

33. The OPTIMUS Statement relates additional information regarding some difficulty OPTIMUS experienced in obtaining that data from PRC, purportedly because of OPTIMUS' and PRC's reliance on the earlier "understanding" that such data would not be necessary:

On August 5, 1998, the Contracting Officer contacted me and explained that she had spoken with her pricing analyst [probably Mr. Spiegel] and would indeed require corrections to the spreadsheets. Furthermore, she explained that the corrections were required by the next business day. I explained to her that the PRC Pricing Person had already departed for vacation based on my agreement with her (that the data would not be required). I explained to the Contracting Officer that I would do whatever I could and escalate this to PRC management and find someone to make the necessary changes. . . . After consultations with Mr. Dick Addi of PRC, Mr. Dougherty rushed to meet this new deadline. PRC forwarded a letter to Ms. Dyer explaining the error on August 5, 1998 and acknowledges that they used the wrong Labor Category in their July 31st submission.

34. It appears that the revised PRC data was provided by noon on August 6, 1998. This was not the end of discrepancies between the PRC and OPTIMUS proposals, however:

Prior to the final submission, a small variance due to rounding off was discovered by Mr. Dougherty and Ms. Davis between OPTIMUS's and PRC's numbers. This error was due solely to the differences in accounting software packages used by OPTIMUS and PRC. Since this error was less than \$[Deleted] over a five year period and we needed to get a response to Melda before noon, I decided to proceed with the submission of the revised cost proposal with these variances because I was led to believe that PRC's submission was not material.

OPTIMUS Statement, page 3.

35. One further error was made by OPTIMUS in its own July 31, 1998 submission. More particularly, in the July 31 revised cost proposal, OPTIMUS increased its direct labor rates for one labor category, Electrical Engineer. OPTIMUS' initial rate for that category, \$[Deleted]/hour, was based entirely on the rate for one individual, Mr. [Deleted]. For the July 31, 1998 submission, OPTIMUS included another individual in that category, Mr. [Deleted]. Mr. [Deleted]' rate was \$[Deleted]/hour. (Spiegel Statement, page 5). It had been OPTIMUS' intent to develop and use a weighted average labor rate for the Electrical Engineer category. Instead, OPTIMUS mistakenly added the two labor rates, and used the total of the two individuals' rates, \$[Deleted], as the Electrical Engineer rate. *Id.* This error was not drawn to OPTIMUS' attention at the time it was detected, and was first disclosed to OPTIMUS at the post-award debriefing on September 11, 1998. OPTIMUS Statement, page 6. It is likely that OPTIMUS would have discovered this error on its own had it prepared and submitted a revised Cost Exhibit 3 ("Development of Direct Labor Rates for First Year") to reflect the development of the revised Electrical Engineer labor rate. In this regard, the July 22, 1998 FAX transmittal from Ms. Dyer stated:

Any changes to the total price must be supported by the necessary Cost Exhibits 1 through 4.

AR, Exhibit 9, July 22, 1998 FAX, page 2. The OPTIMUS July 31, 1998 submission did not contain a revised Cost Exhibit 4. *See* AR, Exhibit 6, OPTIMUS July 31, 1998 Submission.

36. By letter dated August 12, 1998 to the offerors, Ms. Dyer indicated that no further changes to proposals would be accepted. *See* Chronology Timeline, Document 8.

37. On August 17, 1998, Mr. Spiegel submitted to Ms. Dyer a Report to Contracting Officers [sic] on July 31, 1998 Cost Proposals. OPTIMUS' cost proposal was evaluated as being substantially lower in amount than that of SCATS, both in terms of "most probable cost to the Government" at bid rates and "most

probable cost at ceiling rates." The evaluated cost differences between the two offerors for both SOWs for all five contract years were respectively \$[Deleted] at bid rates and \$[Deleted] at ceiling rates. AR, Exhibit 15, Appendix C. Nevertheless, the August 17, 1998 Report stated, with respect to OPTIMUS and one other offeror (not SCATS) that they (together with their proposed subcontractors) both "had enough difficulty complying with the relatively simple cost proposal instructions and preparing error-free proposals to raise doubts about their ability to perform the contractual work." AR, Exhibit 14, page 8. Mr. Spiegel, in his October 7, 1998 Statement of Chairperson, Cost Evaluation Team in Response to Protest of OPTIMUS Corporation, states that OPTIMUS' cost proposal was rated "inferior to any of the five other offerors."

38. On or about August 18, 1998^[1], OPTIMUS submitted to Ms. Dyer a Standard Form 33, Solicitation, Offer and Award, dated "7/31/98" which was signed by OPTIMUS' Ms. Davis. Appended to the Standard Form 33 was a copy of SIR Section H, with revised Section H.1 indirect expense ceiling rates. *See* Product Team Submission to ODRA of October 28, 1998, Chronology Document 9. This submission created considerable confusion with the Product Team, since the July 31, 1998 submission was to have signified the end of discussions for the procurement and the Contracting Officer's August 12, 1998 letter had indicated that no further changes to proposals would be accepted (Finding 32). OPTIMUS may earlier have had the impression that a re-submittal of H.1 ceiling rates was not essential and that the Product Team would not insist on a re-submittal to implement the intended OPTIMUS ceilings (which were to be 15% above the bid rates)(*see* Finding 18). Nevertheless, its July 7, 1998 Response to Question 8 did ask for permission to make a re-submittal of those ceiling rates (Finding 17), and the Product Team, in its July 22, 1998 letter to the offerors, specifically granted permission for that re-submittal to be made as part of any revised cost proposals on July 31, 1998. Indeed, the July 22, 1998 letter clearly instructed offerors that they were to advise the Product Team if they chose not to submit revised H.1 ceiling rates: "*If you are not revising the previously proposed ceiling rates, please state that you are not.*" Finding 21. OPTIMUS' July 31, 1998 submission did not provide revised H.1 ceiling rates, and, at the same time, did not state that the previously proposed ceiling rates were not being revised. *See* AR, Exhibit 6, OPTIMUS July 31, 1998 Submission.

39. The Contracting Officer's Chronology Timeline underscores the significance of the August 18 ceiling rate re-submittal:

The submission of that document by OPTIMUS was significant because (1) it would have raised the probable cost at ceilings by approximately \$[Deleted] and (2) it was submitted with a change which was not allowed (discussions were to be completed [*i.e.*, by July 31]).

40. The Chronology Timeline further relates that the Contracting Officer sought clarification from OPTIMUS as to whether it intended, by the August 18 submission, to withdraw its July 31, 1998 revised cost proposal or, instead, would stand by that earlier offer. By letter dated August 21, 1998, OPTIMUS stated that it did not intend a "new proposal", and confirmed that "the July 31 submission is our current offer," that OPTIMUS was not "withdrawing that bid." In the letter, it went on to say: "The changes that were made to H.1 during the first discussion [*i.e.*, the changes indicated by the Response to Question 8 of the July 7, 1998 questions]" were "not incorporated into the July 31, 1998 submission. [T]herefore, we recognize that the original exhibit H.1 submitted stands as our final offer." Product Team October 28, 1998 Submission to ODRA, Chronology Document 11.

41. On August 19, 1998, the Technical Evaluation Team submitted to the Contracting Officer both an Oral Evaluation Summary and a Past Performance Evaluation Summary with respect to the various offerors. In both instances, OPTIMUS was rated slightly higher than SCATS (4.7 versus 4.6 for oral presentations, and 3.8 versus 3.7 for past performance). AR, Exhibits 10 and 11. Section M of the SIR called for two of the four areas to be covered during oral presentations to be "understanding of performance uncertainties and risk" and "approach to risk management." Finding 1. Both OPTIMUS and SCATS were noted to possess major strengths and no weaknesses in any of the four areas being evaluated, including these risk related areas. In this regard, the Technical Evaluation Team's Oral Evaluation Summary states the following as to SCATS and its teammates/subcontractors Booz Allen & Hamilton and SAIC:

[Deleted]

AR, Exhibit 10, page 10 of 16.

42. In terms of past performance, SCATS itself received [Deleted] to [Deleted] ratings, while its two subcontractors, Booz Allen and Hamilton and SAIC received overall [Deleted] ratings. In this regard, the Past Performance Evaluation Summary contained the following information about the SCATS Team:

Prime: SCATS Overall score 3.7

[Deleted]

AR, Exhibit 11, page 3 of 10.

43. Ms. Dyer, as SSO, made a Source Selection Decision on August 27, 1998. In accordance with SIR Section M, Ms. Dyer ranked the six offerors by comparing them in pairs, and by "trading off the differences in capability, risk, and price between the members of each pair." In this manner, Ms. Dyer determined that SCATS ranked above all the others. OPTIMUS ranked [Deleted] overall. Even though SCATS' price proposal was significantly higher than the prices offered by others, it was still considered reasonable. Moreover, unlike any of the other offerors, SCATS was the only one with a proposal that did not evidence any major weakness. AR, Exhibit 16. As to OPTIMUS, Ms. Dyer made the following observations:

OPTIMUS was eliminated due to their unreliable cost proposal. The numbers in the Analysis Worksheet reflect relatively high capability and oral presentation scores. OPTIMUS had many technical strengths. The probable price for OPTIMUS was not the highest. However, they failed to follow the cost proposal preparation instructions. The failures were significant and numerous. I was particularly troubled that they did not appear capable of correcting the errors in some cases; after two rounds of questions and answers, the OPTIMUS team still exhibited inconsistencies. I concluded that their failure to follow the cost proposal preparation instructions or to correct errors indicates their inability to complete the effort correctly and on time. This indication is derived from the re-work required of OPTIMUS to submit a cost proposal upon which the Team could rely with confidence. * * * The errors that SCATS made in the first cost proposal are less significant than those made by OPTIMUS . . . and were corrected by SCATS. Especially in times of tight budgets, the FAA must be able to rely upon cost information when assigning tasks. * * * The business decision for the FAA is that SCATS is the best value.

AR, Exhibit 16, page 3.

44. On August 31, 1998, a contract award was made to SCATS, and Ms. Dyer telephoned OPTIMUS and the other unsuccessful offerors to advise them of the award. Contracting Officer's Chronology Timeline. By letter dated September 1, 1998, Ms. Dyer provided this notification to OPTIMUS more formally, and stated, among other things:

Your company had at least one major weakness which prevented our awarding the contract to your firm. We will give you a debrief, if you call within the next three days.

AR, Exhibit 9, Contracting Officer's Letter of September 1, 1998 to OPTIMUS.

45. A post-award debriefing was conducted with OPTIMUS on September 11, 1998. Chronology Timeline.

B. The Protest and Succeeding Events

46. By letter dated September 18, 1998, OPTIMUS, through its counsel, Douglas L. Patin, Esq. of Spriggs and Hollingsworth, filed a protest with the ODRA challenging the propriety of the award to SCATS. That award, according to OPTIMUS, was "flawed" in the following ways:

- FAA failed to comply with its own SIR by arbitrarily failing to select the best value offer in conformance with the SIR's evaluation criteria.
- FAA improperly introduced an undisclosed additional evaluation factor -- "Quality of Cost Proposal" -- into the source selection process, in violation of the SIR.
- Even assuming the legitimacy of using a "Quality of Cost Proposal" evaluation factor, FAA arbitrarily applied this new factor with respect to the OPTIMUS proposal, in violation of the "Fundamental Principles" espoused in the AMS.
- FAA misled OPTIMUS when it reported that cost proposal errors were not material and/or failed to communicate that the alleged cost proposal errors were significant deficiencies.
- FAA failed to comply with its own SIR, by failing to make a reasonable or "common sense" determination of the "responsibility" of the winning firm. See Section M.5 of the SIR: "Technically and Financially Capable."

OPTIMUS Protest Letter of September 18, 1998, page 2. OPTIMUS sought the imposition of a stay on the performance of the contract pending resolution of the protest. *Id.*

47. On September 23, 1998, the ODRA Director, Mr. Anthony N. Palladino, conducted a telephonic Preliminary Conference for the protest with the parties' representatives. In accordance with the ODRA's general practice, the parties were encouraged to engage in alternative dispute resolution ("ADR"), and the ODRA's Mr. William J. Sheehan was designated as the Dispute Resolution Officer ("DRO") for purposes of exploring resolution of the protest via ADR. Mr. Palladino advised that the matter would proceed immediately with adjudication under the ODRA's default adjudicative process in parallel to ADR and established a schedule for submission of the Product Team's Agency Report and OPTIMUS' comments with respect to that Response. A Protective Order was agreed upon, and the parties subsequently executed such an Order. During the Preliminary Conference, based on the Product Team's agreement not to argue "preclusion of remedies based on the passage of time," OPTIMUS withdrew its request for a stay.

48. The Product Team filed its Agency Report on October 7, 1998.

49. By letter dated October 8, 1998, Mr. Palladino advised the parties that the ODRA's Mr. Richard C. Walters had been designated the DRO for purposes of adjudication of the protest.

50. On October 19, 1998, after the ODRA's allowance of one extension of time, OPTIMUS filed with the ODRA its comments on the Agency Report. In the comments (hereinafter the "Comments"), OPTIMUS argues (1) that the Contracting Officer "did not conduct a proper best value decision" in that there purportedly was no explanation for why an award to SCATS was deemed "best value" when OPTIMUS' price proposal was more than \$[Deleted] less expensive; (2) that the Agency Report did not address the adequacy of discussions; and (3) that the Contracting Officer made an "irrational risk evaluation" in assessing the risks associated with an award to SCATS. In this latter regard, the Comments point to various aspects of the financial information contained in SCATS' proposal, as set out in Exhibit 4 of the Agency Report:

From the record it is clear that no consideration was given to the risk of awarding a \$22M contract over 5 years to a firm whose submitted financial statement shows only \$[Deleted] of revenue for fiscal year 1997, \$[Deleted] for fiscal year 1996, and

§[Deleted] for fiscal year 1995 (See Tab 4). [Deleted] See Note 10 to financial statement at Tab 4.

There is no risk analysis of an award to such a company. No analysis does constitute a rational risk analysis. This question is raised in the context of a risk analysis -- and not a responsibility determination.

Comments, page 3 (emphasis in original).

51. With the Comments, OPTIMUS requested a one-half day hearing to take up two matters with the Contracting Officer: (1) verbal discussions with OPTIMUS concerning the errors in the cost proposal; and (2) the Contracting Officer's best value analysis. The Product Team opposed this request, by letter of its counsel dated October 20, 1998. That letter also criticized the absence in the Comments of any response to "information in the Statement of the Cost Chair, detailing the numerous shortcomings of the OPTIMUS team cost proposal."

52. On October 20, 1998, Mr. Walters (hereinafter the "DRO") conducted a telephonic conference with the parties to discuss OPTIMUS' request for a hearing. In lieu of a hearing, the DRO tasked the parties with providing the ODRA with the following additional written submissions:

OPTIMUS was asked to provide a point-by-point response to the Statement of the Cost Chair, stating, with respect to each of the alleged errors in the OPTIMUS cost proposal, (1) whether it takes issue or agrees with the findings of the Cost Chair; (2) whether the error was brought to OPTIMUS' attention, how and by whom; and (3) what, if anything, OPTIMUS did to rectify the error. This response should be accompanied by supporting affidavit(s) and relevant documents.

The Product Team was asked to provide the following: (1) a statement as to whether the reservation language in Solicitation Sections L.8 and L.10 is standard solicitation language for the FAA or was special to the instant procurement; (2) a statement explaining any connection (nexus) between the work being procured and the kinds and/or extent of errors allegedly found in the OPTIMUS cost proposal that would justify a finding that OPTIMUS was unable to perform the work required under the contract; (3) a statement as to whether the Product Team believed a cost-technical trade-off analysis was required, in light of the differential in probable cost between the OPTIMUS and SCATS proposals -- if not, why not and if so, whether one was conducted, and the results of that analysis (Please also state whether the Product Team agrees with Mr. Patin's statements regarding the extent of that differential.); and (4) a chronological exposition of any discussions/communications of the Contracting Officer or other FAA officials with OPTIMUS regarding the alleged cost proposal inadequacies, and the substance of those discussions/communications, and a statement as to why the Product Team considers such discussions to have been adequate. As with the contractor's statement, to make a proper record, it is requested that the Product Team provide supporting affidavit(s) and relevant documents.

ODRA Status Conference Memorandum, October 20, 1998. The parties agreed to make these submissions by Tuesday, October 27, 1998. Responsive comments would be allowed by the close of business, Friday, October 30, 1998. *Id.* Thereafter, the DRO permitted a one business day extension for the submissions and responsive comments. With the ODRA's receipt of such comments on November 2, 1998, the record in this protest was closed.

TO PROCEED TO NEXT PAGE,

