DECISION

THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

60476

FILE: B-184606 DATE: February 5,1976

MATTER OF: Management Services Incorporated

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DIGEST:

1. Allegations filed after receipt of best and final offers that RFP was deficient for failure to disclose (1) numerical values assigned to mission suitability factors, and (2) relative importance of cost or "other factors" to mission suitability; and failure to include incumbent contractor closeout costs are untimely since they relate to deficiencies apparent before date set for receipt of initial proposals. Argument that protester did not read RFP as making cost an independent evaluation factor is rejected since evaluation section clearly indicates three distinct major areas of evaluation--mission suitability, cost, and other factors.

2. Since on many occasions questions raised by protester regarding deficiencies in negotiated solicitation have been discussed, there is no basis to conclude that issues untimely raised are of the required level for consideration as significant issues.

3. Since question of whether given point spread between two competing proposals as a result of technical evaluation indicates significant superiority of one proposal over another is primarily within discretion of procuring agency and where point spread is 18 points out of 1,000, no basis exists to object to agency's determination that proposals were essentially equal.

4. Even if offeror's score for mission suitability should have been adjusted downward for its improper escalation of Davis-Bacon Act wage rates, impact on scoring would not be sufficient to make situation one where given point spread between competing proposals indicates significant superiority of one proposal over another.

5. Selected offeror would be successor contractor under Service Contract Act and proposes to hire substantial number of incumbent union workers but also to replace percentage of senior union workers with apprentices. In view of indication of labor unrest resulting therefrom, source selection official should ascertain if risk of possible labor unrest was properly assessed by evaluation board.

6. In negotiated procurement accomplished under NASA Procurement Directive 70-15 which limits agency in discussing deficiencies in offerors' proposals during written or oral discussions, no harm to protester's competitive position is found even though other offeror was advised of deficiency during multiple "final negotiations," since NASA could properly have made necessary Davis-Bacon Act wage cost adjustments to offeror's proposal. Comment is made that this practice seems inconsistent with limitations imposed by procurement directive.

7. Agency's improper release to one offeror of transfer agreement between protester, another offeror, and its predecessor which contained basis of transfer but did not contain financial or business data so as to give insight into protester's proposal was not prejudicial since, unlike situation where either unique technical approach or price is improperly disclosed to other offerors during negotiations, matter relates to protester's responsibility.

8. Agency erred in merely accepting, without more, offeror's proposed use of specific minority subcontractor then using this fact as significant basis for award decision. Evaluation of resources which offeror merely proposes without contractual control or commitment is "patently irrational." Agency must be reasonably assured that resources are firmly committed to offeror, especially where consideration of factor in evaluation may be determinative of award.

9. Where protester files suit under Freedom of Information Act to obtain documents submitted by agency to GAO for in camera review, and requests delay of GAO decision on protest pending outcome of suit, delay of decision would be unreasonable because of indefinite delay of procurement process, severe impact on proposed awardee, and fact that delay would permit protester (incumbent contractor) to continue as holdover contractor long after new contractor (only possibly protester) should have been awarded contract.

10. Where cost realism analysis of competing proposals was based, in part, on collective bargaining agreement in effect at time of evaluation escalated over proposed contract period, but thereafter new collective bargaining agreement is negotiated and becomes effective, more appropriate and precise analysis is now both possible and in order in light of definitization of new applicable wages.

Request for proposals (RFP) No. 8-3-5-12-30505 was issued on December 18, 1974, by the Marshall Space Flight Center (MSFC), National Aeronautics and Space Administration (NASA), Huntsville, Alabama. The RFP requested proposals for base maintenance services on a cost-plus-award-fee basis for 1 year, plus two 1-year options.

The RFP advised the offerors that proposals would be evaluated in accordance with the NASA Procurement Regulations, the NASA Source Evaluation Board Manual (NASA handbook) 5103.6, August 1973 edition, and NASA Procurement Directive 70-15 (Revised September 1972). The RFP states at page 47 that: "Proposals will be evaluated in three areas: Mission Suitability Factors, Cost Factors, and Other Factors."

During the initial evaluation, the Source Evaluation Board (SEB) found that the proposals of two of the offerors contained major weaknesses and were so deficient that they could not be made acceptable without major revision. These proposals were considered to be outside the competitive range and the respective offerors were so notified. However, two firms, Management Services Incorporated (MSI), the incumbent contractor, and Metro Contract Services, Inc. (Metro), were considered within the competitive range and each firm was invited to give an oral presentation of its proposal and answer specific questions raised by the SEB. Both presentations took place on April 3, 1975, and best and final offers were received on April 10, 1975. Thereafter, the SEB presented its initial report on the best and final offers to the source selection official (SSO) on June 16, 1975. In view of the closeness of the scoring of the two proposals in the area of mission suitability and probable cost, the SSO selected both firms for "final negotiations." See NASA Procurement Directive 70-15. The negotiations were conducted between June 23 and July 7, 1975. After the negotiations, and without rescoring the merits of the technical proposals, the SEB compiled an addendum to its initial report comparing each offeror's strengths, weaknesses and costs prior to "final negotiations" with those after "final negotiations."

On August 6, 1975, the SSO issued a source selection statement, the last paragraph of which states in pertinent part:

> "I find that the two proposers are essentially equal in Mission Suitability potential. Nevertheless, I have determined that the critical distinctions between them make it advantageous for the Government to award the contract to Metro, because, in light of the foregoing, of its lower costs and because of its firm commitment to utilize a Minority-owned Enterprise in its subcontracting program. Further distinctions between these two competitors are important in their own right and also because they reinforce the credibility of the costs negotiated with Metro: I have determined that Metro's organizational structure is superior; its management information system is superior; and its system for the processing and control of work is superior. For these reasons I have selected Metro for award of the base maintenance services contract."

Prior to the issuance of this source selection statement, MSI had on July 28, 1975, protested to our Office "a determination of the contracting officer for the National Aeronautics and Space Administration, Marshall Space Flight Center, Huntsville, Alabama, to award subject contract to Metro Contract Services, Inc., on the grounds that Metro Contract Services, Inc., was not the lowest responsible bidder."

Thereafter, MSI supplemented its protest and made the following specific allegations: (1) the RFP was deficient in the following areas: (a) the numerical values assigned to each of the mission suitability factors are nowhere stated in the RFP; (b) the RFP failed to state the relative importance of costs or other factors to mission suitability; (c) the RFP should have included as an evaluation factor the costs of incumbent contractor close out; (2) Metro's proposal contained unrealistically low proposed labor costs creating the possibility of and consequences resulting from labor unrest; (3) MSI was clearly superior in mission suitability; (4) NASA released proprietary information which was prejudicial to MSI; and (5) Metro did not have a firm commitment to utilize a minority-owned enterprise in its subcontracting program.

With regard to the alleged deficiencies of the RFP, section 20.2(b)(1) of our Bid Protest Procedures, 40 Fed. Reg. 17979 (1975), states:

> "Protests based upon alleged improprieties in any type of solicitation which are apparent prior to * * *

> the closing date for receipt of initial proposals shall be filed prior to * * * the closing date for receipt of initial proposals."

In this regard, allegations (1)(a), (b) and (c) relate to RFP deficiencies which were apparent long before the date for receipt of initial proposals, February 3, 1975, and a protest based on these deficiencies filed on July 28, 1975, would clearly appear to be untimely.

MSI, however, argues that it reasonably interpreted the RFP to mean that cost was to be considered not as an independent factor but only as part of mission suitability and that, if the true intent of RFP was to treat costs as an independent factor having equal weight with mission suitability, then the RFP was fatally ambiguous. This ambiguity, MSI alleges, was not apparent on the face of the RFP. Rather, it argues that the ambiguity was latent because a reasonable interpretation of the RFP is that cost was not to be an independent factor.

We disagree. As noted above, the RFP at page 47 clearly states that proposals will be evaluated in three distinct areas: mission suitability factors, cost factors and other factors. The section dealing with source evaluation describes evaluation factors and subfactors, as follows:

(A) Mission suitability factors

- (1) management plan
- (2) key personnel
- (3) staffing plan

(B) Cost factors

(C) Other factors

- (1) phase-in
- (2) policies, procedures and practices
- (3) financial capabilities
- (4) corporate experience and past performance
- (5) make or buy plan
- (6) small and minority business utilization plan
- (7) consultants
- (8) schedule and general provisions

While the RFP statement outlining the method of evaluation of mission suitability factors did indicate that innovation, cost effectiveness and low-cost planning would be considered, we think that an entire reading of the source evaluation section of the RFP clearly indicates that there were three separate and distinct major areas of evaluation.

The protester states that the RFP was "clearly deficient." We submit that, if this is the case, it was incumbent upon MSI to file its protest before the date set for receipt of initial proposals, and not 5-1/2 months thereafter.

MSI also indicates that the matter should be considered on its merits for it raises issues significant to procurement practices or procedures and, as such, may be considered by the Comptroller General, even though untimely in accordance with section 20.2(c) of our Bid Protest Procedures, supra. In 52 Comp. Gen. 20 (1972), we defined the phrase "issues significant to the procurement practices or procedures" as referring to "the presence of a principle of widespread interest." Moreover, as we held in A.C.E.S., Inc., B-181926, January 2, 1975, 75-1 CPD 1, a matter does not present a significant issue for consideration if that matter has been treated on its merits previously. See Hayes International Corporation et al., B-179842, March 22, 1974, 74-1 CPD 141. This Office has on many occasions discussed the questions raised by allegations (1)(a), (b) and (c). Accordingly, we see no basis for us to conclude that the issues raised in the instant case rise to the required level for consideration as significant issues. Therefore, these issues will not be discussed on the merits.

MISSION SUITABILITY EVALUATION

MSI initially argues that the determination that Metro and MSI were approximately equal in mission suitability was inaccurate and arbitrary in light of (1) MSI's past excellent performance at MSFC; (2) its lengthy experience compared to Metro's; and (3) MSI's carefully designed manual system for scheduling and controlling the work as opposed to Metro's proposed use of a computerized system.

However, in reaching the determination that the proposals were essentially equal, the SSO noted that MSI was 18 points (out of a possible 1,000) higher than Metro. MSI was rated higher in the areas of key personnel (program manager, subordinate management) and

staffing plan (plan adequacy and staffing rationale, and ability to implement the plan), while Metro was higher in management plan (organization, processing and control of work, and management information systems). Moreover, MSI's past performance and experience (primarily obtained when the firm was known as Management Services, Inc. of Tennessee) was also noted by the SEB in the "Corporate Experience and Past Performance" subcategory of "Other Factors."

As we have held in other cases, the question of whether a given point spread between two competing proposals indicates significant superiority of one proposal over another is a matter primarily within the discretion of the procuring agency. Lockheed Propulsion Company et al., 53 Comp. Gen. 77 (1974), 74-1 CPD 339; 52 Comp. Gen. 686 (1973). In 52 Comp. Gen., supra, we stated that even an 81-point spread out of 1,000 does not automatically establish that the higher-rated proposal was materially superior. Thus, in the absence of more, we perceive of no basis in the instant case to object to the agency's determination that the proposals, which were merely 18 points apart (out of a possible 1,000), were essentially equal in mission suitability.

MSI also argues that Metro should have been penalized in the mission suitability area for improperly handling Davis-Bacon Act wage costs in its proposal. (See discussion, infra, on realism of Metro's costs and the Davis-Bacon Act.) A similar argument could be made for its overly optimistic view of what would be paid to rehired MSI Service Contract Act employees. (See discussion, infra.)

As noted above, the RFP stated that "Innovation, cost effectiveness, and low cost planning will be considerations in the evaluation of Mission Suitability." The RFP also indicated more specifically that in evaluating the staffing plan subfactor of mission suitability "[A]n assessment will be made of the adequacy of the staffing plan and the proposer's ability to implement the plan as proposed." The SEB stated in reaching its conclusions as to mission suitability:

> "[t]he cost proposal was used extensively in the evaluation and scoring of Mission Suitability Factors to determine realism and understanding of the requirements by the proposers."

That is, in reaching the conclusion as to Metro's staff planning, NASA considered the impact of Metro's overly optimistic proposed wages for MSI rehires. Thus, while both MSI and Metro were considered as "competent" after the initial evaluation, the SEB's final evaluation found MSI to have a nine-point superiority for this subfactor alone. However, since the SEB's "Results of Final Negotiations" did not indicate any change with regard to Metro's ability to implement its staffing plan, we are unable to say that its difficulties with Davis-Bacon wage costs were assessed in mission suitability. However, even if this should have occurred we are unable to quantify the impact, if any, of this deficiency on the mission suitability scoring. Even if mission suitability should have been adjusted on the basis of the SEB omission we do not believe that the impact would be sufficient to make this situation one where the given point spread between two competing proposals under the circumstances presented indicates the significant superiority of one proposal over another. Lockheed Propulsion Company, supra; 52 Comp. Gen., supra.

REALISM OF METRO'S COSTS

Service Contract Act

The proposed contract's scope of work is broken down into six distinct areas of effort (by appendix):

Appendix		Employee Wages Rate Determined in Accordance with
A.	Vehicle Support	Service Contract Act
B.	Repair & Minor Construction Services	Davis-Bacon Act
C.	Material Handling Support Services	Service Contract Act
D.	Operation and Maintenance of Special Equipment	Service Contract Act
E.	Engineering Design Services	Service Contract Act
F.	Grounds Maintenance Services	Service Contract Act

For all appendices other than "B," the Service Contract Act Wage Determination of January 20, 1975, which was included in the RFP was employed by offerors in submitting proposals. The wage determination reflected the collective bargaining agreements then in effect between

NASA's incumbent contractor (MSI) and various trade unions. In accordance with 29 C.F.R. § 4.165, et seq. (1974), the contractor would be required to pay the employees covered by the act in accordance with the wage determination.

The collective bargaining agreements (incorporated into the wage determination) set forth a number of wage steps to be paid based on the respective seniority of the employees. Since MSI is the incumbent contractor, more than 95 percent of its employees have sufficient seniority to be at the top step of the wage schedule (step No. 5). Consequently, MSI's Service Contract Act labor cost was relatively high.

Metro, on the other hand, proposed to hire a substantial percentage of MSI's employees if awarded the contract (substantially in excess of 50 percent) and pay them at a rate established in the collective bargaining agreement, which covers the largest number of employees presently being employed by MSI. Metro also proposed to hire a large number of new hires who would not have any seniority and could be paid at the entry level wage step, step No. 1. It should also be noted that while Metro's proposal indicated that its hiring of incumbent MSI personnel would be at the step No. 2 level of the collective bargaining agreement, since, as noted above, 95 percent of the incumbent contractor's personnel had sufficient seniority to be at step No. 5 of the wage scale, the SEB upwardly adjusted Metro's direct labor costs to reflect Metro's obligation under the law to pay incumbent employees in a manner consistent with the collective bargaining agreement. This adjustment would vitiate MSI's argument concerning possible labor unrest if Metro were to hire incumbent senior employees at a rate less than the incumbent contractor was paying under the collective bargaining agreement.

However, MSI has included as an attachment to its protest a letter from the president of Local No. 783 of the International Union of Electrical, Radio and Machine Workers, AFL-CIO, which according to the RFP represents incumbent contractor employees with regard to the work covered by appendices "A," "C," "F" and part of "D." That letter states in pertinent part:

> "* * * We have learned that it is the intent of Metro to hire a 'substantial number' of the incumbent personnel represented by our union and to hire new people for the remaining positions at base rates as set forth in the RFP. As you know, most of these employees have from 10 to 15 years seniority on this job. Metro's

> plan to replace them with new employees would be extremely unfair.
>
> "It is our belief that any attempt by a successor contractor to replace the trained, experienced personnel of long seniority with new personnel will result in serious labor problems. While we as a union will make every effort to maintain labor peace and to assure the continuance of the work, you will understand the feeling of the employees who would be displaced under such a plan."

The above-quoted letter clearly raises the possibility of labor unrest should Metro follow its proposed labor policy. Thus, we will now discuss the issue presented as to the possible cost and/or performance consequences of Metro's plan to replace a percentage of the incumbent's senior union employees with apprentices--that is, the consequences emanating from the possibility of labor unrest.

As stated on page 49 of the RFP:

> "* * * The evaluation of cost factors will include Government assessment of the probable cost of doing business with each proposer and the possible growth in proposed costs during the course of the contract. * * *" (Emphasis added.)

This Office has recognized the importance of analyzing proposed costs in terms of their realism since, regardless of the costs proposed, the Government in a cost-reimbursement contract is bound to pay the contractor's actual and allowable costs. See Bell Aerospace Company, 54 Comp. Gen. 352 (1974), 74-2 CPD 248; 50 Comp. Gen. 390 (1970); B-178445, October 4, 1973; B-152039, January 20, 1964. It is incumbent upon the agency to exercise judgment as to whether the costs submitted are realistic. Bell Aerospace, supra; Raytheon Company, 54 Comp. Gen. 169 (1974), 74-2 CPD 137. 50 Comp. Gen., supra; B-178445, supra; B-174003, February 10, 1972. Moreover, GAO will not second-guess a cost realism determination unless it is not supported by a reasonable basis. See Dynalectron Corporation , 54 Comp. Gen. 562 (1975), 75-1 CPD 17, affirmed 54 Comp. Gen. 1010 (1975), 75-1 CPD 341.

A conclusion that a cost proposal is realistic cannot appropriately be made unless all nonspeculative cost risks are analyzed. In this regard, the court in Kentron-Hawaii Limited, 480 F.2d 1166 (D.C. Cir. 1973), in somewhat similar circumstances involving a cost-plus-award-fee contract, viewed as speculative the incumbent contractor's assertion that the awardee's offer, which included low wage rates,* would foment labor strife under the existing labor conditions and result in higher ultimate costs to the Government. The question there was the impact of ongoing attempts at unionization upon the awardee's ultimate costs. The court held that:

> "Presumably, newly unionized employees would be quite likely to press for higher wages. Labor strife might result if those demands were not met; but then again it might not. Indeed, if the labor relations at [the] P[acific] M[issile] R[ange] [Facility] had turned as sour as Kentron suggests, the contracting officer might reasonably have concluded that a confrontation and work stoppage was inevitable, no matter who obtained the contract award." (Emphasis added.)

We believe that the Kentron decision is distinguishable. Here, only Metro, the proposed successor contractor, indicated an intention to dismiss a percentage of MSI's senior employees, all of whom are members of a union which the successor would have to recognize as the employees' bargaining agent. See NLRB v. Burns Security Services, 406 U.S. 272 (1972).

Moreover, unlike the RFP in the Kentron situation, the instant RFP did not set a limit on Government reimbursement of the awardee's direct labor costs. In Kentron, the agency specifically stated in the RFP that "maximum labor rates should contain any cost contingency you consider necessary with due regard to unionization activities in progress and/or pending * * *." The court construed this provision to mean that if unionization did force the awardee's labor rates above the proposed maximums, any resulting "* * * 'cost overrun' would still not be reimbursable."

*Dynalectron, the awardee, proposed maximum wage rates averaging $0.13 less than that being paid by Kentron-Hawaii at the time its contract was terminated.

The court seemed to approve the award mechanism used there which allows competitors to receive award, on the basis of not unrealistic maximum labor rate reimbursement levels, while taking reasonable risks of cutting into their own profits should their estimate of actual labor rates prove overly optimistic. Thus, while in Kentron, true competition, which would achieve the lowest actual costs to the Government, was fostered in that the RFP was structured so that any miscalculation in the maximum labor rates to be paid under the contract would be borne by the contractor, such is not the situation here. In the instant situation it would be to the benefit of a competitor to speculate optimistically vis-a-vis the maximum percentage of incumbent senior employees it would hire, for in limiting rehires from this group and supplementing additional hires at apprentice levels, direct labor costs would be minimized. However, should the situation arise that to insure labor peace a larger percentage of rehires would be required, with a concomitant increase in direct labor cost, the Government and not the contractor would have to bear the burden of this increase. Such an increase could result in a decrease in award fee. However, the decrease in award fee paid the contractor need not be so great so as to negate the increased costs to the Government from reimbursing the contractor for direct labor cost increases.

We note that, in other cost-reimbursement situations, NASA has examined the impact of possible labor unrest generated by an offeror's proposed labor policies. See 50 Comp. Gen. 592 (1971); B-171391(2), February 26, 1971. In B-171391(2), supra, NASA decided not to make award to the offeror (Pan American World Airways, Inc.) whose proposal was ranked first technically (tie) and was lowest in cost (at least for the base period of the contract), in large measure, since it was the opinion of NASA's labor relations consultants and its evaluation board that a severe labor impact and a serious disruption of the then present harmonious labor relations at the facility could be foreseen in Pan Am's proposed approach. Pan Am proposed to transfer the incumbent contractor's personnel, who were represented by the International Association of Machinists (IAM), to its bargaining units with the Transport Workers Union of America and the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. The wage rates that Pan Am proposed to pay were also lower than those then being paid by the incumbent contractor as well as being lower than those then paid by Pan Am on a similar contract at a nearby Air Force facility.

In denying Pan Am's protest against NASA's actions, we held that NASA properly considered the factor of possible labor strife

generated by Pan Am's labor policy including the effect on Pan Am's costs of work stoppages, work slowdowns, picketing and other problems which are costly in and of themselves.

In another protest regarding the same procurement, 50 Comp. Gen., supra, we noted that the NASA's industrial relations officer felt that the successful offeror's (Boeing) alternate plan to subcontract one segment of the operation, then being performed by the incumbent with direct hires, might have created a problem of convincing the union that a smaller number of employees was needed. This again illustrates a NASA preselection analysis of the labor strife risk incumbent in proposals.

Again with reference to the procurement noted in 50 Comp. Gen., supra, Boeing planned to bring the incumbent contractor's IAM employees under its own company-wide agreement with the IAM and thus pay them a "considerably lower" wage than those paid by the incumbent for similar work. However, the Acting Administrator of NASA, while directing that "final negotiations" be conducted with Boeing, expressly conditioned award on Boeing's presentation of firm agreements from appropriate unions providing coverage for the work to be performed under the proposed contract. In doing so, we believe that he made a determination that the risk of labor strife had not properly been taken into account up to that point, but that before award to Boeing could properly be made, the risk would have to be minimized. While it may have been more appropriate to have assessed the risk of labor unrest and to take necessary action prior to conducting "final negotiations," clearly the risk must be properly assessed at some point in time.

We have examined closely the SEB report and addendum thereto, as well as the source selection statement and subsequent letter of October 7, 1975, relating to the cost realism of the proposals, prepared by the Director of the Procurement Office at MSFC. Nowhere in that material did we find a specific discussion regarding the direct labor cost risk outlined above.

One possible explanation for this seeming omission is that the SEB in discussing Metro's staffing plan, a mission suitability subfactor, indicated that Metro had contacted the local labor unions, surveyed the local labor market and determined the availability of the percentage of workers other than rehires necessary to fulfill the contract requirement. Moreover, the SEB believed that Metro's staffing plan was feasible and attainable and that consideration of personnel sources combined with source contacts, backup capability of local hire for personnel, and

contact with local unions added to Metro's otherwise well-designed plan. This area of Metro's proposal was rated as competent as was the analogous section of MSI's proposal. This meant that the SEB considered that the staffing plan of both MSI and Metro reflected overall competence and had strengths which clearly predominated over weaknesses particularly in the most important areas.

However, the record is devoid of any information to show that the possibility of labor unrest vis-a-vis the Metro proposal was specifically considered by the SEB either in mission suitability or in assessing cost realism. Therefore, we recommend that the SSO ascertain whether and/or to what degree that risk of labor unrest inherent in the Metro proposal was assessed. If the risk was not assessed or assesssed insufficiently, the SSO should direct the SEB to consider the risk and make appropriate recommendations to the SSO. The SSO should take whatever action relative to the selection of an awardee that is required by the risk assessment. See generally, Tracor Jitco, Inc., 54 Comp. Gen. 897 (1975), 75-1 CPD 253; B-182213, November 24, 1975, 55 Comp. Gen. ____, 75-2 CPD 344.

Moreover, an analysis of the risk of labor strife may also have been warranted with regard to "Other Factors." The RFP indicated that the eight subfactors of "Other Factors" listed above did not constitute an all-inclusive listing of Other Factors which may be used in the selection decision. The NASA SEB Manual, NHB 5103.6 (August 1973 ed.), cited in the RFP as one of the bases upon which proposals were evaluated, states that:

"OTHER FACTORS

"1. Within this category fall factors other than Mission Suitability and Cost Factors that the Source Selection Official considers in making a final selection. Other Factors may become pertinent any time in the acquisition process up to the moment of source selection.

"2. Other Factors include:

a. Financial condition and capability.

b. Corporate experience and past performance.

c. Priority placed by the corporate level of the offeror on the work being proposed, or importance of the business to corporate management.

d. Stability of labor-management relations.

e. Extent of proposed small business and minority enterprise participation in subcontract arrangements.

f. Geographic distribution of subcontract arrangements.

g. Any others pertinent to the particular procurement.

"3. Other Factors will generally be known at the time the RFP is issued. When this is the case, they are to be referenced specifically in the RFP, evaluated by the SEB, and reported on to the Source Selection Official. Certain factors in the Other Factors category, such as financial condition and capability and past performance, may undergo change up to the moment of source selection. Although the SEB has made its formal report to the Source Selection Official, the Board shall have continuing responsibility to report to the Source Selection Official, until its discharge, any changes in its evaluation of Other Factors due to circumstances affecting an offeror different from those pertinent at the time of the Board's formal report. In this connection it is not intended that after its report the Board actively pursue continuing evaluation. What is expected is that matters in Other Factors category which come to the attention of the Board and which might be expected to be pertinent to the selection decision will be communicated to the Source Selection Official." (Emphasis added.)

Thus, the stability of the proposers' labor management relations was from the outset (even though not set forth in the RFP), to be considered under Other Factors. Even if this were not the case, by the terms of paragraph 3, noted above, upon the submission by Metro of its outlined labor policy, we believe that the SEB was under a duty to examine and investigate the circumstances surrounding this proposed labor practice. This does not appear to have been done. Therefore,

the SSO should direct the SEB to consider this aspect of the evaluation as well as those previously noted.

Davis-Bacon Act

NASA's report on the protest to our office states with regard to appendix "B" (Repair and Minor Construction) that MSI properly utilized the December 1974 Davis-Bacon Act Wage Determination in the RFP. NASA states that Metro, on the other hand, found it necessary, during "final negotiations," to make extensive proposal revisions in this regard.

These revisions were accomplished by using the Davis-Bacon wage rates published in the Federal Register on June 20, 1975. However, NASA indicates that MSI was not asked to, nor did it offer to, revise its proposed labor costs for appendix "B," so as to conform to the June 20 wage determination. The SEB and MSI felt that the labor costs already proposed along with the proposed cost escalation were a reasonable and accurate measure of direct labor costs for the appendix.

MSI contends that the deficiency in Metro's proposal relative to the Davis-Bacon act rendered the proposal nonresponsive and that Metro should not have been considered within the competitive range. Moreover, it argues that Metro should not have been advised of its deficiencies and given the opportunity to correct them.

The competitive negotiation process has inherent flexibility, wherein an offeror is permitted to remedy defects which if present in a bid under formal advertising would require the rejection of the bid. Therefore, the rigid concept of responsiveness as used in formally advertised procurements has no place in negotiated procurements. Linolex Systems, Inc., 53 Comp. Gen. 895, 897 (1974), 74-1 CPD 296; Ballantine Laboratories, Inc., B-183122, August 21, 1975, 75-2 CPD 121; Teledyne Ryan Aeronautical, B-180448, April 29, 1974, 74-1 CPD 219. For this reason, the specific cases cited by MSI dealing with a bidder's failure to acknowledge an amendment to a formally advertised procurement (Kuckenberg-Arenz, B-184169, July 30, 1975, 75-2 CPD 67; Hartwick Construction Corporation, B-182841, February 27, 1975, 75-1 CPD 118) are wholly inapplicable to the instant case. Therefore, the protester has presented no viable argument as to why Metro should have been excluded from the competitive range.

With reference to Metro's deficiency regarding the use of the Davis-Bacon Wage Determination, it should be noted that the Government estimate for appendix "B" was prepared utilizing the Department of Labor's Wage Determination of December 20, 1974, escalated by a fixed percentage over the 3-year contract period in recognition of the fact that new wage determinations are issued approximately every 120 days. MSI which had based its appendix "B" direct labor costs on the December 20, 1974, wage determination recognized that increased wages would result from revised wage determinations and so provided in its cost proposal. MSI also included in its proposal an anticipated salary increase for Service Contract Act employees whose union contract expired on May 31, 1975. Metro, on the other hand, did not escalate its first year direct labor costs for this group of employees. However, the SEB made an upward adjustment of Metro's direct labor costs, insofar as the Service Contract Act is concerned, in an amount approximating the NASA estimated rate of escalation.

But, by NASA's own admission, Metro found it necessary during "final negotiations" to make extensive revisions to its proposal with respect to appendix "B," which NASA reviewed and accepted. Metro had apparently also omitted appropriate Davis-Bacon Act wage rate escalation. Therefore, rather than using the December wage determination and escalate therefrom for the entire contract year plus the period from December to July 1, 1975, Metro based its final proposed appendix "B" direct labor costs on the June 20 wage determination escalated only over the contract period itself.

MSI contends that Metro should not have been advised of its Davis-Bacon wage deficiency during final negotiations. In this regard, the NASA SEB Manual states in paragraph 601.3 that:

> "3. The final contract negotiation process differs from the written and oral discussions previously held with offerors in the competitive range. The latter discussions have the specific function of obtaining information for evaluation and selection purposes, while the final contract negotiations have the additional function of presenting that information in contractually binding form. For this reason it is essential that each offeror be brought to the most favorable terms that the negotiation process can produce, including technical and scientific approaches, management arrangements, and estimated costs (or fixed prices where applicable), and cost element ceilings as appropriate. The prohibition against auction techniques applies, of course, to these negotiations."

This Office has held that if negotiations are to be meaningful, the agency should conduct either written or oral discussions to the extent necessary to resolve uncertainties. See Corbetta Construction Company of Illinois, Inc., 55 Comp. Gen. 201 (1975), 75-2 CPD 144; Signatron, Inc., 54 Comp. Gen. 530 (1974), 74-2 CPD 386.

We believe that the instant situation is somewhat complicated by the fact the proposals were evaluated in accordance with NASA Procurement Directive (PRD) 70-15. That Directive states, in pertinent part:

> "However, where the meaning of a proposal is clear, and where the Board has enough information to assess its validity, and the proposal contains a weakness which is inherent in a proposer's management, engineering, or scientific judgment, or is the result of its own lack of competence or inventiveness in preparing its proposal, the contracting officer shall not point out the weaknesses. Discussions are useful in ascertaining the presence or absence of strengths and weaknesses. The possibility that such discussions may lead an offeror to discover that it has a weakness is not a reason for failing to inquire into a matter where the meaning is not clear or where insufficient information is available, since understanding of the meaning and validity of the proposed approaches, solutions, and cost estimates is essential to a sound selection. Proposers should not be informed of the relative strengths or weaknesses of their proposals in relation to those of other proposers. To do so would be contrary to other regulations which prohibit the use of 'auction techniques.' In the course of discussions, Government participants should be careful not to transmit information which could give leads to one proposer as to how its proposal may be improved or which could reveal a competitor's ideas.
>
> "The foregoing guidelines are not all-inclusive; careful judgment must be exercised in the light of all the circumstances of each procurement to promote the most advantageous selection from the standpoint of the Government while at the same time maintaining the fairness of the competitive process." (Emphasis added.)

As we have previously indicated (51 Comp. Gen. 621, 622 (1972) and Dynalectron Corporation, supra), while 10 U.S.C. § 2304(g) (1970) calls for the conduct of "written or oral" discussion with all offerors

in the competitive range, valid exceptions to this rule under NASA procedures have been recognized in subject areas where, for example--

> "* * * it would be unfair to help an offeror through successive rounds of discussions to bring its original inadequate proposal up to the level of other adequate proposals by pointing out weaknesses which were the result of the offeror's lack of diligence, competence, or inventiveness, in preparing its proposal." (Emphasis added.)

In Dynalectron, supra, also involving NASA, the offeror's (incumbent contractor's) proposed low level of effort was not found to have made the proposal ambiguous or uncertain. Similarly, Metro's deficiency with respect to the application and escalation of Davis-Bacon wage rates would not appear to be of such a nature as to allow NASA to apprise an offeror of its existence during written or oral discussions (prior to what NASA calls "final negotiations"). We believe that NASA could properly have made the necessary cost adjustments to reflect cost realism as it had done with regard to Metro's proposed attempt to pay holdover MSI union employees less than they were presently receiving under the MSI union collective bargaining agreement. See discussion, supra.

In essence, the adjustment by NASA during evaluation and the correction of the deficiency by Metro subject to the review and approval of NASA we view as two different actions which reach the same result. Therefore, since NASA could have made the necessary adjustments to Metro's proposal in the evaluation process, its review and approval of Metro's correction of this deficiency in "final negotiations" did no harm to the MSI competitive position from a cost standpoint.

In cost-plus contract cases not involving NASA's PRD 70-15, this process of pointing out such deficiencies and allowing the offeror to make its own proposal modifications is used with the ultimate determination of the offeror's most probable cost still left to the agency. See Bell Aerospace, supra, at 359-360. However, in the context of a NASA PRD 70-15 procurement where multiple "final negotiations" take place, it seems inconsistent to on the one hand limit the discussion process

as it related to disclosing deficiencies only to disclose deficiencies to one offeror in the "final negotiations" phase.

RELEASE OF PROPRIETARY INFORMATION

MSI also argues that NASA's release to Metro of material proprietary to it gave Metro an unfair advantage by affording that firm the opportunity to obtain knowledge of MSI's financial and organization status to which it had no right. NASA indicates that, following the submission of proposals, Metro protested MSI's size status to the Small Business Administration (SBA). In support of this size protest, Metro requested certain documents from NASA. Personnel at MSFC who were not associated with the SEB, in response to this request on March 3, 1975, inadvertently released a copy of the transfer agreement effective September 1, 1974, between MSI and its predecessor, MSI of Tennessee, which related to a novation agreement with NASA. According to the NASA report, the document "contained the basis for the transfer between the two companies but did not contain financial or business data which would have given Metro insight into MSI's proposal."

It is agreed by NASA that Metro did not have a right to the material but NASA argues that MSI was not prejudiced in this procurement by the inappropriate disclosure. We agree. Unlike a situation where either a proposer's unique technical approach or its price is improperly disclosed to other offerors during negotiations and other offerors could modify their proposals to take the new information into account (see, e.g., Swedlow, Inc., 53 Comp. Gen. 139 (1973), affirmed 53 Comp. Gen. 564 (1974), 74-1 CPD 55) here, the materials divulged the financial aspects of the transfer which relate to MSI's responsibility rather than to its price or technical approach in the instant procurement. While it is conceivable that such information may be of value to a party protesting MSI's size status to the SBA, the information in question was already in the Government's hands and we therefore fail to perceive the degree of harm asserted by MSI.

METRO'S COMMITMENT TO
MINORITY SUBCONTRACTING

Lastly, MSI argues that, while the SSO indicated that one factor in deciding in favor of Metro was its firm subcontract with a minority-owned company, information received by MSI on July 29, 1975, indicated that as of that date Metro did not have such a subcontract. (Note--

As mentioned above, minority subcontracting was a subfactor in the "Other Factors" portion of the RFP evaluation factors.)

The source selection statement states in this regard:

> "* * * While MSI is committed to procure certain designated supplies and materials from local Minority-owned or Small Business firms, Metro has agreed not only to consider the same procurement arrangement for like materials and supplies, but Metro is also firmly committed to procure data processing from a local Minority-owned concern, D. P. Associates, Inc." (Emphasis added.)

NASA's report states that:

> "* * * A proposal for the use of a particular subcontractor is accepted by the SEB in the same manner as a proposal to use a named individual as a Key Personnel. Absent any contrary information, the contractor's proposal is accepted on its face.
>
> "Additionally, on August 27, 1975, Metro reaffirmed its intent to subcontract with the firm and will resume negotiations upon resolution of this protest."

It is clear from the above-noted statements that Metro did not have any sort of contractual arrangement with D. P. Associates. Moreover, the record is devoid of information as to any commitment at all between D. P. Associates and Metro other than the fact that Metro "proposed" to use that firm.

As noted above, NASA accepted this proposed use in the same manner as a proposal to use a named individual as a key personnel and evaluated Metro as if it had entered into a contractual arrangement with D. P. Associates. We do not believe this was proper, especially where the use of this minority firm was proposed by Metro only during NASA's "final negotiations" with two offerors whose proposals were extremely close on a mission suitability basis and the proposed use of this minority subcontractor was a significant discriminator between the two proposals. Cf. Serv-Air, Inc., B-179065, April 22,

1974, 74-1 CPD 206. As set forth by the court in Rudolph F. Matzer & Associates, Inc. v. Warner, 348 F.Supp. 991 (M.D. Fla. 1972), where in the course of a negotiated procurement, an agency evaluates a proposal based on an offeror's proposed use of certain resources (key employees) which the offeror neither contractually controls nor has an informal commitment regarding its use, the evaluation is "patently irrational."

We do not believe that an offeror must in every instance have contractual relationships with key employees, subcontractors, etc. However, for those employees, subcontractors, etc., to be considered in the evaluation of the offeror's proposal absent such a contractual relationship, the agency must reasonably be assured that the employee, subcontractor, etc., is firmly committed to the offeror. See Programming Methods, GTE Information Systems, Inc., B-181845, December 12, 1974, 74-2 CPD 331. This is especially true where the consideration of the factor in question may be determinative of award. Serv-Air, supra. We do not believe that an offeror's mere proposed use of a certain person or subcontractor constitutes such a commitment. Indeed, if this was all that was required, there would be no way to preclude an offeror from proposing an impressive array of employees and/or subcontractors, to be evaluated on that basis, and perhaps receive award, even where the persons or companies proposed had never committed themselves to the offeror and had no intention of doing so. See rationale for RFP clause precluding this situation set forth in Hew Es Co., Incorporated, B-183040, April 18, 1975, 75-1 CPD 239.

Accordingly, we believe that NASA erred in merely accepting, without more, Metro's proposed use of D. P. Associates and then using this fact as a significant basis for the award decision. See Serv-Air, supra. In view of this fact, it is now incumbent upon NASA to reopen its evaluation in this regard and assess the respective proposals based on the resources actually "committed" to the project. As can be clearly seen, the concept of commitment of resources can equally apply to the area of key personnel. We therefore feel that NASA should reexamine this aspect of its evaluation.

RESOLUTION OF PROTEST PENDING
FREEDOM OF INFORMATION ACT SUIT

MSI, in pursuing its protest, requested certain documents such as the SEB report from NASA. Some of the information requested was released. Most of it was not. Therefore, MSI filed an appeal in

accordance with the Freedom of Information Act (FOIA), 5 U.S.C. § 552 (Supp. IV, 1974), and NASA's implementing regulations, 14 C.F.R. § 1206 (1975). On October 15, 1975, NASA denied MSI's appeal and on November 10, 1975, MSI filed an FOIA action in the United States District Court for the Northern District of Alabama.

At the conference on this protest, MSI specifically requested that we withhold our decision pending the court's disposition of the FOIA action. On November 17, 1975, MSI was informally advised that GAO would not withhold the processing of its protest.

MSI, thereafter, complained that GAO acted improperly in denying MSI's request to withhold the decision arguing that "This is not an instance where further delay could harm the NASA procurement process since the services which were the subject of the Request for Proposals (RFP) are presently being performed [by MSI] in a manner satisfactory to NASA. In the matter of Riggins and Williamson Machine Company, Inc., et al., 75-1 CPD 168 (1975)."

In Riggins & Williamson the protester claimed that it was at a disadvantage being without access to portions of the agency report on the protest submitted to our Office. We do not disagree that any time material is submitted for our in camera review, one or more parties may feel disadvantaged. However, in deciding to issue a decision in Riggins & Williamson, we indicated that we had carefully balanced the disadvantages to the protester against a further delay in the procurement plan. However, this balancing test is not the sole consideration to be applied to these situations. Each circumstance must be viewed separately and the magnitude of the disadvantages of respective parties including the Government must be weighed.

Here, as MSI asserts, NASA has not claimed that a delay in our issuance of a decision would be critical. Nevertheless, any further delay would postpone the procurement process indefinitely, impact severely on the proposed awardee who has been in limbo since the filing of this protest in July 1975 and further permit MSI to continue as the holdover contractor long after a new contractor (only possibly MSI) should have been awarded a contract for NASA's current needs. Examining these factors, we are of the opinion that delay of the decision would be unreasonable.

CONCLUSION

Summarizing our discussion above with respect to the merits of the protest, we believe that the evaluation should be reopened so that the assessment of possible cost risk relating to potential labor

unrest can be assessed. This cost risk should be properly determined and the impact of any such cost risk on realistic costs, other factors and/or mission suitability should be adjudged with appropriate action taken after this review. Also examined should be the commitment of resources.

In the course of the NASA review of cost, we think that an analysis of the cost impact of the new Service Contract Act wage rates (new collective bargaining agreement) which became effective on June 1, 1975, should be assessed. As noted in Dyneteria, Inc., 55 Comp. Gen. 97 (1975), 75-2 CPD 36, affirmed in Tombs & Sons, Inc., B-178701, November 20, 1975, 75-2 CPD 332, it is insufficient for an agency to simply assume after prices are received but before award that a new Service Contract Act Wage Determination will affect all offerors equally. Thus, even though both proposals were based on the prior collective bargaining agreement with projected escalations, and since NASA has indicated that all evaluation labor costs governed by the Service Contract Act were assessed on this basis, we feel that a more appropriate and precise analysis is now both possible and in order, in light of the definitization of the new applicable wages.

R. F. Keller

Deputy Comptroller General
of the United States