services on a Time and

Material basis at the rates set forth in Attachment 1. The minimum quantity of service to be ordered during the basic contract period will be for eleven full time Overlook employees. This is the level of support effort currently provided to the FAA Satellite Program Office (SPO) under Overlook prime contract number DTFA01-93-C-00090 (exclusive of the support requirement for the Performance Analysis Network and GPS Orientation Course). It is the intent of the parties that the personnel and areas of work remain unchanged.

In addition to the above, it is the intent of the parties that Overlook's participation in support of the SPO be increased as soon as possible to:

(1) accommodate the vacancies created by the departure of contractors who have been rendering support to the SPO prior to the award of the prime contract, and

(2) to participate in any additional

SPO
requirements.

In addition to the above, Overlook requested that AMTI provide us the details for the section on staffing.

Discussions followed whereby AMTI furnished Overlook a copy of the [prime] contract and the labor rates that appeared therein. We were informed that we would have to meet the rates set forth in the contract. We were requested to furnish a plan that would enable us to achieve these rates. (This was in spite of the fact that these were composite rates made up of Overlook, ISI, and AMTI).

* * *

In spite of this, Overlook prepared at AMTI's request a series of calculations of what it would take to achieve the contract rates. We calculated that with 17 people we could achieve the objective.

* * *

AMTI never addressed the proposed paragraph insert [*i.e.*, the proposed subcontract provision] as shown above nor the ability to provide Overlook staffing at 17 people. Rather, on June 23, 1998, a unilateral decision was made on AMTI's part to offer

> Overlook a contract providing coverage for 5 key employees. The rates were those shown in our BAFO which were higher than those offered if we were provided the 17 employees.
>
> The manner the offer was made, the failure to recognize the proposed provisions of the Executive Advisory Board and the Overlook staff of 11 and provisions for additional support is contrary to everything that had been agreed to.
>
> Overlook could not justify this violation of the intent since the team was first conceived in 1996.

16. AMTI, by letter of its attorneys dated June 15, 1999, submitted additional information in the form of a report by the Office of Inspector General for the Department of Transportation (the "IG Report") dated March 11, 1999. According to AMTI's counsel, the IG Report had been prepared in response to a *qui tam* complaint against AMTI filed by Alan Grayson and Ira Hoffman, two of the attorneys for Camber acting in their individual capacities, and in response to a letter from United States Senator Shelby, purportedly on behalf of Overlook. The IG Report contained, among other things, a "Memorandum of Interview of Sandra Harrelson" dated December 15, 1998. As reflected in the Memorandum, during the interview, Ms. Harrelson indicated that she was aware at the time of contract award that AMTI and Overlook had not finalized the terms and conditions of their subcontract and stated that it was "not uncommon for a prime to not have a contract with a sub until after the prime is awarded the contract and therefore did not see this as a problem." Also, according to the Memorandum and as pointed out by AMTI's June 15, 1999 letter, Ms. Harrelson stated during that interview that Overlook representatives did not object to an AMTI statement made at a June 19, 1998 post-award meeting to the effect that agreement on an AMTI-Overlook subcontract was expected within a week. Finally, as reflected in the Memorandum, Ms. Harrelson provided much of the same information to the IG inspector regarding the substance of the June 29, 1998 meeting as had been related in the above-quoted Harrelson affidavit.

17. During a telephone conference with the parties on June 17, 1999, the ODRA Director established cut-off dates for the submission of additional information in conjunction with the AMTI Motion for Reconsideration. AMTI was given until close of business Friday,

June 18, 1999 to submit whatever further materials it wished the ODRA to consider. The FAA Product Team would then have until close of business Monday, June 21, 1999 to provide any additional information or material it wished to submit. The record on the reconsideration Motion was to be closed at that time. Having both withdrawn from further participation in the protests[5], no further submissions were received from either Camber or ISN on this matter.

18. By letter dated June 18, 1999, counsel for AMTI provided the ODRA with copies of two e-mail messages both dated September 28, 1998. In the first, a message from Overlook's Mr. Sorrentino to Ms. Harrelson, Mr. Sorrentino noted the many references in the ODRA Findings and Recommendations regarding the high caliber of Overlook personnel and the role they played in AMTI obtaining the contract award. In that e-mail message, Mr. Sorrentino sought to interest the Product Team in convening a meeting to discuss the possibility of those Overlook personnel being made available for performance of their "critical services." The second e-mail message, that of Ms. Harrelson, forwards the Sorrentino message to the Product Team attorneys, Messrs. Emmett Fenlon and Robert Zuckerman. In that message, Ms. Harrelson states that Overlook accounted for only 1 of 5 "mandatory key personnel categories," that of "Terr Comm Engineer" (*i.e.*, that of Communications Engineer (Terrestrial)). Ms. Harrelson further notes that the report to the Source Selection Official ("SSO") prior to that award had "pointed out that Overlook was only a minor member of the [AMTI] team." Ms. Harrelson also asserts: "The sample task response cited in the evaluation report for excellence was mostly the work of Zeta, AMTI and ISI personnel . . . ."

19. Although the Product Team was provided the opportunity to submit comments on AMTI's Motion and subsequent filings, it did not do so.

20. By letter dated June 24, 1999, counsel for AMTI, while acknowledging that the record on the matter had closed, wrote to the ODRA to draw its attention to the FAA standard clause 3.0.2-3, "Subcontracts (Time-and-Materials and Labor-Hour Contracts)" that had been incorporated into both the Request for Offers ("RFO") and the contract in the present case. The standard clause requires a contractor to obtain the Contracting Officer's written consent to any proposed subcontract. In the June 24, 1999 letter, AMTI states that, in accordance with "standard custom within the industry," and as required by the "AMTI/Overlook Teaming Agreement" (*i.e.*, that of May 27, 1996), "the parties were to negotiate a final subcontract following award of the contract." AMTI further notes that the FAA must have been aware that there was no "finalized subcontract in place when they awarded the GPS TAC to AMTI," since there was never an AMTI request for Contracting Officer approval of an AMTI/Overlook subcontract prior to award and no such approval was given for an AMTI/Overlook subcontract prior to award.

III. Discussion

A. The Standard for Reconsideration

In the aforesaid ODRA interlocutory Decision dated July 18, 1998 in the instant Consolidated Protests, the ODRA articulated the following standard for reconsideration Motions:

> In reviewing requests for reconsideration of its decisions and orders[6], the ODRA . . . will require that the moving party demonstrate either: (1) clear errors of fact or law in the underlying decision; or (2) previously unavailable information warranting reversal or modification. The ODRA will not entertain such requests as a routine matter. Nor will it consider requests demonstrating mere disagreement with a decision, or restatement of a previous argument.

This standard recently was applied by the ODRA for the first time to a request for reconsideration of an Administrator's final decision. *See Consecutive Weather,* 99-ODRA-00112 (Reconsideration).

B. AMTI's Motion

The information produced by AMTI in support of its Motion does not demonstrate "clear errors of fact or law" in the F&R that were material to the ultimate decision regarding the AMTI "bait and switch", or previously unavailable facts or information that they would "warrant reversal or modification" of the Administrator's decision. To the contrary, AMTI's Motion and supporting materials serve to confirm the correctness of the F&R and Order.

AMTI raises four points in support of its Motion: (1) that the ODRA erred in basing its decision on a finding that no teaming agreement was in place between AMTI and Overlook; (2) that the Contracting Officer knew at the time of making the award to AMTI that AMTI had reduced substantially Overlook’s prospective role in the performance of the contract; (3) that the Contracting Officer was aware that subcontract negotiations were continuing between AMTI and Overlook after the award decision; and (4) that any misrepresentation regarding the availability of Overlook's key personnel for the GPS TAC contract was not material, *i.e.*, that the ODRA erred in finding Overlook's participation critical to securing the award for AMTI. For the reasons explained below, none of these points warrants modification or reversal of the original decision.

As to the first point, AMTI's Motion places great emphasis on the "new information" it obtained from the pleadings in the AMTI-Overlook Virginia litigation regarding the existence of a teaming agreement between AMTI and Overlook. The "new information" AMTI gleans from those Virginia pleadings is that both AMTI and Overlook are currently relying on the terms of the May 1996 Teaming Agreement and are currently seeking to enforce those terms against one another. Such information does not contradict the ODRA's conclusion in the F&R that the Teaming Agreement had been superseded, that is, overtaken by a series of events, including withdrawals and additions of team members, some of whom were not signatories to the Teaming Agreement, and team role realignments.[7]

More importantly, AMTI's arguments are based on a false premise, namely that the linchpin of the F&R was a finding that no teaming agreement was in place between AMTI and Overlook. In fact, the existence or absence of a teaming agreement was **not** a critical factor in the original decision. This is evident from Footnote 23 of the F&R, which stated:

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

As stated earlier, the Teaming Agreement provided, *inter alia*, that the team members would each be allocated an ***equal share*** of the contract work, after deducting out work assigned to non-team members:

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

F&R Finding 6 and Finding 6 above. As one of three teammates, Overlook should have been allotted approximately one-third of the work volume, the same share AMTI and ISI were to have, after deducting out the insignificant amount of work that the one non-teammate (Zeta) was ultimately assigned (a single position). Overlook's work allocation within AMTI's BAFO -- a mere [Deleted] -- can hardly be said to have been authorized by the Teaming Agreement. Thus, AMTI's reliance on the Teaming Agreement is unavailing. If anything, the terms of the Teaming Agreement lend yet further support for the ODRA's findings regarding the unauthorized nature of AMTI's proffer of Overlook personnel and the foreseeability of Overlook's subsequent withdrawal from participation. It is now plain that AMTI's unilateral reduction of Overlook's role on the project controverted the express terms of the May 1996 Teaming Agreement as well as the language of Overlook's April 16, 1998 letter.

The second point raised by AMTI, namely, that the Contracting Officer was aware prior to award that Overlook's role had been reduced to that of a "minor" player for the GPS TAC procurement is of no consequence whatsoever. Ms. Harrelson had no knowledge of the above language of the May 1996 Teaming Agreement. Further, in her December 1998

affidavit, Ms. Harrelson indicates that, prior to contract award, she was unaware of the April 16, 1998 Overlook letter tying use of Overlook's revised rates to its receipt of "approximately 33%" of the work for each fiscal year.

The third point raised by AMTI, *i.e.*, that AMTI and Overlook were negotiating subcontract terms after contract award and that Ms. Harrelson was aware that the subcontract had not been finalized (facts stressed in AMTI's submissions of the IG Report and in its repeated references to the Harrelson affidavit) likewise would have no significance in terms of whether AMTI had authority to represent the availability of Overlook's key personnel as part of its BAFO, as that BAFO was structured. AMTI's BAFO literally represented a decimation of the share of work that was to be allocated to Overlook, not only in accordance with the terms of Overlook's April 16, 1998 letter[8] but in accordance with the terms and conditions of the very Teaming Agreement that AMTI would have the ODRA treat as the source of AMTI's authority. There can be no question that a subsequent parting of the ways between AMTI and Overlook was clearly "foreseeable," even if not inevitable. *See Ann Riley & Associates, Ltd., Reconsideration*, Comp. Gen. Dec. B-271741.3, 1997 U.S. Comp. Gen. LEXIS 299, 97-1 CPD ¶122 (March 10, 1997).

In fact, AMTI never came close to offering Overlook the one-third share it contemplated when it teamed with AMTI. It was nearly 4 weeks after contract award that AMTI seemingly agreed to make room on the project for the [Deleted] Overlook incumbent personnel, and its promises regarding expansion of the Overlook role under the GPS TAC contract were hardly definitive. *See* "FAA Summary," Finding 17 above. Although AMTI intended to use the critical key personnel of Overlook, it is apparent that AMTI never intended to pay the agreed price for their availability, *i.e.*, an equal partnership with the others on the AMTI Team in terms of the overall allocation of work on the GPS TAC contract. AMTI's attorneys, both in their August 5, 1998 letter to the ODRA as well as in their June 7, 1999 supplement to the present Motion, admits that AMTI proceeded unilaterally and without authorization from Overlook to drastically reduce Overlook's share of the work for purposes of the BAFO and that it did so as a "business decision" in order to win the contract award.

Although AMTI attempts to couch this unilateral action as one for the benefit of the "AMTI Team," it is clear that AMTI intended to "cherry pick" the four key Overlook personnel who it knew were needed to win the award and to discard the remaining Overlook employees, retaining their positions for itself.[9] *See* F&R, Finding 62. Although AMTI may have intended to use Overlook's four key personnel if they were still available after contract award, hoping that Overlook would tolerate AMTI's actions, AMTI had to know such actions created significant risk that Overlook would become unavailable as a subcontractor. Without informing the Government of the conditions under which Overlook had agreed to make such personnel available, AMTI effectively shifted the risk of Overlook's unavailability to the Government. Under such circumstances, a "bait and switch" could properly be said to have been consummated when Overlook ultimately decided during the June 29, 1999 meeting that it could not trust AMTI, that it would not

want to live with AMTI as its prime contractor for a 7 year period, and that it would rather find alternative business opportunities for its employees. *See* Finding 5.

The fourth point advanced by AMTI with its Motion for Reconsideration, concerns the Contracting Officer's statements after the issuance of the Administrator's decision,[10] as expressed in her September 28, 1998 e-mail. The record simply does not support the implication that AMTI would have the ODRA draw from Ms. Harrelson's e-mail, *i.e.*, that Overlook's role in securing the award for AMTI was only a minor one and that AMTI's misrepresentation of the availability of Overlook personnel for the project was thus immaterial. At the time of the protests, the Product Team made much of the fact that AMTI was the only offeror whose proposal satisfied the requirements for all of the key personnel categories. Indeed, the decision to "downselect" to, and further negotiate price with only a single source, AMTI, was made in May 1998, based on the technical superiority of AMTI Team proposal and on the fact that only the AMTI Team would provide technically qualified personnel for **each of the five categories**. F&R, Finding 55. Therefore, it hardly is decisive that Overlook's key personnel accounted on their own for satisfying only one of the five mandatory key personnel categories (that of Communications Engineer, Terrestrial).

Moreover, the participation of Overlook's two key Systems Engineers, Messrs. [Deleted] and [Deleted], in the GPS TAC procurement was far more significant than their merely filling a mandatory key personnel category. Those two Overlook employees were the AMTI Team presenters for two of the three Sample Tasks at the oral presentation, Tasks 1 and 3. F&R, Finding 41. Overlook's overall participation in the development of AMTI's responses for those two Sample Tasks accounted for 86%[11] and 89% of the total hours expended by the AMTI Team on those Sample Tasks. F&R, Finding 51. As the ODRA has previously found, Camber (the next highest rated firm) fared much worse than AMTI on those two specific Sample Tasks. F&R, Finding 46. The evaluators found Camber's "responses to Sample Tasks 1 and 3 were somewhat generic and did not demonstrate sufficient knowledge and understanding." Agency Response (AR), Exhibit 18, Evaluation Report, page 21. Had [Deleted] and [Deleted] been on the Camber Team rather than the AMTI Team, it is clear that it would have been Camber, not AMTI that would have been considered "technically superior."

The Contracting Officer's e-mail, which is being proferred by AMTI to denigrate the role of Overlook, states: "The sample task response cited in the evaluation report for excellence was mostly the work of Zeta, AMTI and ISI personnel." This statement is incorrect in several respects. First, the Evaluation Report did not cite any particular Sample Task response for "excellence." Although the response to Sample Task 2, the one primarily authored and presented by Zeta's [Deleted], is cited in the Evaluation Report as an example, the Report speaks well of all the responses presented on AMTI's behalf:

> **Overall** the [AMTI] **responses** were thorough, accurate, and demonstrated an in-depth understanding of the technical issues. **In every sample task response**, the offeror provided additional detailed information pertinent to the task to provide further evidence of technical knowledge. For example,

> the offeror's response to Sample Task 2 provided a comprehensive discussion of the special equipment to be used in performing the task, including a configuration diagram which identified the specific components and how they work together. In addition, the offeror provided numerous graphic examples of the kind of data and results the Government would be provided at the completion of the task. **The technical depth and breadth was consistently demonstrated in all presentations and surpassed all other offeror's responses.** * * *

AR, Exhibit 18, Evaluation Report, pages 23-24 (emphasis added). Furthermore, the terms "excellent," "very good," "good," "fair," and "poor" were only to be applied and were applied, in accordance with the Evaluation Plan, to the four evaluation Factors (Technical Knowledge & Understanding; Management Knowledge & Understanding; Key Personnel; and Risk). *See* AR, Exhibit 18, Evaluation Plan and Evaluation Report. AMTI was rated as "excellent" only on Factor 2, Management Knowledge & Understanding. *Id.*, Technical Evaluation Report, page 24.[12]

In addition, even in terms of Sample Task 2, other than Zeta, whose efforts accounted for 70% of the total time expended on that Sample Task, the AMTI Team member having contributed the most to developing the response was Overlook, **not** "ISI and AMTI," as the e-mail seems to suggest. Indeed, Overlook contributed twice as much effort as the other two firms combined (20% for Overlook versus 6% for ISI and only 4% for AMTI). AR, Exhibit 14 (AMTI Proposal), Viewcharts for Sample Task 2, Page 2.

The actions of the Contracting Officer in issuing a cure notice to AMTI after the June 29, 1998 Overlook "walk out," AR, Exhibit 43, also clearly indicate that, at the time of that notice, she had considered Overlook's presence on the project essential to the successful performance of the contract and AMTI's violation of paragraph H.2 of the solicitation (regarding the 12 month minimum requirement for non-substitution of designated mandatory key personnel) a condition endangering that performance. A cure notice threatening termination for default otherwise would have been entirely unjustifiable. Under such circumstances, any after-the-fact attempt to portray Overlook as merely a bit player in the overall scheme of the GPS TAC procurement cannot withstand scrutiny.

In truth, the record fully supports the ODRA's conclusions that Overlook's participation in the procurement on behalf of AMTI was critical to its having secured the contract award, and that AMTI's misrepresentation regarding the availability of Overlook's key personnel after award was a material one. Nothing submitted by AMTI in conjunction with its Motion for Reconsideration, or subsequently, persuades the ODRA that this conclusion was in error or that a reversal of the Administrator's Order would be mandatory or even appropriate.

Conclusion and Recommendation

For the foregoing reasons, the ODRA finds that AMTI's Motion fails to satisfy the applicable reconsideration standard. Accordingly, the ODRA recommends that the Motion be denied.

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

APPROVED:

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

[NOTE: See Supplemental Statement of the ODRA Director below.]

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Footnotes:

[1] Although counsel for Camber Corporation ("Camber") provided one response to the Motion for Reconsideration being addressed herein, Camber later withdrew from further participation in the case.

[2] Counsel for Information Systems & Networks Corporation ("ISN") participated in one telephone conference call relating to the Motion, but subsequently confirmed that ISN was no longer an "interested party" and would not participate further in the matter.

[3] There were two subsequent related protests filed by Camber under ODRA Nos. 98-ODRA-00102 and 98-ODRA-00109. The AMTI Motion for Reconsideration does not involve those protests.

[4] That application was the subject of a separate ODRA matter under ODRA No. 98-ODRA-98-4-EAJA.

[5] Camber's withdrawal was by the aforementioned letter of April 29, 1999. ISN's withdrawal was oral, during a telephone conversation between Richard C. Walters, Esq., the ODRA Dispute Resolution Officer for the protests, and ISN's outside counsel, Kenneth D. Brody, Esq.

[6] The ODRA has been delegated authority by the Administrator to, among other things, issue interlocutory orders that are not dispositive of a contested case. Delegation of Authority, July 29, 1998. Final agency decisions, such as the one currently at issue, are those of the Administrator.

[7] The Teaming Agreement of May 27, 1996 was originally intended to apply to a situation where Overlook was to be the team lead, with AMTI and ISI as major subcontractors. Zeta, which AMTI had identified in

its January 1998 proposal as an AMTI Team member, was never a signatory of that May 1996 Teaming Agreement. (F&R, Finding 5). Moreover, the team which had been established under the May 1996 Teaming Agreement subsequently was reconstituted not merely once, but twice, and there was no other teaming agreement or modification that covered the reconstituted team when it was to be headed by Rockwell Space Division ("Rockwell") and later Rockwell's successor in interest, Boeing Information Services, Inc. ("Boeing"). Significantly, neither Rockwell nor Boeing had ever executed a written teaming agreement of any sort with AMTI and Overlook. Further, when, in January 1998, Boeing opted to withdraw from the GPS TAC procurement altogether and it was decided among the remaining team members that AMTI would take over as team lead, no other or further teaming agreement was executed. Under those circumstances, the ODRA's observation that the May 1996 Teaming Agreement had long been superseded (F&R, page 66) was clearly reasonable.

All the "new information" may be said to signify is that when AMTI was substituted for Boeing as team lead, AMTI and the other remaining team members (Overlook and ISI) agreed that the original Teaming Agreement terms and conditions which all three had jointly developed a year and a half earlier for the Overlook Team would be adopted to apply to the new AMTI Team configuration. That concept seems to be consistent with the "FAA Summary" prepared by Overlook to document the events relating to the GPS TAC procurement. *See* Finding 15 above.

[8] We note that Overlook itself confirms that the above-quoted language of the April 16, 1998 letter was intended as a ***condition*** for the use of its revised rates as part of the BAFO. *See* Finding 7 above. Significantly, AMTI does not provide any "new information" discovered through depositions of Overlook personnel in the Virginia litigation and confines its focus to some, but not all, of Overlook's statements in the pleadings in that case. *Id.*. In this light, AMTI's complaint that the ODRA unfairly precluded it from taking depositions of Overlook personnel for purposes of its intervention in the Consolidated Protests (*see* Reed Smith Shaw & McClay March 26, 1999 letter at page 8, footnote 2) rings hollow.

[9] Notwithstanding its recent protestations that, as of June 29, 1998, it was prepared to offer Overlook as many positions as it wanted at the rates it was demanding, the letter of August 5, 1998 from AMTI's counsel to the ODRA paints an entirely different picture. Explaining why AMTI had only "bid five Overlook personnel," AMTI's counsel in that letter states:

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

As to the alleged unavailability of Overlook officials, AMTI fails to explain why it could not consult with either Mr. Sorrentino, Overlook's President, who was available after April 27, 1998, or with Mr. Roddy, Overlook's Vice President, who was available after May 4, 1998, before AMTI made its May 8, 1998 BAFO submission. *See* Finding 15 above.

[10] Ms. Harrelson's statements incorrectly refer to the "ODRA decision," even though the decision in question was that of the FAA Administrator. Another reference to "ODRA's decision" is found in a third brief e-mail submitted by AMTI, one dated September 29, 1998 from a Mr. Abe Tanenbaum of the FAA to Ms. Harrelson and others.

[11] F&R Finding 51 incorrectly shows a total Overlook participation for Sample Task 1 of 88%.

[12] With a score of [Deleted], AMTI was on the low end of the "excellent" range for that factor. In comparison, Camber received a score of [Deleted], which was at the high end of the "very good" range. *Id.*, Technical Evaluation Report, page 4. Clearly, that meager difference cannot account for or justify the Product Team's decision to "downselect" Camber and the others and to negotiate price on a single source basis with AMTI. Rather, as noted above, the "downselect" decision was based on the demonstrated "technical superiority" of AMTI. As the ODRA has found, Overlook's highly experienced key personnel figured heavily in providing AMTI with an edge, not only in terms of the evaluation of AMTI under Factor 3, Key Personnel, but also in terms of its evaluation under Factor 1, Technical Knowledge & Understanding, and Factor 4, Risk. F&R, Findings 41-47.

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Supplemental Statement of the ODRA Director

AMTI's Motion principally relies on the fact that a 1996 Teaming Agreement was in effect between AMTI and Overlook at the time of contract award. AMTI contends that the existence of the Teaming Agreement demonstrates error in the ODRA's Findings and Recommendation ("F&R"), requiring reversal of the "bait and switch" finding. AMTI's Motion asserts that the "decision was based on the ODRA's findings that AMTI did not have a teaming agreement in place with Overlook Systems Technologies, Inc. ("Overlook") and that AMTI refused to issue a subcontract to Overlook for all the positions demanded." Motion at 1.

AMTI's Motion misconstrues the rationale for the F&R and, more importantly, would have the ODRA ignore the terms of the very Teaming Agreement on which AMTI now relies. The ODRA found a "bait and switch" occurred because AMTI had acted unilaterally and without authority to drastically reduce Overlook's participation in the contract from 33% to [Deleted]%, with the foreseeable result that the Overlook personnel would not be available. At the same time, AMTI continued to proffer key Overlook employees to the Agency at unauthorized rates. Notwithstanding AMTI's assertions in support of its Motion, the existence of the Teaming Agreement neither authorized nor otherwise absolved AMTI's material misrepresentation concerning personnel who played a key role in the evaluation of AMTI's bid.

As the ODRA has found, the Teaming Agreement provided for an equal sharing of contract work volume among team members, with AMTI, Overlook and ISI each to receive a one-third share of the work. These terms only serve to confirm the foreseeability of what eventually occurred, *i.e.*, that AMTI's unilateral conduct would cause the relationship between AMTI and Overlook to disintegrate, and deprive the Agency of the services of a company whose high technical ratings and involvement had been instrumental in the Agency's decision to award the contract to AMTI in the first place.

The submissions made by AMTI in support of its Motion for Reconsideration provide no basis for altering our original conclusion that all of the elements of impermissible "bait and switch" have been satisfied in this case, namely: "(1) intentional or negligent

representation regarding the availability of key Overlook personnel; (2) foreseeability that the personnel would not be available; (3) government reliance on the representation; (4) materiality; and (5) failure to make the named individuals available after award." *See* F&R at 69.

/s/

Anthony N. Palladino