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

Protest of Informatica of America, Inc.	)	
	)	
	)	ODRA Docket No.
	)	99-ODRA-00144
	)	
Under FAA Solicitation No. DTFA03-99-R-00020	)	

DECISION ON INTERVENOR'S REQUEST FOR STAY OF ADMINISTRATOR'S ORDER

The intervenor, Multimax, Inc. ("Multimax"), by letter of December 6, 1999, submitted a request ("Request") that the Administrator's Order of December 3, 1999 (the "Order") in the above captioned protest be stayed pending an appeal by Multimax. The Order, which had adopted the Findings and Recommendations of the Office of Dispute Resolution for Acquisition ("ODRA"), had directed the William J. Hughes Technical Center (the "Center") immediately to terminate the contract of Multimax for information technology ("IT") support services at the Center and to award an IT support services contract to the protester, Informatica of America, Inc. ("IAI"). On December 7, 1999, an appeal was filed by Multimax with the United States Court of Appeals for the District of Columbia Circuit, pursuant to 49 U.S.C. §46110. The Multimax Request states that it was made in accordance with Rule 18 of the Federal Rules of Appellate Procedure and the Local Rules of the District of Columbia Circuit, both of which require an appellant to seek a stay from the agency whose decision is being challenged before petitioning the Court for such a stay.

In its Request, Multimax had sought a ruling from the ODRA by close of business on December 6, 1999, because it had been informed that the Center intended to terminate the Multimax contract and have IAI commence performance of a new contract on the

morning of December 7, 1999. The ODRA conducted a status conference by telephone with representatives of Multimax, IAI and the Center on the afternoon of December 6, 1999. By Status Conference Memorandum ("Memorandum") issued that same date, the ODRA established a schedule for the filing of responses to the Request by December 7, 1999 and the issuance of a decision on the Request by December 9, 1999. In the Memorandum, the ODRA advised that it would be within the Center's discretion, and consistent with the Administrator's Order, to forestall taking the mandated termination and award actions, pending completion of the scheduled briefing and ODRA decision. Thereafter, on December 6, 1999, Center counsel advised the ODRA that the Center had reconsidered and would defer taking the mandated actions pending the ODRA decision on the Multimax Request.

Pursuant to the ODRA's schedule, both IAI and the Center filed their responses to the Multimax Request on December 7, 1999. The Center's submission purported to not take a position on the merits of a Multimax appeal,[1] and consisted solely of a Declaration of the Center's Director, Anne Harlan. In paragraphs 5 and 6 of her Declaration, the Center Director makes the following statements:

> 5. I take no position with respect to the merits of this appeal; however, while this appeal is pending, the Technical Center would prefer to keep the present contract with Multimax in effect, at least during the period from the present until the middle of January, 2000.
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> 6. We expect that the protestor, Informatica of America, Inc., will recruit the entire staff of personnel to perform the services called for under the contract. In effect, the only change would be to the management of the contract. The Technical Evaluation Team had raised serious concerns about the ability of Informatica of America, Inc. to manage a contract of this size and complexity. During the transition to the new millennium, we believe that continuing the contract with Multimax, who is now performing satisfactorily on the contract would minimize the Y2K risk to our mission.

[1] Notwithstanding the Center's statement that it takes no position on the merits of Multimax's appeal, the ODRA notes that the position of the FAA in this matter is that set forth in the Order of the Administrator.

Declaration of Anne Harlan, ¶¶5,6.

For the reasons set forth below, the ODRA finds that Multimax has not demonstrated or even alleged that irreparable harm will result from the lack of a stay. Further, it has failed to demonstrate a likelihood of success on the merits of its appeal. Moreover, the ODRA finds that the proposed stay would harm IAI as well as the FAA dispute resolution process and would be contrary to the public interest. Accordingly, the ODRA will not recommend to the Administrator that a stay be granted pending the completion of the appeal.

In the course of the briefing of this issue, Multimax and the Center raised the specter of a Y2K-related problem arising from a termination and award. As is more fully discussed below, the ODRA finds no factual basis in the record to support such concerns. Moreover, nothing in the record calls into question, let alone raises serious concerns about, IAI's managerial abilities. However, because: (1) the Agency has placed a high priority on Y2K compliance; (2) the ODRA is not in a position to evaluate the state of the Center's Y2K program and any indirect impact any change in contractors might have on that program; and (3) a change of contractors just before the end of the current year is not required in order to provide effective relief to IAI, the ODRA has recommended to the Administrator that the Order be modified to postpone briefly implementation of the specified remedy to allow the Center until Tuesday, January 18, 2000 to comply with the Administrator's mandate.

DISCUSSION

Neither the ODRA's Procedural Rule ("Rule"), the FAA's Acquisition Management System ("AMS"), nor the case decisions interpreting them directly address stays of procurement actions *after completion of a protest adjudication.* The closest analogy is the AMS provision regarding stays during the pendency of protests. The AMS states a policy and presumption strongly favoring continuing procurement activities while

protests are pending and requiring the finding of "compelling reasons" before the Administrator will order such stays:

> The FAA will continue procurement activities and, where applicable, will permit contractor performance (after award) pending resolution of a protest, unless the FAA determines there is a compelling reason to suspend or delay all or part of the procurement activities. For protests after award, the ODR may recommend suspension of contract performance. A decision to suspend or delay activities will be made in writing by the Administrator or his designee.

AMS § 3.9.3.2.1.6. The ODRA concludes that this clear AMS preference against stays militates even more strongly against stays sought after a matter has already been adjudicated and an order has been entered by the Administrator.

In *Crown Communications, Inc.*, 98-ODRA-00098 (Interlocutory Decision on Suspension Request), the ODRA made reference to the four factor test for allowing injunctive relief under the Administrative Procedure Act, 5 U.S.C. §551, *et seq*. ("APA"), in order to evaluate a stay request advanced by the protester, and to determine the existence of such "compelling reasons":

> In determining whether a preliminary injunction should be granted under the APA, the moving party must demonstrate (a) a likelihood that it will prevail on the merits; (b) that it will suffer irreparable injury if the injunction is not granted; (c) that the injunction will not cause substantial harm to other persons interested in the proceedings; and (d) that it is in the public interest (or at least not adverse to the public interest*). Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc*., 559 F.2d 841, 843 (D.C. Cir. 1977); *Virginia Petroleum Jobbers Association v. Federal Power Commission*, 259 F.2d 921, 925 (D.C. Cir. 1958).

Crown, supra. Because *Crown* involved a stay request filed at the beginning of a protest, the ODRA chose to de-emphasize the first factor, *i.e.*, likelihood of success on the merits, so as not to "pre-judge" the merits at too early a stage, and reduced the standard for that factor to one that requires only that a "substantial case" be presented:

> In reviewing whether "compelling reasons" exist to recommend a stay, it is neither necessary, nor in our view provident, to prejudge whether a protester has a probability of success on the basis of initial pleadings. This is particularly true in a bid protest context, where the stay issue will often

> be litigated before the agency report is filed. The protest document itself may be the only substantive pleading in the record. Indeed, as the Court in *Washington Metropolitan* noted, a "weakness of adherence to a strict 'probability' requirement is that it leads to an exaggeratedly refined analysis of the merits at an early stage in the litigation." *Washington Metropolitan, supra* at 844. The ODRA standard for suspension shall be determined on a case-by-case basis by looking at a combination of factors including: (1) whether the protester made out a substantial case; (2) whether a stay or lack of stay is likely to cause irreparable injury to any party; (3) the relative hardships on the parties; and (4) the public interest. Greater emphasis will be placed on the second, third and fourth prongs of the analysis. This approach is consistent with that of the Court of Appeals for the District of Columbia Circuit, and provides for a flexible analysis "under which the necessary showing on the merits is governed by the balance of equities as revealed through an examination of the other three factors." *Id*.

Id.

However, where, as here, the matter already has been fully adjudicated to a final decision by the Administrator, there is no reason to de-emphasize the first factor of the traditional APA test for providing relief of this kind. Accordingly, in deciding whether to recommend stays of ordered Agency corrective action, the ODRA will require that the moving party demonstrate (a) a likelihood that it will prevail on the merits; (b) that it will suffer irreparable injury if a stay is not granted; (c) that the stay will not cause substantial harm to other persons interested in the proceedings; and (d) that a stay is in the public interest (or at least not adverse to the public interest*). Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc*., 559 F.2d 841, 843 (D.C. Cir. 1977); *Virginia Petroleum Jobbers Association v. Federal Power Commission*, 259 F.2d 921, 925 (D.C. Cir. 1958).

Likelihood of Success on the Merits

In its Findings and Recommendations, the ODRA concluded that that the Center improperly "departed" from the Solicitation's evaluation criteria, abandoning the "best value" scheme and effectively making an award to the lowest price/technically acceptable offeror. The Multimax Request attempts to challenge this conclusion by taking issue with particular findings and alleging that improper inferences were drawn.

For example, Multimax indicates that its appeal will take issue with the ODRA's conclusion (at page 31 of the decision) that Mr. Dennis Steelman, the TET Chair and IPT Co-Chair, "unilaterally, and without a rational basis, re-worded the TET report, systematically eradicating the previous conclusion that Informatica's proposal was technically superior to that of Multimax."[2] This conclusion, it contends, was "erroneous" and was purportedly based on an incorrect "interpretation of the events that occurred on September 8, 1999, as reflected in e-mail messages and accompanying documents transmitted between Mr. Steelman and his IPT Co-Chair, Ms. Anne Marie Ternay." Multimax goes on to state:

> As discussed in Paragraph 24 of the Findings of Fact, Ms. Ternay forwarded via e-mail the latest version of the TET report ("Afterlegal.doc") to Mr. Steelman. That version of the TET report reflected Informatica's adjusted score based upon the re-evaluation of Factor 5 and stated that "[i]t is the conclusion of the TET that the submissions by INFORMATICA demonstrate that it is the marginally superior offeror.

Multimax December 6, 1999 letter at 4. Multimax's allegation misstates the facts and misses the point. Paragraph 24 addressed "an e-mail message dated September 3, 1999 at 4:42 P.M. **from Mr. Steelman to Ms. Yak and Ms. Ternay"** and an attached "document still dated August 26, 1999" that the e-mail identified as "revised findings of the TET." It was Mr. Steelman who forwarded the revised TET report to Ms. Ternay – not vice versa. Moreover, the point is that, as of September 3, 1999 – 5 days before she

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[2] The ODRA did not state or imply by the term "unilaterally" that Mr. Steelman did not ultimately convince the other TET members to sign the final TET Report or that they signed it "without reading and agreeing with its contents" or that they "were coerced into signing the report over their objections." Nor did the ODRA state, imply or mean that Ms. Ternay's signature on the final Award Determination document was anything but genuine. Rather, the record supports the ODRA's conclusion that the revised draft TET Report of September 8, 1999 was Mr. Steelman's product. More specifically, this conclusion is supported by the content of the e-mail message forwarding that draft and the fact that he forwarded it to Ms. Ternay, the Contracting Officer, Michael Ward, Center Counsel, Mr. Drew, Ms. Yak and Mr. Filler, the program representatives:

> Does the entire TET sign this or Just Your'es (sic) truely (sic) as chair. I have also included a somewhat more polished version of the TET findings.

IAI Comments, Tab 8, e-mail from Dennis Steelman on 09/08/99 04:23 P.M. Apparently, none of these individual addressees participated in drafting the "more polished version," which the ODRA has found went far beyond wordsmithing, changing altogether the TET's initial findings as to which offeror was most technically qualified. *See* Finding 26.

transmitted her draft Contract Award Recommendation and Determination to Mr. Steelman, Ms. Ternay was made aware of the TET's conclusion that, based on its re-evaluation of the IAI proposal, IAI had gone from being the "technically superior offeror" to being only the "marginally superior offeror." Nevertheless, the language she proposed in her draft Award Recommendation for the Price/Technical Trade-off recognized that IAI's "margin" of "superiority" was still sufficiently "significant" that it would have to outweigh the 4% price differential, given the Solicitation's "best value" evaluation criteria and heavy emphasis on technical merit over price.

Multimax also misses the point in attacking Findings Paragraph 25, alleging an "apparent" ODRA "inference" and contending that the supposed "inference" was "erroneous":

> The ODRA decision at Paragraph 25 then discussed a draft version of a different document, namely, the Contract Award Recommendation and Determination ("SSO.it.doc"), which Ms. Ternay forwarded via e-mail to Mr. Steelman on September 8, 1999. The ODRA ***apparently inferred*** from this draft that Ms. Ternay had revised an earlier draft of the source selection document to reflect the revised conclusions of the TET, as shown in the September 3, 1999 draft TET report discussed above. ***The ODRA's inference, however, was erroneous.***
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> * * *
>
> The more reasonable inference, as indicated in Mr. Steelman's Fifth Declaration and as would be confirmed by both Mr. Steelman and Ms. Ternay had the ODRA made an appropriate inquiry or held a hearing, was that Ms. Ternay was simply forwarding to Mr. Steelman the latest version of the document to be substantively revised to reflect the TET's most recent conclusions (*i.e.*, that Informatica was marginally superior rather than "the technically superior offeror" as stated in the September 3 version of the TET report.)

Id., pages 5-6 (emphasis supplied).

Findings Paragraph 25 does not convey an ODRA inference that there was an earlier version of the Contract Award Recommendation and Determination document, entitled "SSO.it.doc". Indeed, contrary to Multimax's assertion, the record does **not** contain a "***prior version"*** of that document in existence before the re-evaluation of Factor 5. The

record does contain a document entitled "Recommendation.doc" that had been transmitted by August 31, 1999 e-mail from Mr. Steelman to Ms. Yak, and that document did show Multimax tied with RGII at an overall score of 87. *See* IAI Comments, Tab 8, e-mail from Dennis Steelman on 8/31/99 09:57 A.M. However, that document did not contain the following critical "Price/Technical Trade-off" language:

> Price/Technical Trade-off: The solicitation made it abundantly clear that this is a "best value" acquisition in which the combined technical factors were more important than price. Since INFORMATICA was the highest technically rated vendor by a significant margin, the team compared the relative merits of INFORMATICA's and Multimax's who was the lowest priced offer at $22.9M and tied third[3] overall technically. As demonstrated above, the team [*i.e.,* the IPT] believes that given the solicitation's emphasis on technical superiority over price, the qualitative differences between the two companies fully justifies paying a 4% premium for INFORMATICA over Multimax.

The above-quoted "Price/Technical Trade-off" language first appeared in the document that Ms. Ternay sent to Mr. Steelman on September 8, 1999. There is no support whatsoever in the record for the allegation by Multimax that someone other than Ms. Ternay drafted the September 8, 1999 Contract Award Recommendation and Determination document (*see* Multimax letter of December 6, 1999 at page 8). Accordingly, to the extent the ODRA "inferred" that Ms. Ternay had concluded that the evaluation criteria still mandated the selection of IAI, that inference was a reasonable one, based on the documents in the record.

Moreover, as Multimax points out, Mr. Steelman's Fifth Declaration speaks of a "debate" among himself, Ms. Ternay, Ms. Yak and Mr. Filler concerning the "best value" determination. Mr. Steelman's declaration does not say which of the participants took which position and when. All it reflects was the ultimate conclusion: "The decision that the Contracting Specialist and I reached was that there was insufficient technical superiority to warrant almost a million dollars over the life of the contract." Fifth Declaration of Dennis A. Steelman, ¶6. To support that conclusion, Mr. Steelman did not merely suggest different language for the Award Determination that would take into

[3] In fact, in the revised TET findings transmitted by Mr. Steelman on September 3, 1999 (*see* Finding 24), Multimax was tied for second place, with a score of 88.

account the fact that the re-evaluation of Factor 5 had reduced the margin of technical difference, rendering IAI only "marginally technically superior." Instead, he re-drafted the TET Report entirely "with the result in mind" (*see* Fifth Declaration of Dennis A. Steelman, ¶7), thereby reducing IAI to "technically equivalent" status, so that the 4% price differential would not have to compete with any degree of evaluated technical superiority.

Mr. Steelman's approach involved blurring the distinction between the TET Report and the Contract Award Determination and re-drafting the TET Report so that it would allow award to the company that he knew was the low bidder. This was completely contrary to the Source Evaluation Plan[4] and the Solicitation's evaluation scheme, which contemplated that technical evaluation would be done independently of price considerations. *See* Finding 4.

The Multimax Request also baldly asserts that

> the ODRA improperly substituted its technical judgment for that of the TET Chairman and members regarding the comparability, in terms of size and complexity, of Informatica's previous prime contract/subcontract efforts to the overall information technology support requirements set forth in the SIR.

Multimax letter of December 6, 1999 at 12. If Multimax is referring to the ODRA's interpretation of Solicitation Amendment No. 2 regarding evaluation of past performance under Factor 5, for the reasons enunciated in the Preliminary Finding and Interlocutory Order, the ODRA actually ruled that the interpretation provided by the Center was incorrect, from a legal – not a technical – perspective. Furthermore, as Multimax itself notes, the ODRA's conclusion regarding the abandonment of the "best value" evaluation scheme in favor of selecting the "low price/technically acceptable" offeror was founded, in part, on the exchange of e-mails and documents on September 8, 1999. Those documents evidenced acknowledgment on the part of both IPT Co-Chairs that, even with

[4] The Source Evaluation Plan contemplated that TET members may assist with the review of the cost/price proposals only *after* completion of the TET report. The Plan stated, *inter alia*: "*After* the technical evaluation is completed, a written report will be submitted to the Contracting Officer. Members of the Technical Evaluation Team may *then* assist in reviewing the cost/price proposals." (Emphasis supplied).

the reduction in spread caused by the Factor 5 re-evaluation, the award would still have to go to IAI based on the revised TET findings and the evaluation language of the Solicitation. Mr. Steelman has effectively conceded that he recognized not only that the Contract Award Recommendation and Determination document would have to be revised, but that the TET Report itself would have to be reworked, in order to render through those documents "the most compelling presentation" in terms of supporting an award to Multimax. *See* Fourth Declaration of Dennis A. Steelman, ¶3.

Finally, Multimax asserts that an appeal will be sustained due to the ODRA's failure to conduct an evidentiary hearing in this case. Multimax's position ignores the fact that there was no requirement that the ODRA hold one. The ODRA's Rule provides that, where a hearing is requested, the ODRA will hold one, unless the ODRA finds that no party will be prejudiced by the lack of a hearing. In this regard, 14 C.F.R. §17.37(g) states:

> (g) The DRO or Special Master may conduct hearings, and may limit the hearings to the testimony of specific witnesses and/or presentations regarding specific issues. The DRO or Special Master shall control the nature and conduct of all hearings, including the sequence and extent of any testimony. Hearings will be conducted: (1) where the DRO or Special Master determines that there are complex factual issues in dispute that cannot adequately or efficiently be developed solely by means of written presentations and/or that resolution of the controversy will be dependent on his/her assessment of the credibility of statements provided by individuals with first-hand knowledge of the facts; or (2) upon Request of any party to the protest, unless the DRO or Special Master finds specifically that a hearing is unnecessary and that no party will be prejudiced by limiting the record in the adjudication to the parties' written submissions. All witnesses at any such hearing shall be subject to cross-examination by the opposing party and to questioning by the DRO or Special Master.

The ODRA's Website Guide (http://www.faa.gov/agc/DAPTXT.HTM) indicates that hearings will be the norm for the adjudication of contract disputes. This conforms to the general practice for other Government agencies, where contract disputes are tried before boards of contract appeals or the United States Court of Federal Claims. As to bid protests, however, the ODRA's practice of not automatically holding a hearing in every

bid protest is consistent with the long-standing bid protest procedures of the General Accounting Office, where protest hearings are not a matter of right and are not conducted in most cases. Significantly, in this case, none of the parties – including Multimax – ever requested a hearing. Additionally, there were no credibility issues to be determined here, and, although the record in this protest was quite voluminous, the protest did not involve matters of such technical complexity that the DRO here necessarily should have *sua sponte* scheduled a hearing.

In the ODRA's view, Multimax has failed to demonstrate any factual or legal error in the Findings and Recommendations, let alone any that would support a finding that it is likely to succeed on the merits of its appeal.

Irreparable Harm to Multimax

In addition to demonstrating a likehood of success on the merits, a movant such as Multimax must demonstrate that it will suffer irreparable harm in the absence of the requested stay. Multimax does not even attempt to meet this burden and utterly fails to indicate what harm, if any, it will suffer in the absence of a stay. Rather, Multimax merely asserts in Section B of its Request that "the granting of a stay will not irreparably harm any party". Multimax references the declaration of Gary Schumaker for the proposition that "the granting of a Stay will ensure that the contract continues to run smoothly without interruption, particularly for the Y2K timeframe." These assertions are plainly inadequate to satisfy the high burden placed on a party seeking relief of this kind.

Substantial Harm to Other Interested Persons

Multimax seeks to argue that the Center should not be required to take any corrective action until an Appellate Court has reviewed this matter. Multimax fails to discuss in any way the hardship that would result if IAI is unable to obtain prompt effective relief, after being successful in a full and fair adjudication. Nor does Multimax discuss the impact of such a stay on the FAA Administrator's dispute resolution process. In the ODRA's view, it is critical to the viability of an agency-based process that private parties who succeed in litigation against the Agency promptly obtain the relief ordered by the Administrator.

Multimax suggests no rationale to justify making an exception in this instance, and the ODRA can find none.

The Public Interest

Multimax attempts to argue that the public interest would be served by not disrupting the current contract arrangement. In fact, the public interest is best served by the prompt implementation by the Agency of the corrective action mandated at the completion of the full and fair adjudication of this protest. Based on the failure by Multimax to demonstrate a likelihood of success on the merits or irreparable harm that it would suffer in the absence of the stay, there is no basis for the ODRA to conclude that there is significant risk to the Agency or the public from the immediate implementation of the mandated corrective action. Under the circumstances here, the issuance of a stay would be contrary to the public interest.

MODIFICATION OF THE ORDERED REMEDY

As noted above, the Center has submitted a declaration from the Center's Director stating, *inter alia*, that "during the transition to the new millennium, we believe that continuing the contract with Multimax, who is now performing satisfactorily on the contract, would minimize the Y2K risk to our mission." Notwithstanding this assertion, the record in this case suggests that the transition of the contract from Multimax to IAI should be minimally disruptive. The ODRA reaches this conclusion based on: (1) the fact that IAI has already recruited the "entire staff" currently performing the contract on behalf of Multimax, personnel who had previously been employees of IAI and its proposed subcontractor, Federal Data Corporation ("FDC") (*See* Declaration of Anne Harlan, ¶5; Declaration of Michael K. Headley Under 28 U.S.C. §1746; Declaration of Harry Headley Under 28 U.S.C. §1746, ¶¶8-10); and (2) the fact that the management of the contract for IAI would consist of the same individuals who had managed the same IT support services work for the Center from 1997 until September 30, 1999, when Multimax obtained the contract (*See* Declaration of Harry Headley Under 28 U.S.C. §1746, ¶¶1-6).

The statement in the Declaration of the Center Director that "the Technical Evaluation Team had raised serious concerns about the ability of Informatica of America, Inc. to manage a contract of this size and complexity" is not supported in the record. IAI's score on the "Management" evaluation factor for this procurement – Factor 1 – was a 91, "Excellent."

The ability to deal with Y2K related issues was not a stated evaluation criteria in the Solicitation and was not addressed as an issue in the protest or in the resulting ODRA Findings and Recommendation. Although there is nothing in the record that would justify an expression of concern about the management abilities of Informatica, the ODRA recognizes that the Center is wary of replacing contractors so close to the end of the current calendar year. As indicated above, because: (1) the Agency has placed a high priority on Y2K compliance; (2) the ODRA is not in a position to assess the state of the Center's Y2K program or what indirect impact a change of contractors at this juncture might have on that program; and (3) a change of contractors just before the end of this year is not required in order to provide effective relief to IAI, the ODRA has recommended to the Administrator that the remedy set forth in her Order be modified slightly. More specifically, the ODRA has recommended that the modified Order require that the Multimax contract be terminated and that Informatica be awarded a contract to begin performance by no later than Tuesday, January 18, 2000.

CONCLUSION

Inasmuch as Multimax has failed to satisfy the applicable standards for obtaining a stay of the Administrator's Order, the ODRA will not recommend that the Administrator grant a permanent stay pending completion of the Multimax appeal. However, for the reasons stated herein the ODRA has recommended that the Administrator modify the Order of December 3, 1999.

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

December 9, 1999