



**Comptroller General  
of the United States**

Washington, D.C. 20548

# Decision

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**Matter of:** Aerospace Design & Fabrication, Inc.

**File:** B-278896.2; B-278896.3; B-278896.4; B-278896.5

**Date:** May 4, 1998

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Paralee White, Esq., Michael A. Hordell, Esq., and Lisa K. Miller, Esq., Gadsby & Hannah, for the protester.

James S. Ganther, Esq., Ganther & Fee, for Dynacs Engineering Co., Inc., an intervenor.

Vincent A. Salgado, Esq., and Jerald J. Kennemuth, Esq., National Aeronautics and Space Administration, for the agency.

Ralph O. White, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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## **DIGEST**

1. Protester's contention that the awardee misrepresented the availability of its key personnel is sustained where the record shows that the awardee had not obtained a commitment from the proposed individuals as it claimed, and where the misrepresentation, together with an evaluation error by the agency, resulted in a material misvaluation of the key personnel section of the awardee's proposal.
2. Agency contention that award fee negotiations on a prior contract were sufficient opportunity for the protester to comment on adverse information received from a past performance reference, as required by Federal Acquisition Regulation § 15.610(c)(6) (June 1997), is rejected, and the protest sustained, where the protester was a subcontractor on the prior contract, not the prime contractor, and where the record shows that the subcontractor had no meaningful role, or opportunity to respond, during the award fee negotiations with the prime contractor.
3. Solicitation terms are latently ambiguous and result in unequal competition where the record shows that the offerors reasonably understood requirements and submitted proposals based on different assumptions that potentially skewed the agency's assessment under the relevant experience and past performance evaluation factor.

4. Protester's argument that a cost realism adjustment made to its proposed costs was improper is denied where the record shows that the agency had a reasonable basis for the conclusion.

5. General Accounting Office recommends reimbursement of proposal preparation costs as well as protest costs because unique circumstances create a situation where reevaluation and reconsideration of the selection decision cannot return the parties to their respective positions prior to the agency error.

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## **DECISION**

Aerospace Design & Fabrication, Inc. (ADF) protests the decision by the National Aeronautics and Space Administration (NASA) to make award to Dynacs Engineering Co., Inc., pursuant to request for proposals (RFP) No. 3-085970, seeking offers to provide scientific, engineering, technical, and administrative services for NASA's Lewis Research Center. ADF argues that award to Dynacs is improper because the Dynacs proposal included material misrepresentations about its key personnel; the agency miscalculated proposals; and the agency failed to disclose during discussions certain weaknesses regarding ADF's past performance.

We sustain the protest.

## **BACKGROUND**

The contract here is a follow-on to an earlier scientific, engineering, technical and administrative services contract awarded by NASA's Lewis Research Center to NYMA, Inc., under the Small Business Administration's (SBA) section 8(a) set-aside program.<sup>1</sup> The RFP was issued on September 30, 1997, after NYMA, Inc. was acquired by a large business earlier in the year, and lost its status as a small disadvantaged business under SBA regulations. The RFP anticipated a competitive procurement limited to 8(a) businesses leading to the award of a hybrid contract containing approximately 10-percent fixed-price and 90-percent cost-plus-award-fee task orders. RFP Cover letter, Sept. 30, 1997, Attach. 1 at 1; RFP §§ B.2, L.14; RFP, Attach. 1, Industry Briefing Questions, Oct. 8, 1997 at question 53. The estimated maximum value of the effort was \$45 million for the 27-month performance period. Initial Contracting Officer's Statement, Jan. 26, 1998, at 1.

Section M.3 of the RFP set forth three evaluation factors of equal importance: mission suitability; cost; and relevant experience and past performance. Of these three factors, cost and relevant experience and past performance were not scored,

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<sup>1</sup>Thus, the predecessor contract and the current contract have been referred to, respectively, as SETAR I and SETAR II (for scientific, engineering, technical, administrative, and related tasks).

but were evaluated by the source evaluation committee (SEC) for review by the source selection official (SSO). RFP § M.2. The mission suitability factor was evaluated on a 1,000-point scale, with the following allocation of points among the subfactors (the elements of the subfactors were not separately scored):

MISSION SUITABILITY	<u>Points</u>
Subfactor 1: Understanding the Requirements	200
-- Technical Approach	
-- Quality Assurance Plan	
Subfactor 2: Management Plan	550
-- Phase-In Plan	
-- Personnel Management	
-- Business Management	
-- Property Management	
-- Subcontracting	
Subfactor 3: Key Personnel/Company Resources	<u>250</u>
TOTAL	1,000

RFP § M.3.

After NASA's receipt and evaluation of 14 proposals in response to the RFP, the SEC, on December 8, selected 3 of the proposals for inclusion in the competitive range--ADF, Dynacs, and a third offeror. The agency then held discussions with the competitive range offerors, and best and final offers (BAFO) were received on December 12. After final evaluation by the SEC, the results of the competition were presented to, and discussed with, the SSO. The final point scores and adjectival ratings are set forth below<sup>2</sup>:

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<sup>2</sup>Since the third competitive range offeror did not participate in this protest, and since its proposal was generally evaluated less favorably than the proposals of ADF and Dynacs, we have not included the evaluation results for the third offeror's proposal in this decision.

	<b>DYNACS</b>	<b>ADF</b>
<b>MISSION SUITABILITY TOTAL</b>	[deleted] Excellent	[deleted] Very Good
--Understanding the Requirements	[deleted] [deleted]	[deleted] [deleted]
--Management Plan	[deleted] [deleted]	[deleted] [deleted]
--Key Personnel/ Company Resources	[deleted] [deleted]	[deleted] [deleted]
<b>RELEVANT EXPERIENCE AND PAST PERFORMANCE</b>	Excellent	Very Good
<b>PROBABLE COST</b>	[deleted]	[deleted]

The table above, showing the final evaluation results, reflects one change made by the SSO. When the SEC completed its evaluation, it awarded ADF a rating of good under the relevant experience and past performance factor. The SSO, however, disagreed with the rating and raised ADF's score under this factor from good to very good. Source Selection Statement, Dec. 16, 1997, at 8. Based on the evaluation results shown above, the SSO selected Dynacs for award because of "its superior technical proposal, its excellent [r]elevant [e]xperience and [p]ast [p]erformance, and its lowest probable cost . . . ." *Id.* These protests followed.

#### EVALUATION OF KEY PERSONNEL

ADF argues that Dynacs misrepresented the level of commitment from three of its proposed key managers, leading the agency to improperly award Dynacs more credit in the key personnel portion of the evaluation than the proposal merited. In addition, ADF claims that the effect of these misrepresentations rippled through other mission suitability assessments, causing Dynacs's score under this factor to be improperly inflated. ADF also argues that Dynacs crafted the key personnel section of its proposal in an effort to wrongly gain credit for a manager it was not offering in its proposal. As a result, ADF argues that the evaluation should be overturned, and Dynacs should be barred from any subsequent competition for these services.

Dynacs and NASA reply that the Dynacs proposal did not misrepresent the availability of either the three key managers, or the manager that was not offered. In addition, both point out that each of the three key managers whose commitment ADF questions eventually agreed to come to work for Dynacs after award. Thus, the agency and intervenor argue that there was no "bait and switch" of key

personnel for this contract, and there was no prejudice resulting from any alleged misrepresentation of the level of commitment of the three key managers.

In our review of protests involving service contracts where the most qualified personnel are often those currently performing the services, we are mindful of the difficulty faced by a nonincumbent contractor in securing a qualified workforce sufficient to win the competition. ManTech Advanced Sys. Int'l, Inc., B-255719.2, May 11, 1994, 94-1 CPD ¶ 326 at 5; CBIS Fed. Inc., B-245844.2, Mar. 27, 1992, 92-1 CPD ¶ 308 at 5. Nevertheless, an offeror's misrepresentation concerning personnel that materially influences an agency's consideration of its proposal generally provides a basis for proposal rejection or reevaluation of the award decision based on the faulty proposal. ManTech Advanced Sys. Int'l, Inc., *supra*, at 5, 13 (misrepresentation of personnel commitments, reevaluation recommended); CBIS Fed. Inc., *supra*, at 6-7, 17 (misrepresentation of personnel availability, reevaluation recommended); Ultra Tech. Corp., B-230309.6, Jan. 18, 1989, 89-1 CPD ¶ 42 at 5 (misrepresentation of availability of key person and use of name in proposal without permission, termination recommended absent other agency findings); Informatics, Inc., B-188566, Jan. 20, 1978, 78-1 CPD ¶ 53 at 13 (misrepresentation of results of a survey of the availability of incumbent's personnel, exclusion recommended).

For the reasons set forth below, we find that Dynacs misrepresented the nature of the commitment it received from three of the four incumbent personnel it proposed. We also find that Dynacs included in its proposal one of the incumbent's key personnel despite his specific request that it not do so. Further, we conclude that these actions, together with the related evaluation errors by the agency, resulted in a material misvaluation of the key personnel portion of Dynacs's proposal.

The RFP for this procurement did not specify the number of key personnel an offeror should propose, but instead left the matter to the offeror's discretion. RFP § M.3 at M-4; RFP, Attach. 1, Industry Briefing Questions at questions 6-7. Offerors were required to include in their proposals "the responsibilities, qualifications, availability, level of involvement and number of key personnel," RFP § L.27 at L-20, and were advised that this information would be evaluated. RFP § M.3 at M-4. There was no requirement in the RFP for offerors to provide written commitments for key personnel.

In its proposal, Dynacs identified five key personnel, consisting of a project manager, and four area managers--one each for Aeronautics, Aerospace Technology, Aeropropulsion Systems, and Space Experiments. Dynacs Proposal, Vol. I at 23-27. Each of the four proposed area managers was an incumbent employee (working for NYMA, Inc.) on the predecessor contract. *Id.* at 24. For three of these proposed area managers, Dynacs represented--using identical wording in each case--that "Dynacs has received [Dr. A's] [Dr. B's] [Dr. C's] commitment to become a member of the Dynacs team upon contract award." *Id.* at 25-26.

After ADF cast doubt upon the nature of the commitments that were made to Dynacs, our Office convened a hearing to receive testimony from representatives of Dynacs, and from each of the three key individuals mentioned above as to the nature of the commitments in question.

During the hearing, two of Dynacs's representatives testified that prior to submitting the proposal they contacted each of the three individuals by telephone and eventually met face-to-face with all three. Hearing Transcript (Tr.) at 23-24, 26, 31, 110-11, 113. For each individual, one of the Dynacs representatives testified that he asked--using similar words in each instance--"if we [Dynacs] were fortunate enough to win the contract, would he [Dr. A], in fact, come to work for Dynacs . . . ." Tr. at 114.<sup>3</sup> However, in each case, the Dynacs witness testified that there was no exchange of information about salary, benefits, or the precise position which might be offered, other than inquiring whether the individual might like to continue performing his current job. Tr. at 110, 112, 116-17, 119, 133.

The Dynacs witness who conducted the face-to-face meetings initially testified that none of these three individuals were asked if their names could be used in the proposal, and none gave permission for their names to be used. Tr. at 118-19. The same witness then conceded that one of the individuals--Dr. A--expressly denied Dynacs's request to provide information for use in the proposal, and refused to grant permission to Dynacs to identify him in its proposal. Tr. at 119; see also Tr. at 70. Dr. A himself testified and confirmed that he met with the Dynacs representative (Tr. at 157), and told Dynacs that he was exclusively committed to another offeror, and that Dynacs could not use his name, or his resume, in its proposal. Tr. at 158. He also testified that when the Dynacs representative asked if he would "consider working for them if they won," he agreed that he "would consider it." Id. Finally, Dr. A testified that he did not know he had been offered as a key person in Dynacs's proposal until after the contract had been awarded, when--as a representative of the outgoing contractor--he was participating in a meeting to plan the transfer of the contract to the new awardee. Tr. at 161-62.

Drs. B and C also testified that they had not committed to work for Dynacs and that neither was aware he had been named as a key manager in Dynacs's proposal. Tr. at 288, 299-300. Dr. B testified that after award to Dynacs he was concerned about keeping his job and supporting his family, and had no idea whether he would be hired by the new awardee. Tr. at 305-07. On the other hand, both Drs. B and C testified that it was their purpose in meeting with Dynacs to be included in the

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<sup>3</sup>The testimony regarding the other two individuals was as follows: "[w]e basically met with [Dr. B] to determine if he would be willing to come to work for Dynacs should we be fortunate enough to win the contract," Tr. at 109; and "[w]e had requested that he [Dr. C] also, if we were fortunate enough to win the contract, would he, in fact, come to work for our company," Tr. at 111-12.

proposal, and both hoped they had been included. Tr. at 288, 312. Unlike Dr. B, Dr. C testified that it was his understanding that he would be named in the Dynacs proposal, even though he did not consider himself committed to Dynacs in the event it prevailed in the competition. Tr. at 285, 288.

As a starting point in our analysis, the record in this case, including the testimony received at the hearing, clearly refutes Dynacs's claim of a commitment between the company and Drs. A, B, and C.

With respect to Dr. A, the record not only shows that Dynacs misrepresented that it had received a commitment from this individual, but Dynacs's own witness admitted that Dr. A expressly refused to provide permission for the company to include him in its proposal, and refused to provide background information that could be used for that purpose. Tr. at 119. At best, after Dr. A refused to respond to several entreaties, he agreed to "consider" working for Dynacs in the event it prevailed in the competition. Tr. at 158. In short, there is no way to reconcile the proposal's claim<sup>4</sup> that "Dynacs has received [Dr. A's] commitment to become a member of the Dynacs team upon contract award" with the testimony received from both Dr. A (Tr. at 158) and Dynacs's own witness (Tr. at 114).

Even with respect to Drs. B and C, the record does not support Dynacs's claim of a commitment. As set forth above, both testified that they had not provided a commitment to Dynacs, and neither was aware of having been identified in the proposal. Tr. at 288, 299-300. Although Drs. B and C both explained that they "hoped" they had been named in the proposal (Tr. at 288, 312), the clear import of the testimony received by our Office was that neither of these individuals, nor Dr. A, knew whether they would have a job after learning of Dynacs's selection for award. In fact, the record shows that Dr. A first learned of his "commitment" while participating in a meeting--as a representative of the outgoing contractor--to plan the smooth transfer of services to the new awardee. Tr. at 161-62.

Finally, even Dynacs's description of its efforts here undercuts its claim of commitments. Dynacs's own witness testified that there was no agreement with any of these three incumbent personnel regarding salary, benefits, or the precise job involved in this commitment. Tr. at 110, 112, 116-17, 119, and 133. In similar circumstances, we have upheld an agency determination that an agreement to work for an offeror if it prevails in the competition--assuming successful salary and benefit negotiations--is no more than a promise to negotiate for employment, and not a binding commitment. Scientific Management Assocs., Inc., B-238913, July 12, 1990, 90-2 CPD ¶ 27 at 7. Accordingly, we find that the totality of the evidence convincingly shows that Dynacs's misrepresented the level of commitment for three

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<sup>4</sup>Dynacs's Proposal, Vol. I at 25.

of the five key personnel in its proposal.<sup>5</sup> See ManTech Advanced Sys. Int'l, Inc., supra, at 10; Ultra Tech. Corp., supra, at 4-5.

Our analysis of the misrepresentation here turns next to an assessment of the effect on the evaluation. Despite NASA's assertion that Dynacs's claimed commitments did not change the outcome of this competition, the record does not support this contention. As explained below, there was very little basis to distinguish between these two offerors under the mission suitability evaluation factor, other than the rating under the key personnel/company resources subfactor. In addition, an evaluation error by the agency improperly magnified the effect of Dynacs's claimed commitments. Finally, Dynacs's misrepresentation of its commitments had a ripple effect in the evaluation that pushed the ultimate assessment of its proposal even farther afield. As a result, we conclude that the agency's reliance on, and inflation of, the misrepresentations in Dynacs's proposal led to a miscalculation of the relative merits of the two proposals.

First, both Dynacs and ADF received [deleted] ratings under the first two subfactors within the mission suitability evaluation factor. The scores were [deleted] under the first subfactor, and [deleted] points apart under the second subfactor [deleted]. All of the remaining difference between their mission suitability scores is accounted for by the [deleted] point difference under key personnel/company resources subfactor. While Dynacs also received credit for a strong project manager, there is no doubt that the mission suitability scores of these two offerors would have been much closer if Dynacs had not received a strength for its highly qualified key personnel, and the proposals may have received the same adjectival rating.

Next, we note that an evaluation error by the agency magnified the effect of Dynacs's claimed commitments by giving even greater credit to Dynacs's proposal in this area than was appropriate. Evaluation worksheets developed to assess

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<sup>5</sup>For the record, we deny the protester's allegation related to Dynacs's fourth key area manager--i.e., that Dynacs crafted its proposal to attempt to receive credit for an individual it did not offer, and thus Dynacs misrepresented (and NASA miscalculated) the availability of this individual. In this instance, the proposal clearly explained that the individual in question was not available to perform the contract, and clearly identified the individual Dynacs was proposing instead. Dynacs Proposal, Vol. I at 26-27. The SSO apparently recognized that the agency evaluators might still be hoping that the unavailable individual would materialize, and stated in the final selection document that he "consider[ed] the potential nonavailability of a key Microgravity Project Manager in the Dynacs proposal to be of greater significance than the SEC." Source Selection Statement, Dec. 16, 1997, at 8. Given this record, we see no basis to conclude, as ADF argues, that the SSO's recognition of the manager's potential nonavailability suggests that NASA viewed him as available--and thus miscalculated the proposal.

Dynacs's proposal include the notation, "Very Good Key personnel Quals. (signed commitments from 3 incumbent mgrs. & 2 others." Worksheets, Agency Report Tab 23 at 3. This notation in the evaluation worksheets eventually found its way into the Source Selection Statement. Specifically, in reviewing the merits of Dynacs's proposal under the key personnel and company resources subfactor, the SSO states:

Dynacs proposed an outstanding Project Manager with extensive technical and business management experience on similar contracts. **Dynacs also proposed a team of highly qualified key personnel. Signed commitments were obtained from all key personnel proposed.** Numerous other contracts currently performed by Dynacs provide a broad base of technical and personnel resources to support the SETAR II contract.

Source Selection Statement, Dec. 16, 1997, at 5 (emphasis added). This is the entirety of the SSO's consideration of this evaluation subfactor for Dynacs.

While the inclusion of the reference to "signed commitments" in the final selection decision document strongly suggests that the agency erroneously evaluated the proposal in this area, the Chairman of the SEC testified at the hearing that the notation was simply an administrative error. Tr. at 197. Specifically, he testified that the notation about signed commitments was listed on the worksheets for both ADF and Dynacs, but was correct only for ADF; he also testified that the worksheet error in Dynacs's evaluation was inadvertently carried forward to the final source decision document, but did not reflect the views of the SEC or the SSO. Tr. at 197-99.

The testimony of the SEC Chairman conflicts with the contemporaneous evaluation evidence found in both the worksheets and in the final selection document. We consider the entire record in attempting to resolve such conflicts, including later explanations and arguments, but we accord greater weight to contemporaneous evaluation and source selection materials than to explanations prepared in response to protest contentions. Cygnus Corp., B-275181, Jan. 29, 1997, 97-1 CPD ¶ 63 at 8; DynCorp, B-245289, B-245289.2, Dec. 23, 1991, 91-2 CPD ¶ 575 at 7 n.13. While we consider the testimony of the SEC Chairman to be entirely credible, we have no contemporaneous evidence that the SSO, or the evaluators, believed this written finding to be in error. Nor did the agency, at any time prior to the hearing, advise that this conclusion was in error, despite the submission of an initial and two supplemental agency reports. Given that the Source Selection Statement is the foundation of any agency award decision, and should not have been signed by the SSO if it did not accurately reflect his considerations, we cannot justify disregarding the statements in it, as well as those in the written evaluation materials, that NASA evaluators--and more importantly, the SSO--concluded Dynacs had offered written commitments for its key personnel, and that NASA valued those commitments, where the only evidence in conflict with the contemporaneous materials is the

testimony of one individual made during the course of the protest. Instead, we must accord greater weight to the contemporaneous documents that were prepared to reflect the considered judgment of the agency. See Boeing Sikorsky Aircraft Support, B-277263.2, B-277263.3, Sept. 29, 1997, 97-2 CPD ¶ 91 at 15.

Finally, as stated above, we conclude that these misrepresentations in Dynacs's proposal had a ripple effect in the evaluation as well. For example, the record here shows that after contract award Dynacs was surprised to learn the magnitude of the incumbent employees' salaries and concluded that it had significantly underestimated their salaries in its proposal. Tr. at 249. Thus, Dynacs found it necessary to explore a cost increase with NASA immediately after award. Tr. at 103-04, 249. If the proposal had accurately reflected the salaries of these personnel, or acknowledged that the incumbent employees might be asked to take significant pay cuts, the proposal might not have been viewed as having [deleted] for its total compensation package or its thorough personnel management practices.<sup>6</sup> See Final Evaluation Report, Dec. 5, 1997, at 20.

Before ending this analysis, we address NASA's and the intervenor's contentions that there was no prejudice here because each of the three key managers eventually accepted employment with Dynacs, such that no "bait and switch" occurred. As NASA correctly points out, our Office will not sustain a protest unless the protester demonstrates a reasonable possibility of prejudice, that is, unless the protester demonstrates that, but for the agency's actions, it would have had a substantial chance of receiving the award. McDonald-Bradley, B-270126, Feb. 8, 1996, 96-1 CPD ¶ 54 at 3; see Statistica, Inc. v. Christopher, 102 F.3d 1577, 1581 (Fed. Cir. 1996).

While the ultimate conclusion here that ADF might have had a substantial chance of receiving the award depends upon the resolution of other protest issues in ADF's favor, as discussed in greater detail below, the eventual decision of these key individuals to accept employment with Dynacs is not dispositive of the question of prejudice.<sup>7</sup> ManTech Advanced Sys. Int'l, Inc., supra, at 12-13; see Informatix, Inc., supra, at 13 ("it is also inappropriate to take note of [the awardee's] post-selection efforts in regard to recruitment of [the incumbent's] employees").

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<sup>6</sup>As a further example, the record shows that at least one of the three incumbent key employees at issue here accepted a significant reduction in salary in order to remain employed on the contract. Tr. at 164-65, 173. Again, if an issue like this had been apparent in the proposal, the evaluators might have been concerned about the company's ability to retain incumbent personnel, and Dynacs might not have received the strong evaluation it obtained.

<sup>7</sup>As we have stated in prior cases, we are aware that the reality in the current government contract market is that incumbent personnel to a large degree follow the award of contracts. ManTech Advanced Sys. Int'l, Inc., supra, at 13.

Here, the prejudice occurred when Dynacs received evaluation credit for nonexistent commitments from key employees, and in one case, for naming a key employee who had expressly denied Dynacs permission to use his name in its proposal. Thus, Dynacs was placed on the same footing as ADF, which did, in fact, accurately represent in its proposal that it had signed commitments from its proposed key personnel.

## RELEVANT EXPERIENCE AND PAST PERFORMANCE

ADF raises several arguments related to NASA's evaluation under the relevant experience and past performance factor. Specifically, ADF contends that both proposals were evaluated unreasonably in this area; that the agency failed to advise ADF during discussions of unfavorable past performance information ADF had not previously been given an opportunity to rebut, in violation of Federal Acquisition Regulation (FAR) § 15.610(c)(6) (June 1997); and, that the solicitation contained a latent ambiguity with respect to the submission of past performance information that caused ADF to receive a lower rating than was received by Dynacs. As set forth below, we deny ADF's challenges to the specific evaluation assessments made by NASA, but we sustain its contentions that it was misled by a latent ambiguity in the RFP regarding the submission of past performance information, and that the agency was required to discuss certain of ADF's unfavorable past performance reviews during negotiations.

In describing the expected structure of proposal submissions for this procurement, the RFP anticipated a three-volume submission with page limits on two of the three volumes. RFP § L.26(a). The third volume of each proposal was to address the offeror's relevant experience and past performance, and was not to exceed five pages. *Id.* In addition, offerors were required to identify two references, on forms supplied within the solicitation, for each prime and subcontractor participating in the proposal. RFP § L.31. This provision also explained that the completed reference forms would not be counted against the five-page limit for this portion of the proposal.

ADF's proposal identified itself as the prime contractor, and NYMA, Inc. (the incumbent) and a second company as subcontractors. ADF Proposal Vol. III at 1. As required by the RFP, ADF included two references for itself, and two references for each of its two subcontractors. ADF's two references both involved contracts where it had been the subcontractor--one reference was NYMA (ADF's subcontractor here) for the SETAR I effort; the other reference was [deleted]. ADF then used its five-page discussion to expand on the information related to its two references, and those of its two subcontractors. *Id.* at 1-5. In contrast, Dynacs did not propose to use subcontractors for the SETAR II effort. Thus, its proposal included the two references required by the RFP, while its five-page discussion was used to expand on those two references and on Dynacs's experience with six other related contracts. Dynacs Proposal Vol. III at 1-5.

In evaluating the proposals under this factor, NASA awarded ADF [deleted]. Each [deleted] included an indication about which of the three companies--ADF, NYMA, or the third company--possessed the [deleted].

Final Evaluation Report, Dec. 5, 1997, at 22. As a result, the SEC awarded ADF an overall score of good under the relevant experience and past performance evaluation factor. *Id.* As explained above, the SSO disagreed with the SEC's conclusion, and in his selection decision he raised the score to very good. Source Selection Statement, *supra*, at 8. In contrast, Dynacs received an overall score of excellent based on the SEC's assessment that the proposal contained [deleted] and [deleted].

During the course of this protest, NASA expanded on its basis for the evaluation. First, it explained that it reasonably took note of ADF's lack of prime contract experience, and concluded that NYMA's experience as a prime contractor could not be used to fill that need for ADF. Initial Contracting Officer's Statement, Jan. 26, 1998, at 3-4. The agency also explained that it tempered NYMA's very favorable reviews of ADF's past performance because of NYMA's obvious economic interest in ADF's prevailing in the competition. Contracting Officer's First Supp. Statement, Feb. 23, 1998, at 5-6. In addition, it explained that it was reasonably concerned about [deleted]. In the [deleted] response to the request for past performance information, the company indicated that ADF [deleted]. *Id.* at 6. In NASA's view, there was no need to advise ADF of its concerns about [deleted] during discussions because this issue had been aired during award fee negotiations with [deleted], the prime contractor. Initial Contracting Officer's Statement, *supra*, at 4.

With respect to ADF's contentions that the evaluation conclusions reached about the past performance proposals were unreasonable, our review consists of examining the record to determine whether the agency's judgment was reasonable and consistent with stated evaluation criteria and applicable statutes and regulations. *ESCO, Inc.*, B-225565, Apr. 29, 1987, 87-1 CPD ¶ 450 at 7. We have reviewed each of ADF's claims and find that the agency's conclusions were appropriate and reasonable, based on the information before it. Since most of ADF's contentions involved its own less than favorable evaluation, we set forth two examples below.

First, despite ADF's contentions to the contrary, we see nothing unreasonable about NASA's concern that ADF lacked experience performing a contract of this magnitude as the prime contractor. Among other things, NASA expects a significant downsizing of the SETAR II effort halfway through performance of this contract (Tr. at 194), and predicted that the attendant management challenges would best be met by an offeror with past experience as a prime contractor, rather than as a subcontractor. Initial Contracting Officer's Statement, *supra*, at 4.

As a second example, we also see nothing unreasonable about the agency's decision to temper the favorable past performance reviews given ADF by NYMA. As the record shows, NYMA has a direct economic stake in a favorable outcome for ADF. In addition, this tempering of NYMA's review of ADF should not have been a complete surprise to the company. Our review of the reference form included within the RFP reveals that the form asks the company supplying the past performance information if a corporate or business relationship exists between the supplier of the information and the company being evaluated, and if so, to explain the relationship. RFP § J, Attach. F at 1. Simply put, this inquiry provides an appropriate safeguard against an abuse of the past performance reporting system, and we think the agency evaluators made reasonable use of the information it generated in this situation.

With respect to whether the agency's evaluation of relevant experience and past performance was compromised by a latent ambiguity in the RFP, and by its decision not to disclose certain unfavorable past performance information to ADF during discussions, we reach a different conclusion. As set forth below, we conclude that ADF's reasonable interpretation of the RFP caused its past performance proposal to be evaluated more unfavorably than Dynacs's proposal, and we conclude that the agency's award fee discussions with a prime contractor on an earlier contract were not sufficient to provide notice to ADF--the subcontractor in that procurement--of NASA's concerns.

An ambiguity exists where two or more reasonable interpretations of the terms or specifications of the solicitation are possible. Moreover, 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. Sciaky, Inc., B-261787.2, Nov. 8, 1995, 95-2 CPD ¶ 269 at 4.

The evidence in the record shows that potential offerors were concerned about the relationship between the reference forms to be supplied with an offeror's proposal, and the five-page narrative, prior to the submission of proposals. RFP, Attach. 1, Industry Briefing Questions, Oct. 8, 1997, questions 8, 35, and 40. In response to question number 8 during this briefing, NASA answered in the affirmative when a potential offeror asked if the narrative information should augment the information provided on the forms. As described above, ADF used its five-page narrative to provide greater detail about the underlying contracts with its two references, and greater detail about the two references for each of its two subcontractors; Dynacs, on the other hand, used its narrative to expand on its two references, and then provided information about six other prior contracts it considered relevant to the SETAR II effort. Both ADF and Dynacs argue that their narratives were used to "augment" their references.

ADF argues that because it was limited to providing information about its two references, and because it concluded that its most important references would be those where it had worked as a subcontractor on the previous SETAR I effort [deleted], it did not have an opportunity to provide past performance information on other contracts that would have shown its experience as a prime contractor. Conversely, ADF argues that Dynacs's interpretation permitted it to unfairly submit past performance information about eight different prior contracts, and to demonstrate a broader range of experience to NASA's evaluators. NASA responds that ADF's interpretation of the solicitation was unreasonable on the basis that the common understanding of the meaning of the word "augment" is to increase. Thus, NASA contends that the only meaning offerors could reasonably take from the RFP was that they could provide information about additional contracts in their past performance narratives.

We disagree. Our review of the RFP, including the questions and answers attached to it, the proposals themselves, and the evaluation materials, leads us to conclude that ADF's interpretation of the RFP's instructions to offerors was as reasonable as the interpretation offered by NASA and Dynacs. In fact, not only could an offeror reasonably conclude that the scope of the narrative was limited to the contracts identified on the reference forms, but this reading is consistent with the tone of the other questions raised during the industry briefing. While we will not set forth their entire text here, our reading of the related questions 35 and 40, and the agency's response to them, supports ADF's interpretation of the RFP's instruction about the relationship between the proposal narrative and the reference forms.<sup>8</sup>

While we recognize that any prejudice to ADF was ameliorated somewhat by its ability to provide detail in its narrative regarding the past experience of its subcontractors, a review of the two proposals leads us to conclude that if ADF had the opportunity, within the constraints of the page limitation, to detail a broader portrait of its past experience--as Dynacs did in its proposal--ADF may have been able to avoid some of the unfavorable evaluation conclusions NASA raised regarding its proposal. Compare ADF Proposal, Vol. III at 1-5 with Dynacs Proposal, Vol. III at 1-5. In addition, this situation was exacerbated by NASA's reasonable decision to accord less weight to the favorable review from NYMA because of the ongoing

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<sup>8</sup>Specifically, questions 35 and 40, and the responses thereto, indicate a concern by an offeror, or offerors, that a competitor using subcontractors will have a greater opportunity to identify references--and to expand on them in the narrative--than will an offeror that does not propose subcontractors. The underlying premise in this concern is that an offeror that does not propose subcontractors will not be able to identify other contract experiences in the narrative, and thus will have less of an opportunity to demonstrate its past performance. Reading the solicitation as a whole, we think these questions lend support to ADF's narrow reading of the RFP's instructions about the narrative portion of the proposal.

economic relationship between the two companies. ADF, which reasonably limited its narrative to detailing two prior contracts--only to have one of the two references largely, but reasonably, discounted--was then compared to an offeror who reasonably expounded on eight related contracts. Under circumstances such as these, we conclude that the differing reasonable assumptions of these offerors about the RFP's requirements did not permit competition on an equal basis. Sciaky, Inc., *supra*, at 4; Wheeler Bros., Inc.; Defense Logistics Agency--Recon., B-214081.3, Apr. 4, 1985, 85-1 CPD ¶ 388 at 6.

Our final consideration in the area of relevant experience and past performance is whether NASA was required to advise ADF during discussions of the unfavorable review of its past performance from one of its references. For the reasons below, we believe this information should have been discussed during negotiations.

There is no dispute between the parties about the general requirement found at FAR § 15.610(c)(6)--namely, that agencies holding discussions must permit offerors an opportunity to respond to past performance information obtained from references on which the offeror has not had a previous opportunity to comment. See generally American Combustion Indus., Inc., B-275057.2, Mar. 5, 1997, 97-1 CPD ¶ 105 at 9-11. Instead, NASA argues that ADF received its comment opportunity when the issue in question was raised during the award fee discussions on a prior contract.

During the course of the hearing held in connection with this protest, both the SEC Chairman and the contracting officer's technical representative (COTR) described the award fee sessions held during both NYMA's and [deleted] prior contracts--the referenced contracts for which ADF served as a subcontractor. Tr. at 240-43, 256-61. The testimony was that, as a general matter, a subcontractor does not attend the award fee evaluation sessions between the agency and the prime contractor. Tr. at 241. The COTR also explained that NASA does not become involved in award fee discussions between prime contractors and subcontractors, and that a subcontractor has no opportunity to ask NASA to review the outcome of these discussions. Tr. at 259-61. In addition, the COTR admitted that since NASA does not attend award fee discussions between prime contractors and their subcontractors, the agency does not know the nature of the exchange between the two parties. Tr. at 259-60.

Generally, award fee discussions may be sufficient, in some circumstances, to meet the requirements of FAR § 15.610(c)(6). In fact, FAR § 42.1503(b)--found within FAR Subpart 42.15, which describes a formal past performance reporting system to be implemented beginning January 1, 1998, and which was not in place at the time NASA negotiated this contract--expressly provides that such award or incentive fee evaluations will suffice to meet the requirement for an opportunity to comment. Despite this guidance, however, we do not agree that an agency can satisfy this requirement for an opportunity to comment when the award fee discussions upon

which it relies were held with a different party--i.e., the prime contractor on the earlier contract, for whom ADF served as a subcontractor.

We reach this conclusion based on the testimony received in this case which indicates that award fee discussions with a prime contractor--at least as conducted by NASA--do not generally afford a subcontractor any meaningful role in the exchange that is held as part of the award fee evaluation. In our view, the second-hand transmission of information from the prime contractor to the subcontractor will not normally provide the kind of opportunity for exchange and review anticipated by the requirements of FAR § 15.610(c)(6). Accordingly, we conclude that NASA was required to raise during discussions with ADF information received from ADF's references on which the firm had no prior opportunity to comment. This information includes, at a minimum, the information provided by [deleted] that formed the basis for the evaluation weakness that ADF might have [deleted].

#### COST ADJUSTMENT

ADF contends that NASA unreasonably adjusted its proposed costs upward by \$1.99 million, and that the biggest portion of the adjustment was based on a determination that ADF [deleted]. SEC Final Report, Dec. 15, 1997, at 5. Based on our review of the record, and the testimony received at the hearing, we conclude that the adjustment challenged by ADF was reasonable.

The RFP here anticipated award of a hybrid contract expected to contain approximately 10-percent fixed-price and 90-percent cost-plus-award-fee task orders. RFP Cover letter, Sept. 30, 1997, Attach. 1 at 1; RFP §§ B.2, L.14. Although the RFP identified an average work year of 2,080 hours and a workforce of 315 employees, RFP § L.28 at L.22, offerors were allowed to use whatever number of hours or employees they thought was appropriate. Offerors were also allowed to develop their own estimates of the number of productive hours for the effort, and to provide support for the number of claimed hours.<sup>9</sup> RFP, Attach. 1, Industry Briefing Questions at question 20.

In its proposal, ADF explained that it was using "a [deleted]. ADF Proposal, Vol. II, Cost, Oct. 30, 1997, at 6. Section 3.2 of the proposal identified a total skill mix of [deleted] employees. Id. at 4. The skill mix used by ADF [deleted]. RFP § L.28.

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<sup>9</sup>There is no definition in the RFP for the term "productive labor hours." In a conference call with all the parties on April 20, 1998, NASA representatives explained that productive labor hours were, in essence, those direct labor hours that remained after the allocation of all other hours to overhead accounts or to categories where both the agency and the offeror agreed there would be no direct labor charge for the time to the government.

During negotiations, NASA asked ADF to explain the assumptions used in its proposal regarding a standard workyear. In a second question, NASA also noted ADF's use of a productive workyear of [deleted] hours, and asked:

Where are the non-productive hours costed (i.e., which cost category and which cost element within the cost category) and how many hours are costed in each cost category. BE VERY SPECIFIC!!

NASA Letter to ADF, Dec. 9, 1997, Attach. 1, questions 4-5.

In response, ADF confirmed its use of [deleted] hours for a standard workyear, as set forth at [deleted], and provided a fact sheet to detail its deductions from the [deleted] figure to reach the [deleted] productive hours included in its proposal. In reviewing this list of reductions, NASA learned that in two instances--[deleted]. SEC Final Report, Dec. 15, 1997, at 5; Tr. at 219.

During the hearing, the Chairman of the SEC explained that the panel's cost specialist concluded that ADF could not reasonably [deleted], and also concluded that it was not reasonable to compare ADF's resulting lower proposed costs with the proposed costs of the other two offerors. Tr. at 219-21. Thus, for purposes of the agency's most probable cost review, NASA [deleted]. *Id.* ADF argues that this adjustment was unreasonable.

When an agency evaluates 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(c) (June 1997). 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., B-216516, Nov. 19, 1984, 84-2 CPD ¶ 542 at 5. Contracting officers are required to document this evaluation, FAR § 15.608(a)(1) (June 1997), and, when properly documented, 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., B-241569, Feb. 19, 1991, 91-1 CPD ¶ 183 at 5, recon. denied, American Management Sys., Inc.; Department of the Army--Recon., B-241569.2, B-241569.3, May 21, 1991, 91-1 CPD ¶ 492 at 7-8; Grey Adver., Inc., B-184825, May 14, 1976, 76-1 CPD ¶ 325 at 27-28.

We conclude that there was nothing unreasonable about NASA's adjustment to ADF's proposed costs [deleted]. As a point of comparison, we note that in two other areas--[deleted]--NASA accepted ADF's explanation [deleted]. For the two categories at issue here, however, we think NASA's approach was a sensible attempt to ensure that the proposal reflected all of the probable costs that might be incurred. [deleted], NASA reasoned that the government would still be liable for

the cost of the time because [deleted]. Thus, NASA decided that ADF's proposal should reflect a cost for the time in some category in the proposal--rather than [deleted], as ADF did. Our review of this logic leads us to conclude that NASA's probable cost adjustment in this area was reasonable.

ADF's contention that the [deleted] should have been accepted by NASA is also undercut by the terms of its own proposal. ADF's claim is premised upon an assumption that the agency had no basis in the record to support a conclusion that [deleted]. However, NASA's interpretation that these were [deleted] was clearly understood by ADF, as shown in its cost proposal at page 6.<sup>10</sup> In addition, ADF's sparse explanation during the negotiations for its decision to offer the [deleted] hours as [deleted] cannot reasonably be viewed as sufficient to override NASA's concern [deleted]. Thus, we conclude there was nothing unreasonable about the agency's decision to add to the proposal the probable costs associated with this time.

Finally, ADF argues that its challenge to NASA's probable cost review should be sustained because the agency did not adequately document its decision. FAR § 15.608(a)(1) requires contracting officers to document cost evaluations. While we agree that a more complete, written, contemporaneous record of the cost considerations at issue here should have been prepared, we cannot agree that there is no evidence in the record of the judgments that were made. NASA included in its final source selection materials an explanation of its adjustments--albeit cryptically brief--and none of the more detailed explanations offered during the course of this protest conflicted with those materials. Accordingly, we conclude that NASA met its requirement to document the decisions it made in sufficient detail to allow us to judge the rationality of the agency's determinations. PHP Healthcare Corp., B-251933, May 13, 1993, 93-1 CPD ¶ 381 at 7.

## CONCLUSIONS AND RECOMMENDATION

As explained above, we conclude that Dynacs misrepresented the level of commitment it received from its key personnel, which, together with the agency's erroneous conclusion that the proposal offered "signed commitments," led to a material misevaluation of Dynacs's proposal under the key personnel subfactor within the mission suitability evaluation factor. We also conclude that the misevaluation of the key personnel portion of Dynacs's proposal had a ripple effect

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<sup>10</sup>As quoted above, and despite ADF's assertions to the contrary, we conclude that page 6 of ADF's cost proposal indicates that [deleted]. To the extent that ADF argues that NASA unreasonably interpreted the proposal to be based on [deleted], we deny the protest. For the record, we also note that nothing about NASA's adjustment means that an offeror cannot fulfill the agency's requirements using [deleted], as ADF asserts.

in other areas of the mission suitability evaluation as well. Further, we conclude that NASA was required to discuss with ADF adverse information received from its past performance references upon which ADF had been given no meaningful opportunity to comment. Finally, we conclude that ADF was misled by a latent defect in the solicitation instructions regarding the past performance portion of the proposal that resulted in ADF's receipt of a lower score under the relevant experience and past performance evaluation factor than it might otherwise have received.

In attempting to fashion the appropriate remedy here, we begin with ADF's assertion that Dynacs should be barred from further participation in this procurement based on its misrepresentation of the availability of its proposed key personnel, following our holding in Informatics, Inc., supra. While the preliminary clearance process Dynacs used here did not rise to the level of a commitment between it and its proposed key personnel, we do not find the same level of disregard for the truth that we found in the Informatics case. In that case, the awardee responded to an agency question during discussions asking the nature of the commitments received from the incumbent personnel. The awardee asserted that it had surveyed 60 of 95 incumbent personnel to ascertain their availability, and--in a detailed written explanation of the results of that survey--claimed that a substantial percentage of those employees were either committed or would probably join the company. In fact, our review showed that 59 of the employees had not even been contacted by the awardee during the period the awardee claimed to have conducted its survey. Dynacs's misrepresentations, in contrast, were less pervasive in nature, and were compounded by agency actions during the evaluation. Under these circumstances, we do not believe it would be appropriate to bar Dynacs from further participation in this competition.

We recognize, however, that if a new round of BAFOs is received and reevaluated Dynacs will continue to benefit from its earlier misrepresentations. For example, each of the key employees named by Dynacs has since accepted employment with the company. As a result, any reevaluation of the proposal would appropriately continue to reflect a high level of certainty that these individuals will be available to perform as the proposal promised. In addition, some of the ripple effects from the claimed availability of these employees that we noted earlier will remain appropriately credited to the proposal. Thus, it does not appear that a reevaluation can return the parties to their positions before the agency's error.

Specifically, if proposals were reevaluated it is unlikely that Dynacs would, at this juncture, lose any points in the area of mission suitability. Thus, even if we assume that ADF could recapture nearly every available lost point in this area, a reevaluation would result in a tie under the mission suitability factor (with ADF's rating being raised to excellent, and Dynacs retaining its excellent rating). Similarly, even assuming that ADF's rating under the relevant experience and past performance factor was raised from very good to excellent, the result again would

be a tie between the two offerors. Finally, given that we find nothing unreasonable in the agency's evaluation of probable costs, Dynacs's probable cost would remain lower than ADF's by approximately [deleted]. Under these circumstances, while we find that ADF was prejudiced by the evaluation errors at the time they were made, we see no basis to conclude that ADF could prevail in a recompetition. Accordingly, we do not believe it would be appropriate to recommend a reevaluation or that Dynacs's contract be terminated. Instead, we recommend that ADF be reimbursed for the cost of preparing its proposal to participate in this competition. Continental Maritime of San Diego, Inc., B-249858.2, B-249858.3, Feb. 11, 1993, 93-1 CPD ¶ 230 at 8, aff'd, B-249858.4, Mar. 10, 1993.

We also recommend that the protester be reimbursed the reasonable cost of filing and pursuing its protest, including attorneys' fees. 4 C.F.R. § 21.8(d)(1) (1997). In accordance with 4 C.F.R. § 21.8(f)(1), ADF's certified claim for such costs, detailing the time expended and the costs incurred, must be submitted directly to the agency within 60 days after receipt of this decision.

The protest is sustained.

Comptroller General  
of the United States