

Matter of: NSI Technology Services Corporation

File: B-253797.4

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Thomas J. Whelan, Esq., National Aeronautics and Space Administration, for the agency.

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DIGEST

1. Protester's contention that evaluations of mission suitability and cost realism were unreasonable is denied where the record shows that the agency had a reasonable basis for its conclusions and conducted the evaluation in accordance with the terms of the solicitation.

2. Contention that agency should cancel the procurement and resolicit after releasing the protester's initial protest document--which included the protester's proprietary information--to the awardee is denied where there is no evidence that the release of the protest document caused competitive harm to the protester because the agency had already selected the awardee for final negotiations leading to award, debriefed the protester, and there is no evidence that the agency intends to give further consideration to awarding to the protester.

DECISION

NSI Technology Services Corporation protests the proposed award of a contract to Serv-Air, Inc. under request for proposals (RFP) No. RFP2-35216(RMT), issued by the Ames Research Center of the National Aeronautics and Space Administration (NASA). The RFP was issued to procure aircraft and flight simulator maintenance and technical support services. NSI, the incumbent contractor, argues that the selection of Serv-Air for further negotiations leading to award should be overturned because the agency conducted an improper evaluation of cost and technical proposals. In addition, NSI argues that the procurement

should be canceled and resolicited because NSI's initial protest, containing NSI's proprietary data, was provided to the awardee by NASA.

We deny the protest.

BACKGROUND

The solicitation, issued November 25, 1992, seeks offers for a cost-plus-award-fee, level-of-effort contract for the Ames Research Center's maintenance and technical support services for aircraft and flight simulators. It anticipates award of a 2-year contract, followed by two option periods: one for 2 years and one for 1 year. In addition, it includes options for an additional level of effort and for additional materials.

The RFP at section M identifies four evaluation factors: (1) mission suitability, (2) cost, (3) relevant experience and past performance, and (4) other considerations. Mission suitability and cost are described as the most important of the evaluation factors, and are weighted approximately equal in importance. The last two evaluation factors--relevant experience and past performance, and other considerations--are described as having "somewhat less importance" and "considerably less importance," respectively, than the first two factors. In addition, the RFP advised that only the mission suitability factor would be weighted and scored, according to the scheme set forth below:

MISSION SUITABILITY -- 1000 POINTS

Subfactor: Understanding the Requirement	400
Subfactor: Management Plan	350
Element: Organizational Structure and Management Approach	200
Element: Staffing, Training, Phase-In/Phase-Out, and Total Compensation Plan	150
Subfactor: Key Managers and Personnel	200
Subfactor: Corporate Resources	50

NASA received two proposals in response to the RFP--one from Serv-Air, and one from NSI. (NSI is the incumbent here, having provided these services to NASA for the previous 27 years.) After an initial evaluation, written and oral discussions, and submission of best and final offers (BAFO), the Source Evaluation Board (SEB) assigned a final rating--

both numerical and adjectival--for the subfactors and elements under the mission suitability evaluation factor. The SEB also completed a review of the remaining evaluation factors.

The SEB assessment concluded that Serv-Air's proposal was superior technically to the proposal submitted by NSI, and had lower proposed costs. This conclusion was based predominantly on the fact that Serv-Air's proposal was rated "excellent" for overall mission suitability, while NSI's proposal was rated "very good." The adjectival ratings given the two offerors on each of the evaluation factors other than cost are shown below:

	<u>Serv-Air</u>	<u>NSI</u>
Mission Suitability	Excellent	Very Good
Relevant Experience/ Past Performance	Very Good	Good
Other Considerations	Very Good	Fair

Both Serv-Air's and NSI's cost proposals were also evaluated and adjusted to reflect the agency's view of the proposals' most probable cost. Since the RFP provided offerors with the number of labor hours to use in preparing their proposals, the cost evaluation focused predominantly on the hourly amounts proposed for direct labor charges, and the concomitant overhead charges. As shown below, NASA added more than \$9.1 million to Serv-Air's proposed costs to determine the most probable cost to the government, and added more than \$8.8 million to NSI's proposed costs for the same reason. Thus, the proposed and evaluated total cost of the two offerors was as follows:

	<u>Proposed Cost</u>	<u>Evaluated Cost</u>
Serv-Air	\$ 90,312,314	\$ 99,450,728
NSI	94,410,684	103,255,141

At the end of the evaluation process, the SEB presented its findings to the agency's Source Selection Official (SSO), who concluded that Serv-Air's proposal presented a decided advantage in the areas of mission suitability and cost, the two most important evaluation factors. Thus, the SSO selected Serv-Air for final negotiations leading to award based upon its superior mission suitability rating and its lower probable cost. The SSO concluded that the other two evaluation factors--relevant experience and past performance, and other considerations--did not provide a basis for discriminating between the two offerors.

At a debriefing held on June 10, 1993, NASA explained the basis for its selection decision, and on June 17, NSI filed its initial protest with our Office arguing that the selection decision was based on an unreasonable evaluation of the technical and cost proposals.

Events Surrounding Release of NSI's Initial Protest

Four days after the protest was filed, NASA provided a copy of NSI's initial protest to Serv-Air. NASA released the protest despite the following legend placed on each page of NSI's protest letter:

"This document contains material which should not be disclosed except to appropriate officials of NASA."

Serv-Air received from NASA the NSI protest on June 22, and on June 24 Serv-Air provided a copy of the protest to its counsel. On June 25, Serv-Air's counsel notified counsel for NSI that NASA had released the protest document, and on the same day, NASA requested that Serv-Air return all copies of NSI's protest letter. Serv-Air says it has done so.

By letters dated July 2 and July 8, NSI requested that NASA cancel the procurement due to the harm NSI claims resulted from the release of its protest letter. When NASA refused to cancel the procurement, NSI filed a protest of that decision as well.

PROTESTER'S CONTENTIONS AND OVERVIEW

As stated above, NSI claims that NASA's selection of Serv-Air was based on an unreasonable evaluation under the mission suitability evaluation factor, and an improper evaluation of the offerors' probable costs. In addition, NSI argues that NASA should have canceled the procurement and resolicited after it released NSI's initial protest letter to Serv-Air.

Our decision considers first NSI's challenges to the technical evaluation--i.e., NASA's assessment of Serv-Air's mission suitability as excellent, and its assessment of

¹NSI filed additional bases of protest with our Office on July 15, August 9, August 20, and September 1. The July 15 protest arose from actions taken by NASA after NSI filed its first protest. NSI's other supplemental protests were based upon information gleaned from the agency report and from documents provided by NASA in response to NSI's initial and supplemental document requests filed pursuant to our regulations at 4 C.F.R. § 21.3(e), (f) (1993).

NSI's mission suitability as very good. As a result of that review we uphold NASA's conclusion that Serv-Air submitted the superior mission suitability proposal. We then turn to whether NSI's proposal, not Serv-Air's, should have been viewed as the proposal with the lowest probable cost, where our review again leads us to uphold NASA's assessment of the two proposals. Since we reject NSI's challenges to both the agency's review of mission suitability and cost realism, we do not reach the issue of whether NASA should have made a cost-technical tradeoff before selecting NSI because Serv-Air remains the highest-rated offeror with the lowest probable cost. Finally, we consider and reject NSI's argument that the release of its initial protest by NASA should result in cancellation of the procurement.

MISSION SUITABILITY

Although NSI placed less emphasis on its arguments regarding the evaluation of mission suitability than on its arguments regarding the cost realism review, NSI nonetheless raised 10 separate challenges to NASA's mission suitability evaluation. In considering protests against an agency's evaluation of proposals, we will examine the record to determine whether the agency's judgment was reasonable and consistent with the stated evaluation criteria and applicable statutes and regulations. ESCO, Inc., 66 Comp. Gen. 404 (1987), 87-1 CPD ¶ 450. A protester's disagreement with the agency's judgment, without more, does not show the agency's judgment was unreasonable. Id.

NASA's evaluation of mission suitability, set forth in detail in the final evaluation report, identified the major and minor strengths and weaknesses associated with each offeror's proposal. The evaluation also identified certain concerns associated with each proposal. Based on our review of the proposals, the evaluation materials, NSI's detailed challenges to the evaluation, the responses to those challenges by the agency and the awardee, and NSI's replies to those responses, we find that the evaluation was reasonable and did not deviate from the stated evaluation criteria. We will discuss below two representative challenges to the mission suitability evaluation: NSI's claim that NASA erred in awarding a major strength to Serv-Air under the management plan subfactor for Serv-Air's proposed subcontractor, Micro Craft; and NSI's claim that NASA erred in downgrading NSI for proposing an excessive number of key personnel.

Serv-Air's Small Disadvantaged Subcontractor

In its evaluation, NASA concluded that Serv-Air's proposal was excellent under both elements of the management plan subfactor. As stated above, these elements were:

(1) organizational structure and management approach, worth 200 points; and (2) training, phase-in/phase-out and total compensation plan, worth 150 points. Serv-Air was awarded 194 of the 200 points available for the organizational structure and management approach element after NASA concluded that Serv-Air's proposal in this area contained two major strengths, two minor strengths, and one minor correctable weakness. One of the two major strengths credited to Serv-Air was that Serv-Air's subcontractor for flight simulator support, Micro Craft, Inc. (a woman-owned small business) would help the agency meet its statutory requirement to ensure "to the fullest extent possible" that at least 8 percent of the dollar value of its prime contracts and subcontracts are awarded to small disadvantaged businesses (SDB).² According to NSI, this conclusion was unreasonable because NASA knew, or should have known, that Micro Craft did not meet the size standard included in the RFP, and did not qualify as a woman-owned business.

As a preliminary matter, NSI recognizes that our Office will not consider a challenge to Micro Craft's size status or to the agency's selection of an appropriate size standard for the procurement. See 4 C.F.R. § 21.3(m)(2). Instead, NSI argues that it was unreasonable for NASA to evaluate Serv-Air more favorably for proposing to subcontract to Micro Craft because the agency knew, or should have known, that Micro Craft was not an SDB for purposes of this procurement. While we agree with NSI that its challenge is properly before our Office, we do not agree that the evaluation was unreasonable.

The record as a whole supports NASA's decision to award a strength to Serv-Air for proposing a subcontractor that will help the agency meet its statutory goal for SDB contracting. Serv-Air's proposal clearly identifies Micro Craft as its subcontractor, and explains that Serv-Air's use of Micro Craft will help the agency meet its SDB goal. Also, NASA observed that Serv-Air proposed to utilize other SDB vendors in addition to Micro Craft.

Most of NSI's contentions that Micro Craft was not properly considered a small business are based on the incorrect assumption that Micro Craft was required to meet the size standard set forth in the RFP. This is not so. Instead,

²Congress has directed NASA to ensure "to the fullest extent possible" that it awards at least 8 percent of its prime contract and subcontract dollars to SDB concerns, and for this program has expanded the definition of an SDB concern to include women-owned businesses. Pub. L. No. 102-389, 106 Stat. 1610 (1992).

both the Federal Acquisition Regulation (FAR) and the Small Business Administration's Office of Hearings and Appeals state that a subcontractor (for subcontracts exceeding \$10,000) is properly considered small if it does not exceed the size standard "for the product or service it is providing on the subcontract." FAR § 19.701. See Size Appeal of Eastern Technologies, Ltd., No. SIZ-92-1-7-1 (Feb. 6, 1992). Thus, the fact that Micro Craft does not meet the size standard in the RFP for the whole contract is irrelevant to the issue of whether Micro Craft was reasonably considered an SDB for the services for which it was proposed.

Here, while the Standard Industrial Classification (SIC) Code identified in this RFP was 4581, Flying Fields and Airport Terminal Services (with a size standard of average annual receipts not to exceed \$3.5 million), NASA and Serv-Air argue that the services provided by Micro Craft are more appropriately categorized under SIC Code 8731, Commercial Physical and Biological Research, Aircraft (with a size standard of up to 1,500 employees). Since Micro Craft (including all affiliates) has 412 employees, it clearly meets the size standard associated with SIC Code 8731.

NSI argues that NASA should have viewed the 8731 SIC code as inapplicable to this procurement. NSI points out that NASA had already rejected a suggestion by Micro Craft that this procurement should be reclassified under SIC code 8731. NSI also asserts that NASA should have concluded that Micro Craft does not qualify as a woman-owned business.

Our review shows that NSI is correct in claiming that prior to the receipt of initial proposals Micro Craft attempted to convince the contracting officer to change the applicable SIC Code for the entire procurement from 4581 to 8731. However, the fact that the contracting officer rejected Micro Craft's suggestion that the entire RFP be reclassified does not mean the 8731 SIC Code is inappropriate for the portion of the services provided by Micro Craft under its subcontract.

Our review of the record shows that Micro Craft was proposed as Serv-Air's subcontractor for performing research support functions at two divisions of NASA's Ames Research Center: the Flight Systems and Simulation Research Division, and the Aerospace Human Factors Research Division. As explained in the statement of work ("SOW") these divisions require unique research-related simulation support services. For example, support for the Flight Systems and Simulation Research Division requires the contractor to provide "support services to develop, maintain, operate and modify the simulation mechanical, hydraulic, and electrical/electronic

facilities comprising SimLab, and to perform engineering tasks." SOW § C.2.3. In the same section, the support contractor is advised that the effort will include "research equipment development and engineering/design/drafting support." Id. Similar requirements are part of the support efforts at the Aerospace Human Factors Research Division. SOW § C.2.4. Based on this review, we see nothing unreasonable in NASA's conclusion that the SIC code related to research (8731) is more appropriate for Micro Craft's services than the SIC code covering Airport Terminal Services (4581), or in NASA's evaluation of Serv-Air's proposal offering Micro Craft as an SDB subcontractor.

We also see no basis to conclude that it was unreasonable to accept Serv-Air's representation that Micro Craft is a woman-owned business. NSI offers nothing to refute the explanation that 65 percent of Micro Craft's stock is owned by three women, or that Micro Craft's Chairman of the Board is a woman. We also note that Micro Craft's principal stockholder submitted an affidavit detailing her daily involvement in the management of the company. Under these circumstances, we see no reason to overturn NASA's decision to give an evaluation credit to Serv-Air for proposing a subcontractor that will help the agency meet its SDB contracting goal.

Evaluation of NSI's Key Employees

With respect to NSI's challenge to NASA's evaluation of its proposed key employees, NASA decided that the NSI proposal contained a minor weakness because NSI's identification of 33 individuals as key personnel was too high, and suggested a poor understanding of the RFP's requirements. According to NASA, NSI's decision to name so many key personnel would require the agency to perform excessive oversight and expend additional administrative effort because NSI would have to notify the agency and seek its approval before replacing key personnel.

As explained above, the key personnel subfactor was worth 200 points toward the 1,000 point total for mission suitability. Under this subfactor, NSI was awarded 188 of the 200 available points, and its proposal was considered excellent. Nonetheless, NASA stated that the proposal contained a minor weakness in this area because of the high number of key personnel identified in NSI's proposal.

In our view, there was nothing unreasonable about NASA's concerns regarding NSI's designated key personnel. The number of key employees identified by NSI was far higher than the number identified by Serv-Air. Also, given that NASA would be required to be involved in approving replacement personnel, it was appropriate for the agency to

question whether NSI's approach would require more agency administrative effort than necessary. Finally, as with so many of NSI's contentions, the impact here bordered on de minimis. NSI was rated excellent under this category and its several pages of complaints regarding this evaluation decision amount to little more than mere disagreement with the agency's evaluation.

COST REALISM ADJUSTMENT

NSI sets forth 17 separate challenges to NASA's assessment of probable costs, thus arguing that the agency's cost realism evaluation was unreasonable and should be overturned. After reviewing the agency's evaluation materials and Serv-Air's proposal, pursuant to the terms of the protective order issued by our Office, NSI ultimately withdrew four of its challenges, while NASA concurred with one of the challenges in total and with two others in part. As a result, NASA amended its evaluation of Serv-Air's probable costs by adding approximately \$217,000 to Serv-Air's proposal. The proposed and amended evaluated cost of the two offerors are:

	<u>Proposed Cost</u>	<u>Evaluated Cost</u>
Serv-Air	\$ 90,312,314	\$ 99,668,309
NSI	94,410,684	103,255,141

Thus, Serv-Air's probable cost advantage over NSI, as amended, is approximately \$3.6 million.

Of NSI's remaining 12 challenges to the cost realism evaluation, 9 concern upward adjustments to Serv-Air's proposed costs that NSI argues should have been made by NASA. The other three challenges focus on portions of NASA's upward adjustment to NSI's proposed costs that NSI argues should be rescinded. As a result, NSI argues that it, not Serv-Air, submitted the proposal with the lowest probable cost.

When agencies evaluate proposals for the award of a cost-reimbursement contract, an offeror's proposed estimated costs are not dispositive, because regardless of the costs proposed, the government is bound to pay the contractor its actual and allowable costs. FAR § 15.605(d). Consequently, a cost realism analysis must be performed by the agency to determine the extent to which an offeror's proposed costs represent what the contract should cost, assuming reasonable economy and efficiency. CACI, Inc.-Fed., 64 Comp. Gen. 71 (1984), 84-2 CPD ¶ 542. Because the contracting agency is in the best position to make this cost realism determination, our review of an agency's exercise of judgment in this area is limited to determining whether

the agency's cost evaluation was reasonably based and not arbitrary. General Research Corp., 70 Comp. Gen. 279 (1991), 91-1 CPD ¶ 183, aff'd, American Mgmt. Sys., Inc.; Department of the Army--Recon., 70 Comp. Gen. 510 (1991), 91-1 CPD ¶ 492; Grey Advertising, Inc., 55 Comp. Gen. 1111 (1976), 76-1 CPD ¶ 325.

Our review of the record in this case reveals that, contrary to NSI's assertions, the agency performed a reasonable and extensive cost realism analysis. As a result, we find no basis for concluding that the cost realism evaluation here should be overturned. To illustrate our conclusion that the evaluation was reasonable, we will discuss in detail a sampling of NSI's contentions involving amounts large enough to have some possibility of changing the agency's selection decision.

Serv-Air's Direct Labor Rates for Incumbent Personnel

NSI's largest single proposed adjustment to Serv-Air's evaluated costs--an increase of \$2,645,771--arises in an area where NSI agrees with NASA's intentions, but disagrees with the method by which NASA calculated its adjustment. Specifically, NSI argues that NASA failed to increase Serv-Air's proposed direct labor rates to reflect the rates currently being paid to incumbent personnel--i.e., NSI's current employees. We see nothing unreasonable in NASA's approach.

Serv-Air proposed 121 direct positions to perform the services requested in the RFP, 114 of which were to be filled by individuals currently performing these same services for NSI. In evaluating the direct labor rates proposed for these personnel, NASA noted that Serv-Air's average incumbent pay rate for non-key personnel was 15 percent lower than the average rate paid by NSI. Given the lower rates, NASA expressed doubts about whether Serv-Air would be able to retain a high proportion of incumbent personnel over the life of the contract. As a result, NASA stated in its Final Evaluation Report that "the SEB adjusted the proposed direct labor rates for non-key personnel to reflect the current rates being paid incumbent personnel." NASA's adjustment, however, was calculated by job category and wage rate, rather than by individual salary.

According to NSI, NASA's method of adjusting Serv-Air's direct labor rates overlooked the fact that a few of NSI's employees are paid at rates higher than those used in NASA's job category adjustments. For example, NSI and Serv-Air provide extensive argument regarding the reasonableness of NASA's approach given its impact on the cost of one position referred to by NSI as a "program planner." While not among

the 33 key personnel identified by NSI, this individual is the single most highly-compensated person on NSI's payroll for these services. The difference between NASA's approach and NSI's recommended approach for this person alone accounts for approximately \$600,000 of the \$2.6 million upward adjustment NSI claims should be made to Serv-Air's proposed costs.

The second situation where NSI challenges NASA's approach to making direct labor adjustments to Serv-Air's proposal is where NSI had positions that are not currently filled. While there may have been no way for Serv-Air to discern this fact, 12 of the positions for which Serv-Air proposed to use incumbent personnel were open at the time of the evaluation. In its probable cost analysis, NASA computed an average wage rate for categories of employees for which open positions existed and used this number rather than the rate proposed by Serv-Air. According to NSI, this approach resulted in an understatement of Serv-Air's probable cost.

NSI's arguments here must be viewed in the light of a basic fact regarding this procurement--i.e., because of its long incumbency, NSI's payroll has many long-term, well-paid individuals with a great deal of seniority. As a result, NSI has sought to ensure that Serv-Air and the agency do not fail to accurately account for the expense of retaining these employees. While NSI's efforts properly relate to the overriding purpose of a cost realism review--to ensure that the offerors do not gloss over additional costs for which the agency will be ultimately responsible--in some instances Serv-Air simply will not incur the same labor costs as NSI.

For example, with respect to the person whose level of compensation accounts for \$600,000 of the difference between NASA's adjustment and the adjustment urged by NSI, Serv-Air points out that during discussions it refused to commit to automatically adopting the rates of pay paid to each incumbent employee. Serv-Air explains that it refused to make such a commitment because it decided that such issues should be handled on a case-by-case basis. While we have no opinion on whether this individual should be paid at the level NSI claims, we note that Serv-Air states that it has considered assigning some of this individual's responsibilities to a senior manager or professional staffer. Based on our review of the extensive exchanges between NSI and Serv-Air on this issue, we see no reason to overturn the agency's probable cost adjustment merely because it attempted to determine the incumbent's rate of pay for the job category here rather than using the same rate of pay paid to the person who currently fills that job.

With respect to the treatment of open positions, we likewise see no basis to question NASA's adjustment. NSI argues that the agency should have used the rate proposed by Serv-Air in its cost proposal. NASA, however, recognized that Serv-Air was not in a position to know which positions were currently unfilled. Since Serv-Air was aware that NSI's incumbent employees were, as a general matter, well-paid, Serv-Air proposed rates for these positions that were higher than they might have been had Serv-Air known that it would be able to hire new employees to fill the position. NSI, on the other hand, was aware of this fact and used it to its advantage.³ As a result, we find nothing unreasonable about NASA's decision to use estimates for these positions rather than the rate of pay proposed by Serv-Air.

NSI's Escalation Rate for Direct Labor

On the other side of the equation, NSI's largest challenge to its own evaluation is in the area of its failure to use the escalation rate in the RFP for annual increases in direct labor expense. In this regard, NSI argues that \$4.3 million of the \$8.8 million NASA added to NSI's proposed costs should be rescinded, thus lowering NSI's probable cost by that amount.

The RFP here, at paragraph L.28(a)(2)b.8, advises offerors that "project labor rates must be based on current rates escalated for each year of contract performance" at 3.8 percent annually. In its evaluation of NSI's direct labor, NASA recognized that NSI did, in fact, escalate its direct labor costs as required by the RFP, but before doing so, NSI adjusted its costs downward, so that the overall effect over the life of the contract was to avoid the impact of the annual escalation rate. NASA rejected NSI's proposed downward adjustments to the direct labor costs and instead adjusted the proposed direct labor rates to reflect a 3.8 percent increase each year.

NSI argues that it was unreasonable for NASA to reject NSI's proposed decrease in direct labor expenses over the life of the contract. As with many of its other arguments, NSI explains its position employee-by-employee. In this case, NSI explains which employees are likely to retire in the coming years and when; the average age at which the employees will retire; why NSI's retirement benefits will induce them to retire; why future attrition rates will be higher than those in the past; and how NSI will be able

³We have reviewed a list of the differences in pay for the 12 open positions, and despite NSI's reply to the contrary, NSI clearly proposed lower overall rates for these positions than did Serv-Air.

to replace certain of these employees with lower-paid employees--what NSI calls "the domino effect" resulting from the retirements.

NSI's arguments in this regard are unpersuasive. While we will not address NSI's estimates and forecasts on a point-by-point basis, the record shows that several of NSI's assumptions are optimistic, and Serv-Air has attacked each estimate in detail. For example, one of NSI's assumptions used to lower its direct labor costs over the life of the contract is that employees will immediately retire upon reaching the age of 62. Serv-Air, on the other hand, presents data from the Social Security Administration showing that in 1992, the mean age at which men and women retired, nationwide, was 63.7 years and 63.5 years, respectively.⁴ NSI, of course, argues that as these employees retire they will be replaced by employees paid much less, and that new hires will be paid the lowest possible rate.

Since the purpose of an agency's cost realism review is to attempt to ascertain an offeror's probable costs, and since NASA clearly indicated in the RFP how it wanted offerors to escalate their direct labor costs over the life of the contract, we see nothing unreasonable about NASA's decision here. The agency was not required to accept NSI's optimistic estimates. In fact, its decision to instead require NSI to calculate the escalation in direct labor costs as requested in the RFP was a sound approach to protecting the agency from NSI's actuarial optimism.

NASA'S FAILURE TO CANCEL THE PROCUREMENT

NSI's final contention is that NASA should cancel the procurement and resolicit for these services since the agency released NSI's initial protest document to Serv-Air. According to NSI, NASA's release of the protest to Serv-Air gave Serv-Air the advantage of access to NSI proprietary information prior to the conclusion of the competition.

NSI's initial protest--and hence, NASA's release of that document--was not generated until after NSI learned that Serv-Air had been selected for award. Specifically, under NASA's alternate source selection procedures, see NASA FAR Supplement § 1815.613-71(b)(7), the agency advised NSI that it had selected Serv-Air for final negotiations leading to award, and the agency had given NSI a debriefing. While it might remain within NASA's power to abandon its selection of Serv-Air and to reinstate further negotiations with NSI,

⁴Social Sec. Bulletin, Annual Statistical Supplement, 1993, Table 6.B.5.

there is no evidence that NASA will ever do so. In the absence of such a decision, NSI's role in this procurement has come to an end. Accordingly, there can be no competitive harm to NSI (related to its ability to win this contract) from a release of information that took place after NSI was excluded from further consideration.

Our decision does not mean that NSI has no remedy available to it for the release of its initial protest document. Among other things, the Trade Secrets Act, 18 U.S.C. § 1905 (1988), bars agency officials from releasing an offeror's proprietary information outside the government without taking appropriate steps to protect such information. If NSI believes release of its protest violated the Trade Secrets Act, it should bring this matter to the attention of the appropriate officials at the Department of Justice.

The protest is denied.

James F. Hinchman
General Counsel