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

FINDINGS AND RECOMMENDATIONS

Matter: **Protest of E&I Systems, Inc.**
Under Solicitation No. DTFA03-99-R-00025

Docket No.: **99-ODRA-00146**

Appearances:

For Protester, E&I Systems, Inc.: Robert G. Fryling, Esq., and Edward J. Hoffman, Esq., Blank Rome Comisky & McCauley, LLP

For the Intervenor, Hi-Tec Systems, Inc.: Michael E. Veve, Esq., Lasa, Monroig & Veve

For the Agency Product Team: James J. Drew, Esq.

I. Introduction

This Protest involves an award made to Hi-Tech Systems, Inc., ("Hi-Tec") on September 29, 1999, pursuant to Solicitation No. DTFA03-99-R-0025 ("Solicitation") for the automated project planning and engineering support services contract at the FAA's William J. Hughes Technical Center ("Center") in Atlantic City, New Jersey. The Protester, E&I Systems, Inc. ("E&I"), was the incumbent contractor and an unsuccessful offeror on the Solicitation. The Solicitation involved a base contract period of two years, and three one-year options. The Solicitation calls for award to the offeror whose proposal is determined to be the best value to the Government, considering both technical merit and price.

The Protest alleged that the Center failed to evaluate offerors in accordance with the evaluation criteria set forth in the Solicitation; specifically, the third technical evaluation factor, which required offerors to provide their "prime corporate experience in performing the same or similar work as described in the [Statement of Work ("SOW")]." As a remedy, E&I requested a re-evaluation of Hi-Tec's proposal in accordance with the stated evaluation criteria, a new best value determination, and award to the offeror that best meets the new best value determination.[1]

The Center's response contended that E&I's protest was untimely because: (1) the Solicitation language "prime corporate experience" was patently ambiguous; (2) E&I's interpretation of the language "prime corporate experience" was unreasonable; (3) the Contracting Officer's original determination of "best value" was reasonable and supported by substantial evidence; and (4) in any event, a technical *re*-evaluation using E&I's interpretation of "prime corporate experience" and a *re*-determination of best value by the Contracting Officer did not change the decision to award to Hi-Tec.

For the reasons set forth herein, the ODRA recommends that E&I's Protest be denied. Although the language "prime corporate experience" was latently ambiguous and E&I's reasonable interpretation should have governed the initial technical evaluation, the record shows that the technical *re*-evaluation, which used E&I's interpretation of "prime corporate experience", as well as the subsequent *re*-determination of best value, was supported by substantial evidence, was not irrational, and did not change the original award decision. Thus, we find that E&I effectively suffered no prejudice as a result of the Center's initial, albeit improper, evaluation.

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[1] In its Comments, filed on November 19, 1999, E&I also requested an Order prohibiting the Center from issuing any more task orders to Hi-Tec until a proper evaluation was made, as well as lost profits for the improperly awarded delivery order and proposal/protest costs. We view E&I's request pertaining to task orders to be an untimely request for suspension. Under our regulations, in order to be considered, a request for suspension of contract performance must be filed with the initial protest. 14 C.F.R. § 17.15(d). As for E&I's request for lost profits, we note that the GAO has found that even where a protester has been wrongfully denied award of a contract, there is no legal basis for allowing the recovery of lost profits. *CFM Equipment Company – Reconsideration*, B-251344.2, 1993 U.S. Comp. Gen. LEXIS 808; 93-2 CPD ¶ 134. Even though the ODRA has broad discretion under 14 C.F.R. §17.21 to recommend remedies for a successful protest, *i.e.*, discretion which arguably could include a payment for lost profits, we need not reach this issue here, since we are recommending that the protest be denied.

II. Findings of Fact

1. The Solicitation was to acquire automated project planning and engineering services for the ATC Engineering and Test Division, which included schedule analysis, database maintenance, update data, format conversions, operation and use of scheduling applications on the local area network (LAN), logic revision and control, Facilities Control Office (FACO) support, Voice Switching and Control System (VSCS)/VSCS Training and Backup System (VTABS) Test Support, etc. The Solicitation contemplated the award of an indefinite delivery, indefinite quantity, 2-year base (with three 1-year option periods) time and materials type contract. The procurement was set-aside exclusively for Socially and Economically Disadvantaged Businesses ("SEDBs").[2] Agency Report ("AR"), Tab 1.

2. The Solicitation specifies that during the term of the contract, the contractor shall furnish and make available all professional, technical, and support labor, needed to accomplish the requirements set forth in Part I, Section C, Statement of Work. In addition to supporting the ATC Engineering and Test Division (ACT-200), the contractor was to provide engineering services for other FAA organizations that support ACT-200 and any organizations that reside at the Center, at FAA Headquarters or at various **prime contractor** and support contractor facilities. AR, Tab 2, Solicitation, page 4.

3. The automated project planning and engineering services specified in Section C included, but were not limited to:

a. **Schedule Analysis**. The contractor shall provide schedule analysis along with related services and products as required. The contractor shall

[2] Under Section 348 of Public Law 104-50, the 1996 Department of Transportation Appropriations Act, the Congress expressly made the Small Business Act inapplicable to the FAA's Acquisition Management System ("AMS"). Even so, the AMS calls for the identification of contracting opportunities for small businesses and SEDBs as a matter of agency policy. See AMS §3.2.1.3.4.

analyze the schedule on a monthly basis using the Critical Path Method (CPM), or other approved FAA methods. The contractor shall provide the results of such analysis to the FAA. As part of these results, the contractor shall provide identification and tracking of on-schedule performance, as well as identification of milestone slippage. The contractor shall also identify probable future programmatic costs or schedule problems based upon actual performance analysis.

b. **Database Maintenance**. The contractor shall update the schedule database based on project requirements. These requirements will dictate the frequency of these updates to the contractor. Generally, the **prime contractor's** development schedule is usually updated on a monthly basis; however, there may be periods of heavy test activity during which the **prime contractor's** test schedules are updated daily or weekly.

c. **Update Data**. The FAA will provide these updates to the contractor. The updates may take one or several forms: hardcopy listings, tables in magnetic media or oral instructions from FAA personnel. If data entry services are required, the contractor shall provide such services.

d. **Format Conversions**. When required, the contractor shall provide services to convert data from one magnetic format to another.

e. **Operation and Use of Scheduling Applications on the LAN**. The scheduling applications presently in use are Primavera P3 and Microsoft Project. The contractor shall use these applications, and others, as designated by the FAA, to provide reports and other schedule products.

f. **Logic Revisions and Control**. The contractor shall develop and revise the network logic schedule, based upon inputs from the COTR or designated representative. The contractor shall keep the network logic under strict configuration control because the networks will be large and complex.

g. **Facilities Control Office (FACO) Support**. The contractor shall provide a trained point-of-contact for the new Facility Automation Network (FAN). The FAN system request initiator requests VSCS/VTABS system time and lab resources for the ACT-234 test team, resolves lab and system usage conflicts, and, communicates FAN system/lab use confirmation/charge numbers to the test team. This activity enables us to schedule use of the VSCS/VTABS system and the WJHTC labs through FACO, and enables FACO to precisely calculate the annual ACT-234 portion of the WJHTC system/lab charge amount.

h. **VSCS/VTABS Test Support**. The contractor shall participate as an ACT-234 test team member providing VSCS/VTAB's test support. This

test support includes air traffic position operator support during VSCS and VTABS testing. In addition, this includes observing system performance and citing anomalies by writing VSCS Test Program Technical Reports (PTRS).

i. **Projects Supported**. The contractor will provide some or all of the above engineering services to the following projects: TVSR [Terminal Voice Switch Replacement], NIMS [NAS Infrastructure Management System], DSR [Display System Replacement], VSCS/VTABS [Voice Switching and Control System/VSCS Training and Backup System], HOCSR [Host/Oceanic Computer System Replacement], Y2K [Year 2000] and CMM [Capability Maturity Model]. The Government may add or subtract from this list as necessary to satisfy FAA Mission needs.

AR, Tab 2, Solicitation, page 4.

4. Section L.3 of the Solicitation describes how proposals are to be submitted by Offerors. It states, in part, "[t]he evaluation of proposals will be conducted on the basis of the information contained in the proposal. The Government will not assume that an offeror possesses any capability not specified in the proposal." AR, Tab 2, Solicitation page 27.

5. Section M of the Solicitation sets forth the evaluation factors for award. Clause M.2 states:

> The Government anticipates a single award to the responsible offeror whose proposal conforms to the solicitation and is determined to be the best value to the Government, considering both technical merit and price. The combined technical criteria are considered more important than the price criteria. Accordingly, the Government reserves the right to award on other than the lowest price. As proposals become more equal in their technical merit, the evaluated price becomes more important. The price proposal will be evaluated and determined by adding the total proposed price for the base period and all of the optional periods.

AR, Tab 2, Solicitation, page 28.

6. Section M.2 also identifies the following technical factors that would be used to evaluate technical proposals and listed them in descending order of importance:

1. Personnel: The offeror shall provide resumes for each individual proposed to work under this effort, that clearly evidences the minimum levels of education and professional/technical experience as cited in SOW and represent the offeror's capability to perform the work. Each resume is limited to a total of two pages …. The offeror should provide letters of intent for individuals not currently employed by the firm.

2. Technical Approach: The offeror shall address in sufficient detail the technical approach that shall be used to support the needs, programs, and objectives defined in the SOW tasks, in a timely manner. Page limit shall be 10 pages.

3. *Corporate Experience*/Past Performance: The offeror shall provide the extent and depth of its *prime corporate experience* in performing the same or similar work as described in the SOW. This information should include points of contact and a description of projects similar in scope, size, and complexity to the tasks under this SOW. Page limit shall be 10 pages.

AR, Tab 2, Solicitation, page 28 (emphasis added).

7. The technical evaluation plan ("TEP") provided that technical evaluation team ("TET") members would examine each proposal in sufficient detail to ensure a thorough understanding of the approach presented and the relative merits of each. AR, Tab 3, paragraph 4.1. Each proposal would be evaluated in detail using specified Technical Rating Sheets. The TEP instructed the team members to measure each proposal against the criteria set forth in the solicitation and rank the proposals. For each proposal, a narrative assessing each proposal would be prepared and a rating assigned based on the descriptions below. The rating would be justified by the narrative, and an overall rating would be assigned "by simple compilation of the ratings of all factors."

Excellent	90 – 100	Outstanding in essentially all respects; represents the best that could be expected of any contractor. None or very few minor deficiencies, and none pertaining to the stated performance requirements
Good	80 – 89	Cannot be considered outstanding but is above average expected from any qualified contractor. Lacking in one of three areas of feasibility, manageability, or practicality. Minor deficiencies, which would require correction and/or expansion before the contractor would be permitted to begin work.
Average	70 – 79	Satisfactory; represents the norm from a qualified contractor. Lacking in the areas of feasibility, manageability, or practicality. Several deficiencies including at least one that risks causing difficulty in performance.
Marginal	60 – 69	Less than satisfactory; below the standard expected from a qualified contractor. Lacks reasonableness, tractability and practicality. Many deficiencies. Substantial revision would be required to perform at an average or above level.
Poor	0 – 59	Unacceptable. Many deficiencies. Contractor would have to completely revise proposal, tantamount to submitting a new proposal.

AR, Tab 3, paragraph 4.2.

8. The Technical Rating Sheets specified how the "Overall Technical Rating" would be determined by weighting the three evaluation factors as follows: Personnel (50%); Technical Approach (30%); and Corporate Experience/Past Performance (20%). AR, Tab 3, Attachment 2.

9. On September 20, 1999, the Chairperson of the TET provided to the Contracting Officer the results of the technical evaluation in a report signed by all the evaluators. The TET's conclusion was that E&I was the technically superior offeror with an overall score of 96.17, while Hi-Tec had a score of 91. The TET report indicated that the only meaningful distinction between E&I and Hi-Tec was

in Factor One, Personnel, in which E&I received a rating of Excellent and Hi-Tec received a rating of Good. The report further indicated that there was no meaningful distinction in the other two factors. The consensus view of the evaluators on Factor 3 was articulated as follows:

> Hi-Tec's history demonstrates an excellent foundation for supporting the requirements of this SOW. They have provided project management support to the FAA. In addition, they have a long history of providing engineering services to ACT-200. Their corporate history demonstrates that they will be able to successfully meet the requirements of the SOW.

AR, Tab 4, page 1.

10. A document entitled "Award Recommendation and Determination" was prepared on September 29, 1999 by the Contracting Officer. It states that the total evaluated price (base and options) for E&I was $2,672,340.80 and for Hi-Tec was $2,415,419.20. The price/technical trade-off analysis that resulted in the decision to make the award to Hi-Tec was explained as follows:

> It is the opinion of the Contracting Officer, that since E&I and Hi-Tec both submitted overall technically "Excellent" proposals, and that other than Factor 1 (Personnel) where Hi-Tec rated an overall "Good", there are no meaningful distinctions between E&I and Hi-Tec. The Contracting Officer verified with the Chairperson of the TET that based on Hi-Tec's proposal, they would be able to successfully perform this requirement. The Chairperson had no further technical concerns with Hi-Tec Systems that needed to be addressed.
>
> The solicitation stated that award will based [sic] on the best value to the Government, considering both technical merit and price, and as proposals become more equal in their technical merit, the evaluated price becomes more important. E&I price is some 10% higher than that offered by Hi-Tec Systems. Accordingly, it is therefore recommended that award be made to Hi-Tec Systems, who is the second highest rated offer, on the basis of best value to the Government.

AR, Tab 5, page 3.

11. The Center awarded the contract to Hi-Tec on September 29, 1999. AR, Tab 7.

12. A debriefing was held on October 5, 1999 with E&I. As a result of that debriefing, E&I learned that in evaluating Factor 3, Prime Corporate Experience/Past Performance, the TET considered Hi-Tec's subcontractor experience. The Contracting Officer explained that Factor 3 "was not intended to limit corporate experience to contracts where the offeror was the prime contractor." AR, Tab 9; Affidavit of Andrew Carnegie Turner II, dated November 18, 1999. E&I filed the instant Protest on October 12, 1999.

13. In response to E&I's protest, E&I reconvened and re-scored the technical proposal of Hi-Tec, in accordance with E&I's interpretation of evaluation Factor 3, considering only Hi-Tec's *prime contractor experience*. AR, Tab 11. As a result of the TET's re-evaluation, Hi-Tec's final score was reduced by one point to 90. The TET again concluded that E&I was the technically superior offeror; the only meaningful distinction between E&I and Hi-Tec was in Factor One, Personnel, and there was no meaningful distinction in the other factors. AR, Tab 11. The second TET consensus report was signed by all three evaluators and stated with respect to Factor 3 the following:

> Hi-Tec's history demonstrates an excellent foundation for supporting the requirements of this SOW. Hi-Tec has experience as prime contractor on one contract. On that contract Hi-Tec performed project planning and scheduling, data quality measurement tool development, data management, software development, performance measurement tool development, data quality standards development, risk assessment and the development of metrics for project development.
>
> The only weakness that the team found is a lack of experience with specific SOW projects. The team does not feel that this lack of experience would have a significant impact on Hi-Tec's ability to successfully meet the requirements of this SOW.

AR, Tab 11, paragraph 3.

14. As a result of the *re*-evaluation, the Contracting Officer prepared a document entitled “Alternate Award Recommendation and Determination” on November 9, 1999, which reaches the same conclusion as did the one dated September 29, 1999.

III. Discussion

In making recommendations concerning substantive protest issues, the ODRA will apply the standard of review under the Administrative Procedure Act, 5 U.S.C. § 706 (“Act”), which is "whether the agency's decision was legally permissible, reasoned, and factually supported." *Protest of Information Systems & Networks Corporation*, 99-ODRA-00116, *citing Washington Consulting Group Inc.*, 97-ODRA-00059. The reviewer may not substitute his or her judgment for that of the agency. *Id.* Agencies have broad discretion with regard to the evaluation of proposals, since evaluation is "inherently a judgmental process which cannot accommodate itself to absolutes." *Id.* Thus, agency actions will generally be upheld, so long as they have a rational basis, are neither arbitrary, capricious, nor an abuse of discretion, and are supported by substantial evidence. *Protests of Information Systems & Networks Corporation*, 98-ODRA-00095 and 99-ODRA-00116, *citing Protests of Camber Corporation and Information Systems & Networks, Inc.*, 98-ODRA-00079 and 98-ODRA-00080 (Consolidated).

A. The Language “Prime Corporate Experience” In Evaluation Factor Three was Latently Ambiguous.

The Center asserts that the ambiguity contained in the language “prime corporate experience” was apparent on the fact of the Solicitation and it was incumbent on the protester to protest the disputed language prior to the time set for receipt of initial proposals under 14 C.F.R. §15(a)(1). In its Comments, the Protester asserts that its protest was timely filed because there is no ambiguity in term “prime

corporate experience," since contracting professionals and the Comptroller General routinely use the term "prime" to mean "prime contractor".

An ambiguity exists where two or more reasonable interpretations of the terms or specifications of the solicitation are possible. A party's particular interpretation need not be the most reasonable to support a finding of ambiguity; rather, a party need only show that its reading of the solicitation provisions is reasonable and susceptible of the understanding that it reached. *Aerospace Design & Fabrication, Inc*. B-278896.2 *et al*., 1998 U.S. Comp. Gen. LEXIS 203; 98-1 CPD ¶ 139, *citing Sciaky, Inc*., B-261787.2 Nov. 8, 1995, 95-2 CPD ¶ 269 at 4. Where the language in a solicitation is vague or ambiguous, one looks to the rules of interpretation to discern its proper meaning. *Chesapeake & Potomac Telephone Company*, GSBCA No. 10331-P, 1989 GSBCA LEXIS 570, 90-2 BCA ¶ 22,883. If a patent ambiguity exists, the rules of government contracting place the obligation of inquiry upon the offeror or contractor. *See Lockheed Martin IR Imaging Systems, Inc. v. Secretary of the Army*, 108 F.3d 319, 1997 U.S. App. LEXIS 3829; *Fortec Constructors v. United States*, 760 F.2d 1288, 1291; *Newsom v. United States*, 230 Ct. Cl. 301, 676 F.2d 647, 649-50 (Ct. Cl. 1982). However, if there is no facial ambiguity, the criterion is whether the offeror or contractor reasonably interpreted the contract, applying the usual rule of *contra proferentum* against the contract drafter:

> If some substantive provision of a government-drawn agreement is fairly susceptible of a certain construction and the contractor actually and reasonably so construes it, in the course of bidding or performance, that is the interpretation which will be adopted …. If the [government] chafes under the continued application of this check, it can obtain a looser rein by a more meticulous writing of its contracts [or solicitations]….

Lockheed Martin IR Imaging Systems, Inc., supra, citing WPD Enterprises, Inc. v. United States, 163 Ct. Cl. 1, 323 F.2d 874, 877-78 (Ct. Cl. 1963).

In this case, the parties have set forth two reasonable interpretations of the language "prime corporate experience." Furthermore, each party has shown that its reading of the solicitation provisions is reasonable and susceptible of the understanding that it reached. Accordingly we find the Solicitation language "prime corporate experience" to be latently ambiguous. As indicated above, where there is no ambiguity apparent on the face of the Solicitation and the offeror prepared its proposal based on its own reasonable interpretation of the language, we will apply the rule of *contra proferentum* against the contract drafter and adopt the interpretation of offeror. Accordingly, we find that the proper interpretation of the language "prime corporate experience" should have resulted in the evaluation of an offeror's experience *as a prime contractor only*. If the Center intended to evaluate an offeror's "best" experience as both a prime and a subcontractor, it should have clearly said so.[3] Furthermore, we find that because the ambiguity was not apparent on the face of the solicitation, the Protest was timely filed.

B. Although The Technical Evaluation Team's Consideration Of Subcontractor Experience In The Initial Evaluation Was Improper, The *Re*-Evaluation, Which Was Based On The Protester's Interpretation, Was Factually Supported And Not Irrational.

The Center, in effect, argues that even if it improperly evaluated offerors' subcontractor experience, the protester was not prejudiced, since if only prime

[3] The interpretation of the term "prime" here is distinguishable from the ODRA's interpretation of the term "prime" in *Informatica of America, Inc*. 99-ODRA-00144 (Preliminary Finding and Interlocutory Order). There, the ODRA relied on an objective interpretation, *i.e.* the plain meaning, of the following language: "The offeror is required to submit a total of 2 separate references, indicating the capability of the *prime* to perform the work of similar scope and complexity (emphasis added)." The ODRA found such language to mean:

> The offeror was to provide a total of 2 separate contract references for contracts that involved work of similar scope and complexity "performed" by "the prime" – i.e., the proposed prime contractor of the offeror team – and that such past performance information was to be taken into consideration, regardless of whether it related to the prime's experience as a prime contractor or as a subcontract.

Informatica, supra. In contrast, in the instant Protest, the plain meaning of "prime corporate experience" is susceptible of two reasonable interpretations, namely, it can be interpreted to mean "*best* corporate experience" or "corporate experience *as a prime contractor*."

contractor experience had been evaluated, the award decision would have been the same. The Protester contends that both the *re*-evaluation and the Contracting Officer's second award decision were unreasonable.

As a general matter, in situations involving post-protest re-evaluations, we will accord greater weight to contemporaneous materials than to judgments made in response to protest contentions, which we recognize may not represent the fair and considered judgment of the agency. However, in this case the TET's *re*-evaluation of Hi-Tec's Factor 3 and the Contracting Officer's second award decision are supported by the record and are consistent with the terms of the Solicitation, as well as the TEP Rating System.

There is no Solicitation requirement for *specific* SOW experience; nor is there any requirement that offerors demonstrate experience for each and every item of work specified in the SOW. Rather, Factor 3 only requires the offeror to demonstrate the extent and depth of its experience in performing "the same *or similar* work as described in the SOW." AR, Tab 2, Solicitation, page 27 (emphasis added). The consensus of the TET in the *re*-evaluation was that Hi-Tec's experience on one contract constituted "same or similar" work as described in the SOW, and sufficiently demonstrated its ability to successfully meet the Solicitation's requirements. Findings of Fact Nos. 6 and 13. Even though the TET broadly interpreted the language "same or similar work", based on the express terms of the Solicitation, that interpretation cannot be said to be irrational.

Furthermore, the TET's rating of Hi-Tec as "Excellent" for Factor 3 was consistent with the TEP's Rating System, under which a rating of "Good" would have required the TET to find Hi-Tec's proposal to be "[l]acking in one of three areas of feasibility, manageability, or practicality" or having "minor deficiencies which would require correction and/or expansion." AR, Tab 3, paragraph 4.2. The "only weakness" referenced by the TET pertained to the extent and depth of Hi-Tec's experience in performing the same or similar work as described in the

SOW. Moreover, the TET did not identify any weaknesses that pertained to the "feasibility, manageability or practicality" of Hi-Tec's proposal; nor did it identify any "minor deficiencies", either of which, under the terms of the TEP, would have called for a rating of less than "Excellent."

Furthermore, the TET expressly found that Hi-Tec's "only weakness" did not significantly affect its ability to meet the SOW's requirements. We note that "weaknesses" have been distinguished from "deficiencies," in that a weakness only reflects the failure of a proposal to compare favorably with another proposal, while a deficiency reflects the failure of a proposal to meet a solicitation requirement. *See Planning Research Corp*. GSBCA 10472-P, 90-2 BCA ¶ 22,798, *recons. denied*, 90-3 BCA ¶ 23,042. The TET's conclusion, that Hi-Tec's experience weakness was insignificant in terms of impacting its ability to successfully meet the SOW requirements, was consistent with that distinction.

Even where Agency actions are found to have been improper or otherwise without a rational basis, a protest will not ordinarily be sustained, unless the actions in question have in some way prejudiced or resulted in harm to the protester. *A&T Systems, Inc.*, 98-ODRA-00097. Here, there is no evidence in the record that would require a finding that the TET could not rate Hi-Tec as "Excellent" for Factor 3, or that the Contracting Officer's November 9, 1999 "Alternate Award Recommendation and Determination" was legally impermissible, irrational or unsupported. Rather, we find that because the *re*-evaluation was proper and resulted in the same award decision to Hi-Tec, the Protester suffered no prejudice as a result of the original evaluation error.

IV. Conclusion And Recommendation

For the reasons set forth above, the ODRA recommends that the Protest be denied.

/s/

Marie A. Collins
Dispute Resolution Officer
Office of Dispute Resolution for Acquisition

APPROVED*:

/s/

Richard C. Walters
Dispute Resolution Officer, for the
Office of Dispute Resolution for Acquisition

*Because the ODRA Director, Anthony N. Palladino, Esq., had served as an ADR neutral in this case, he did not participate in the adjudication. Accordingly, Mr. Walters has reviewed and approved the foregoing findings and recommendations under delegation from Mr. Palladino.