

FRIED, FRANK, HARRIS, SHRIVER & JACOBSON LLP

801 17th Street, NW
Washington, DC 20006
Tel: +1.202.639.7000
Fax: +1.202.639.7003
www.friedfrank.com

April 26, 2021

Direct Line: +1.202.639.7130
Email: James.McCullough@friedfrank.com



**FINAL REDACTED
PROTEST**

VIA EPDS

The General Counsel
United States Government Accountability Office
441 G Street, N.W.
Washington, D.C. 20548

Attn: Procurement Law Control Group, Room 1103

**Re: Protest of Dynetics, Inc., A Leidos Company
Under U.S. National Aeronautics and Space Administration
Broad Agency Announcement NNH19ZCQ001K APPENDIX-H-HLS,
Solicitation for Option A**

Dear Sir or Madam:

On behalf of Dynetics, Inc., A Leidos Company (“Dynetics”), 1002 Explorer Blvd., Huntsville, AL 35806, telephone (256) 964-4000, we hereby file this timely protest concerning the award of an “Option A” contract to Space Exploration Technologies Corp. (“SpaceX”), and not to Dynetics, by the U.S. National Aeronautics and Space Administration (“NASA”) for the Next Space Technologies for Exploration Partnerships-2 (“NextSTEP-2) Human Landing System under the Solicitation for Option A of Broad Agency Announcement (“BAA”) NNH19ZCQ001K_APPENDIX-H-HLS (the “Solicitation”).

The General Counsel
Page 2
April 26, 2021

The Solicitation was issued on October 30, 2020 and was amended one time.¹ The Solicitation was open to contractors with an existing HLS Base period BAA contract with NASA. The Solicitation contemplated the award of up to two Option A contracts from among three contractors, including Dynetics. On April 16, 2021, NASA notified Dynetics that a single Option A contract had been awarded to SpaceX for a Total Evaluated Price of \$2,941,394,557.

EXECUTIVE SUMMARY

As NASA explained to Congress in its budget justification for fiscal year 2021, the Human Landing System (“HLS”) program was created to partner with private industry to develop an integrated lunar landing system. To accomplish this goal, the HLS program was meant to “utiliz[e] partnerships and competition to ensure affordability” and to “rel[y] on commercial partners to develop and jointly deploy the integrated landing system that will transport humans to and from the Moon.” NASA, “FY 2021 President’s Budget Request,” at DEXP-72, available at https://www.nasa.gov/sites/default/files/atoms/files/fy2021_congressional_justification.pdf.

When NASA made the initial HLS contract awards in April 2020, NASA explained that its acquisition strategy would allow NASA to “realize the benefits of competition when making down-selections for the award of the HLS contract options” and that “[m]aintaining this competitive environment through the 2024 demonstrations and beyond will create performance and pricing incentives for HLS contractors that will maximize the probability of NASA achieving its primary HLS objective -- landing the first woman, and next man, on the lunar

¹ The Solicitation consisted of the NextSTEP-2 Appendix H Option A BAA, the NextSTEP-2 omnibus BAA, and Solicitation Attachments A-Q.




The General Counsel
Page 3
April 26, 2021

surface by 2024.” Ex. A (April 2020 Source Selection Statement), attached hereto, at 15-16. Thus, ongoing competition was of the essence in the HLS program and the goal of returning to the lunar surface by 2024.

But after obtaining buy-in from its private partners on NASA’s HLS strategy, and after having solicited and obtained the offerors’ Option A proposals premised on its acquisition strategy of competition, NASA has now apparently abandoned the fundamental ground rules it had previously established for this program. In selecting SpaceX as the only Option A contractor in this second phase for the HLS program (and, consequently, for the last phase, as well), NASA has prematurely abandoned a core element of the acquisition strategy behind the HLS program -- i.e., “to create the most competitive environment practicable, maximizing the likelihood of successful development that will culminate in crewed demonstration missions” (*id.* at 3).

NASA’s change of strategy cannot be reconciled with notions of order and fairness in this public-private partnership or with NASA’s own stated goals for the HLS program. Rather, the Option A award decision appears to be a direct result of NASA having only a quarter of its requested budget available for this program this fiscal year. *See, e.g.*, Elizabeth Howell, “NASA receives \$23.3 billion for 2021 fiscal year in Congress’ omnibus spending bill: report,” Space.com (Dec. 22, 2020), available at <https://www.space.com/nasa-2021-budget-congress-omnibus-spending-bill> (noting that the HLS program received \$850 million, or “roughly a quarter of NASA’s \$3.3 billion request,” for fiscal year 2021). As euphemistically explained in the Source Selection Statement, “NASA’s fiscal year 2021 appropriations and appropriations indications for future fiscal years that span the Option A period of performance are incongruent



The General Counsel
Page 4
April 26, 2021

with NASA's Option A acquisition strategy." Ex. B (Source Selection Statement), attached hereto, at 7. In fact, the new budget constraints were worse than merely "incongruent" -- "NASA's current fiscal year budget did not support *even a single Option A award.*" *Id.* at 3 (emphasis added). On top of that, NASA's stated goal of returning to the lunar surface by 2024 no longer appears to be realistic. As recently reported, "NASA's acting administrator said . . . that the goal of landing humans on the Moon by 2024 no longer appears to be feasible" given recent budgetary constraints. Eric Berger, "Acting NASA chief says 2024 Moon lander no longer a 'realistic' target," *Ars Technica* (Feb. 18, 2021), available at <https://arstechnica.com/science/2021/02/acting-nasa-chief-says-2024-moon-landing-no-longer-a-realistic-target/>.

In light of this new budget constraint and schedule change, the HLS program as originally conceived and as set forth in the Solicitation is no longer executable. Accordingly, NASA had several reasonable (and lawful) alternatives to choose from in connection with this acquisition. Because the new budget constraints were imposed after the offerors had submitted their proposals (which were premised on a Solicitation that did not reflect those constraints), NASA could have --

- (i) amended the Solicitation to reflect its new acquisition strategy and budget;
- (ii) opened discussions with the offerors to advise them of NASA's new strategy and to allow the offerors to submit revised proposals; or
- (iii) withdrawn or cancelled the Solicitation given its incompatibility with the severe budget constraints imposed on the HLS program.

NASA even could have maintained ongoing competition by making additional Option A awards or, at the very least, additional Contract Line Item Number ("CLIN") 010 awards in order to



The General Counsel
Page 5
April 26, 2021

have more than one contractor providing sustaining and preliminary design work while NASA's budget and schedule issues are resolved.

Instead, NASA elected the most anti-competitive and high risk option available -- a single award of an Option A contract, thereby all but ensuring that any Option B contract in the next phase of the HLS program will be a sole-source award. In making this decision, NASA walked away from the ground rules for the HLS program, effectively converting this Option A award into a lowest-priced, technically acceptable ("LPTA") competition and eschewing any future competition for the HLS program. NASA has placed the entire, long-term HLS program into the hands of one possible contractor, ignoring the high risk associated with that decision. There were compelling reasons behind NASA's declared strategy of maintaining ongoing competition in the HLS program, but that strategy has now been abandoned.

Finally, the record of NASA's evaluation of the proposal submitted by Dynetics was unreasonable and inconsistent with the terms of the Solicitation. NASA's evaluation also unreasonably ignored the extensive technical data, reports, and other information NASA obtained during the offerors' Base period performance. To the extent NASA identified purported weaknesses in Dynetics' proposal, the vast majority are grounded, not in the engineering substance of the lunar lander proposed by Dynetics, but in perceived information gaps where, in fact, NASA had the information in hand to resolve its concerns. Yet other perceived weaknesses are based on erroneous readings of Dynetics' proposal. None of the perceived weaknesses should have precluded an Option A contract award to Dynetics.



The General Counsel
Page 6
April 26, 2021

As discussed in detail below, Dynetics hereby protests NASA's failure to award an Option A contract to Dynetics for the following reasons:

- (1) Despite fundamentally changing the HLS program, NASA unreasonably failed to apprise the offerors -- either through issuing a Solicitation amendment or by engaging all offerors in discussions -- that NASA's entire acquisition strategy for the HLS program had dramatically and fundamentally changed due to new budget constraints; and
- (2) NASA's evaluation of Dynetics' proposal was unreasonable and impermissibly applied unstated evaluation criteria.

Dynetics was prejudiced in this acquisition because, but for these clear and prejudicial errors, NASA would have solicited revised proposals reflecting NASA's actual requirements and strategy and, therefore, would have properly evaluated Dynetics and awarded an Option A contract to Dynetics.

As required by 4 C.F.R. § 21.1(e), Dynetics will transmit a copy of this protest to the Contracting Officer within one day of this filing.

I. INTERESTED PARTY STATUS

Dynetics submitted a timely proposal in response to the Solicitation on December 8, 2020. NASA awarded an Option A contract to SpaceX on or about April 16, 2021. NASA awarded no Option A contract to Dynetics. But for NASA's failure to adhere to the terms of the Solicitation and its improper evaluation of Dynetics' proposal and SpaceX's proposal, the proposal submitted by Dynetics would have had a substantial chance for award of an Option A contract. Dynetics is therefore an interested party with standing to challenge the contract award to SpaceX. *See* 4 C.F.R. § 21.0(a).



The General Counsel
Page 7
April 26, 2021

II. TIMELINESS

NASA awarded the contract to SpaceX on or around April 16, 2021. NASA notified Dynetics of the award decision on April 16, 2021, *see* Ex. C (Notification of Non-Selection), attached hereto. On April 19, 2021, NASA provided informal feedback to Dynetics. This protest is timely filed within ten days of NASA's April 16, 2021 award decision. *See* 4 C.F.R. § 21.2(a)(2).

III. STAY OF PERFORMANCE

Because the protest is filed within 10 days of the April 16, 2021 award of the Option A contract to SpaceX, Dynetics requests that the GAO immediately notify NASA of this protest and, as required by law, that NASA immediately implement an automatic stay of the awardee's contract performance pending the resolution of this protest. *See* 31 U.S.C. § 3553; FAR 33.104(c); 4 C.F.R. §§ 21.3(a) and 21.6. NASA is hereby requested to provide written confirmation to Dynetics that it has implemented a stay of the awardee's performance. In the event that NASA decides not to implement an automatic stay of performance, or decides to terminate the automatic stay, fully or partially, before this protest is resolved, NASA is requested to provide immediate written notice to Dynetics, as required by FAR 33.104(d).

IV. BACKGROUND


The overall objective of this acquisition is to enact the direction provided in Presidential Space Policy Directive-1 for returning humans to the surface of the Moon -- for the first time since the Apollo program -- and once again establish U.S. preeminence around and on the Moon. The Presidential Space Policy Directive-1 instructs NASA to “[l]ead an innovative and



The General Counsel
Page 8
April 26, 2021

sustainable program of exploration with commercial and international partners to enable human expansion across the Solar System and to bring back to Earth new knowledge and opportunities. Beginning with missions beyond low-Earth orbit, the United States will lead the return of humans to the Moon for long-term exploration and utilization, followed by human missions to Mars and other destinations.” Ex. D (Solicitation), attached hereto, § 1.1.

As directed by the NASA Administrator, NASA is implementing a multifaceted approach across several organizations to develop a series of progressively more complex missions to the lunar surface with commercial participation by the private sector. *Id.*, § 1.2.1. The Advanced Cislunar and Surface Capabilities (“ACSC”) activity will engage with U.S. Industry partners to use innovative approaches to combine robotics, a cislunar presence, and lunar landing capabilities to return humans to the surface of the Moon. *Id.* To address a portion of the objectives in Presidential Space Policy Directive-1, the purpose of the Solicitation is to facilitate the development and demonstration of an HLS for the purpose and with the goal of delivering humans to the lunar surface by 2024. *Id.*, § 1.1. The HLS encompasses all objects, vehicles, elements, integrated systems, systems, subsystems, or components designed, developed, and utilized by the NextSTEP-2 contractor in performance of the contract, and which comprise the contractor’s Integrated Lander (or elements thereof), all Supporting Spacecraft, all launch vehicles necessary for launch and delivery of the contractor’s Integrated Lander (or elements thereof) and its Supporting Spacecraft, and the contractor’s Active-Active docking adapter (“AADA”) (if required for performance of the contractor’s crewed demonstration mission). *Id.*, § 1.3.2.



The General Counsel
Page 9
April 26, 2021

The scope of work encompassed by the Option A contract and the launch of the first HLS demonstration mission include the aggregation of HLS elements, HLS docking and transfer of crew to the HLS, lunar surface landing near the South Pole, lunar surface extra-vehicular activity (“EVA”), and the return of crew and materials from the surface and transfer from the HLS. *Id.*, § 1.2.2. While NASA will manage the requirements and operations concept for the overall HLS, the design, development, test, and evaluation (“DDT&E”) of the HLS will be led by the Option A contractors. *Id.* The Solicitation contemplated that the HLS capabilities demonstrated in the first mission to the lunar surface would evolve into a sustainable transportation system for frequent access to the lunar surface and would eventually expand to include surface elements necessary to support prolonged human exploration. *Id.*, § 1.2.3; *see also id.*, § 1.3.5 (describing future lunar space transportation services that may be procured by NASA following successful crewed lunar demonstrations performed pursuant to the contract).

A. The Solicitation and Evaluation Criteria

NASA issued the Solicitation on October 30, 2020. The Solicitation was amended once. The Solicitation was open to prime contractors with an existing Base period Appendix H HLS contract with NASA. The Solicitation contemplated the award of up to two Option A contracts from among three eligible contractors -- Dynetics, SpaceX, and Blue Origin Federation LLC (“Blue Origin”) -- that had been previously down-selected by NASA and awarded initial Base contract CLINs. Under the existing Base contracts awarded by NASA, Dynetics, SpaceX, and Blue Origin performed research and development in support of their respective and distinctly different HLS designs.



The General Counsel
Page 10
April 26, 2021

The Solicitation contemplated that, within sixty days after completion of all Continuation Reviews (“CRs”) during the Base period, and in accordance with the instructions set forth in the Solicitation, NASA would determine whether to award an Option A contract to one or more Base period contractors. *Id.*, § 1.3.1. While NASA reserved the right to change its HLS acquisition strategy at any time, it nonetheless stated its intention “to award Option A CLINs for up to two of the Base period contractors, with a preference for awarding two, pending availability of funds; and later award Option B CLINs for either one or two Option A contractors.” *Id.* The award of an Option A contract would be effectuated through a bilateral modification of existing HLS Base period contracts. *Id.*, § 4.2.4. The logic behind maintaining competition was simple and compelling: It is exceptionally complex and difficult to land humans on the Moon, and it would be unwise for NASA to place all of its reliance on one company.

The Solicitation instructed offerors to include a firm-fixed-price (“FFP”), milestone-based proposal for the Option A period of performance covering the initial 2024 crewed HLS demonstration mission, and no price for the Option B period of performance covering the 2027 HLS demonstration mission, which was to be priced at a later stage in the acquisition. *Id.*, § 1.3.1. The Option A period of performance included the following four CLINs:

- **CLIN 005 – Option A: 2024 HLS DDT&E and Demonstration Mission.** 2024 mission Design, Development, Test and Evaluation and flight demonstration (excepting detachable docking adapter work, if proposed, to be performed under CLIN 009).
- **CLIN 008 – Option A: IDIQ - Special Studies.** Special studies, analysis, and/or support tasks as initiated by written direction from the Contracting Officer.



The General Counsel
Page 11
April 26, 2021

- **CLIN 009 – Option A: Docking System.** Work on a detachable docking adapter, if proposed, for the 2024 demonstration mission.
- **CLIN 010 – Option A: Sustaining Requirements and Preliminary Design.** Includes work to achieve a Sustaining System Requirements Review (“SRR”) and Sustaining Continuation Review (“CR”). The beginning of performance for this CLIN coincides with the start of Option A performance and is anticipated to run through January 31, 2023, which is the date that NASA currently plans to authorize the start of performance for one or more Option B CLINs. Note that long lead items for the Sustaining demo shall be procured by the contractor exclusively during Option B performance and are not permitted under Option A.

Id., § 1.3.3. NASA reiterated its intention to “exercis[e] Option A for up to two contractors,” which meant that NASA would select one contractor to perform its crewed demonstration flight first in 2024, and one contractor to perform its demonstration flight approximately within eighteen months of the first demonstration mission. *Id.* The Solicitation advised offerors that this timing could result in the second contractor incurring unforeseen expenses (e.g., storage, staffing, etc.), but that NASA would effectuate any necessary contractual changes to accommodate this situation. *Id.*

Offerors were instructed to submit their proposals in four volumes, as follows: (1) Volume I (Technical); (2) Volume II (Price); (3) Volume III (Management); and (4) Volume IV (Proposal Attachments), consisting of forty-four distinct proposal attachments. *Id.*, § 4.2.1. The Solicitation advised offerors that NASA was conducting the acquisition as an “other competitive procedure” in accordance with FAR 6.102(d)(2) and FAR 35.016 (as deviated). *Id.*, § 5.2.1. Accordingly, NASA would not conduct a comparative analysis and tradeoff amongst proposals; instead, each proposal would “be evaluated on its own individual merits.” *Id.* The Solicitation advised offerors that NASA would evaluate (1) the offeror’s understanding of and

The General Counsel
Page 12
April 26, 2021

approach to meeting all of the Solicitation requirements; and (2) the degree to which the proposal demonstrates the offeror's in-depth knowledge of the required engineering processes, procedures, and tools to successfully perform the tasks on schedule, and a clear understanding of current NASA requirements, goals, policies, and procedures affecting such tasks. *Id.*

For each of the evaluation criteria, NASA would assess "the credibility, feasibility, effectiveness, comprehensiveness, suitability, risk, completeness, adequacy, and consistency of the Offeror's unique proposed approach, as well as its ability to successfully meet the technical, management, schedule, and all other requirements and goals of this solicitation." *Id.* The Solicitation advised offerors that NASA would base its evaluation on information presented in the proposal, and that data previously submitted, or presumed to be known (e.g., data or services previously submitted or performed for the Government), would not be considered unless entirely incorporated into and contained within the proposal. *Id.*

Proposals were to be evaluated according to the following evaluation Factors and Areas of Focus:



The General Counsel
 Page 13
 April 26, 2021

Table 5: Evaluation Factors and Areas of Focus

Evaluation Factor	Area of Focus
Factor 1: Technical Approach	Technical Design Concept
	Development, Schedule, and Risk
	Verification, Validation, and Certification
	Insight
	Launch and Mission Operations
	Sustainability
	Approach to Early System Demonstrations
Factor 2: Total Evaluated Price	No focus areas
Factor 3: Management Approach	Organization and Management
	Schedule Management
	Risk Reduction
	Commercial Approach
	Base Period Performance
	Small Business Subcontracting Plan
	Data Rights

Id., § 5.2.2. According to the Solicitation, the Areas of Focus were “not listed in order of importance.” *Id.*, §§ 4.4.3, 4.4.5. Rather, NASA would “conduct a holistic assessment through these Areas” as a means of evaluating the Offeror’s end-to-end technical and management approach to “design and develop an HLS integrated lander capability on schedule and complete a successful crewed demonstration of its capability.” *Id.* The Solicitation advised offerors that the relative order of importance for the evaluation Factors was as follows:

The factors above are listed in descending order of importance to the Government: Factor 1 is more important than Factor 2, and Factor 2 is more important than Factor 3. Factors 1 and 3, when combined, are significantly more important than Factor 2.

Within Factors 1 and 3, all Areas of Focus are considered in totality to arrive at a single adjectival rating for each factor. Areas of Focus will not receive their own adjectival ratings. In determining adjectival ratings for Factors 1 and 3, all Areas of Focus will be considered as approximately of equal importance within their respective Factor.

Id., § 5.2.3. In other words, price was not paramount.



The General Counsel
 Page 14
 April 26, 2021

The Solicitation further advised offerors that NASA would identify strengths and weaknesses in each offeror’s proposal. *Id.*, § 5.2.4.1. For purposes of evaluating strengths and weaknesses, NASA would “consider how an Offeror’s proposed approach affects risk, such as technical risk, risk to meeting the Offeror’s proposed schedule, the need for increased Government oversight, or the risk of likelihood of unsuccessful contract performance.” *Id.* The Solicitation provided the following definitions for NASA’s classification of strengths and weaknesses:

Table 6: Strength and Weakness Definitions

	Definition
Significant Strength	An aspect of the proposal that greatly enhances the potential for successful contract performance and/or that appreciably exceeds specified performance or capability requirements in a way that will be advantageous to the Government during contract performance.
Strength	An aspect of the proposal that will have some positive impact on the successful performance of the contract and/or that exceeds specified performance or capability requirements in a way that will be advantageous to the Government during contract performance.
Weakness	A flaw in the proposal that increases the risk of unsuccessful contract performance.
Significant Weakness	A flaw in the proposal that appreciably increases the risk of unsuccessful contract performance.
Deficiency	A material failure of a proposal to meet a Government requirement or a combination of significant weaknesses in a proposal that increases the risk of unsuccessful contract performance to an unacceptable level.

Id. The Solicitation advised offerors that NASA would issue overall adjectival ratings for Factor 1 (Technical Approach) and Factor 3 (Management Approach) and provided the following adjectival ratings and definitions:



The General Counsel
 Page 15
 April 26, 2021

Table 7: Adjectival Ratings Definitions

Adjectival Rating	Definition
Outstanding	A thorough and compelling proposal of exceptional merit that fully responds to the objectives of the BAA. Proposal contains strengths that far outweigh any weaknesses.
Very Good	A competent proposal of high merit that fully responds to the objectives of the BAA. Proposal contains strengths which outweigh any weaknesses.
Acceptable	A competent proposal of moderate merit that represents a credible response to the BAA. Strengths and weaknesses are offsetting or will have little or no impact on contract performance.
Marginal	A proposal of little merit. Proposal does not clearly demonstrate an adequate approach to and understanding of the BAA objectives. Weaknesses outweigh strengths.
Unacceptable	A seriously flawed proposal that is not responsive to the objectives of the BAA. The proposal has one or more deficiencies, or multiple significant weaknesses that either demonstrate a lack of overall competence or would require a major proposal revision to correct. The proposal is unawardable.

Id., § 5.2.4.2.

With regard to Factor 1 (Technical Approach), the Solicitation instructed offerors to describe their understanding of and approach to developing an HLS that addresses all of the technical requirements of the Solicitation. *Id.*, § 4.4.3. Accordingly, offerors had to demonstrate “in-depth knowledge of the required systems engineering processes, procedures, and tools to successfully perform the tasks on schedule, and a clear understanding of current NASA requirements, policies, and procedures affecting that task.” *Id.* In connection with the Area of Focus titled “Development, Schedule, and Risk,” the Solicitation instructed offerors to “identify technical risk areas and describe its approach to minimize and mitigate the total system technical risk associated with the Offeror’s HLS development.” *Id.*, § 4.4.3.2. In this respect, offerors were required to identify in Attachment 33 (Risk Reports) “its cost, technical, schedule, and safety risks associated with development and the Offeror’s approach to mitigating these risks.” *Id.*



The General Counsel
Page 16
April 26, 2021

With regard to Factor 2 (Total Evaluated Price), the Solicitation advised offerors that NASA would not assign an adjectival rating or strengths and weaknesses in connection with the price evaluation. *Id.*, § 5.2.5. The Solicitation further explained that NASA would evaluate each offeror's price as follows:

Total Evaluated Price Calculation. The Government will calculate a Total Evaluated Price that it will use for evaluation of Factor 2 – Price. The Total Evaluated Price shall be inclusive of the Offeror's proposed amounts for CLINs 005, 009 through 010, plus the value of any Optional GFE/GFP, plus the value associated with any GTAs, plus the minimum IDIQ obligations (see Attachment P, Pricing Template). Additionally, when an Offeror, as part of its proposal, proposes to use one or more items of optional GFE/GFP, the Total Evaluated Price will be adjusted by applying, for evaluation purposes only, the value of such Government property as specified by NASA. Similarly, when an Offeror, as part of its proposal, proposes to perform a portion of the work on-site at one or more NASA facilities using NASA resources to do so (as memorialized in one or more GTAs), the Government will adjust the Total Evaluated Price by applying, for evaluation purposes only, the value of all such GTAs.

Price Reasonableness. The Government will evaluate the overall price reasonableness of the Total Evaluated Price using price analysis techniques identified in FAR 15.404-1(b).

Balanced Pricing. In accordance with FAR 15.404-1(g), the Government will perform an analysis to determine if the total evaluated price is unbalanced among the Option A CLINs. The Government may determine that a proposal is unacceptable if the prices proposed are materially unbalanced between CLINs or if the prices proposed are materially unbalanced between milestone payments. Unbalanced pricing exists when, despite an acceptable total evaluated price, the price of one or more CLINs or milestone payments is significantly overstated or understated as indicated by the application of cost or price analysis techniques. A proposal may be rejected if the Contracting Officer determines that the lack of balance poses an unacceptable risk to the Government.



The General Counsel
Page 17
April 26, 2021

Id.

With regard to Factor 3 (Management Approach), the Solicitation instructed offerors to describe their approach to managing and coordinating the efforts of the contract, including their approach to “planning, assigning responsibility, controlling personnel, controlling utilization of resources, tracking deliveries, managing subcontractors and suppliers, and periodically monitoring performance and obtaining feedback.” *Id.*, § 4.4.5. The Solicitation further advised offerors that the proposal should (1) “demonstrate a thoughtful approach to managing a fixed-price research and development contract of this magnitude and complexity”; and (2) “demonstrate the Offeror’s relevant base period performance as an indicator of NASA’s confidence in the Offeror’s ability to successfully perform a complex spaceflight hardware development effort along with successful demonstration of that hardware.” *Id.*

In connection with the Area of Focus titled “Base Period Performance,” the Solicitation advised offerors that NASA would evaluate the substantive merits of each offeror’s Base Period Performance Record (“BPP-R”) and Base Period Performance Narrative (“BPP-N”) to assign an overall Base period performance rating. *Id.*, § 5.2.4.3. In undertaking this evaluation, NASA would “qualitatively consider the green/yellow/red color ratings and the accompanying narratives that support these color ratings that were previously assigned to each offeror as documented in the BPP-R.” *Id.* In addition, NASA’s base period performance evaluation would include a “holistic assessment of the offeror’s BPP-R and its BPP-N that results in a single rating for this Area of Focus and is supported by an accompanying narrative.” *Id.* The Solicitation provided the following definitions applicable to NASA’s Base period performance evaluation:



Table 8: Base Period Performance Ratings

Base Period Performance Rating	Description
Very High	Performance is of exceptional merit, demonstrating very consistent compliance with all contract requirements, terms and conditions, as well as on-time delivery of all contract deliverables and fulfillment of all contract milestones in a manner that demonstrates accelerated progress and maturation of the offeror’s HLS capability. Very few (if any), very minor performance problems, and very effective responses to problems, with little to no adverse effect on overall base period performance.
High	Performance is of high merit, demonstrating consistent compliance with all contract requirements, terms and conditions, as well as delivery of all contract deliverables and fulfillment of all contract milestones in a manner that demonstrates timely progress and maturation of the offeror’s HLS capability. Few, minor performance problems for which the offeror provides effective responses and that have a relatively insignificant adverse effect on overall base period performance.
Moderate	Performance is of moderate merit, demonstrating compliance with some but not all contract requirements, terms and conditions, as well as delivery of contract deliverables and fulfillment of contract milestones in a manner that is occasionally behind schedule and demonstrates delayed progress and maturation of the offeror’s HLS capability. Performance problems, some of which may be serious, are present, and the offeror’s responses are only somewhat effective, leading to moderate adverse effect(s) on overall base period performance.
Low	Performance is of low merit, demonstrating infrequent on-time delivery of contract deliverables and failing to adhere to many contract requirements, terms and conditions, as well as delivery of contract deliverables and fulfillment of contract milestones frequently behind schedule, demonstrating significant delayed progress and maturation of the offeror’s HLS capability. Performance problems, many of which may be serious, are present, and the offeror’s responses are ineffective, leading to material adverse effect(s) on overall base period performance.

Id.

The Solicitation advised offerors that NASA “may evaluate proposals and award contracts without conducting discussions or post-selection negotiations with Offerors (except clarifications as defined in FAR 15.306(a)).” *Id.*, § 5.1. Nonetheless, NASA “reserve[d] the right to conduct discussions or post-selection negotiations if the Contracting Officer later determines them to be necessary.” *Id.*



The General Counsel
Page 19
April 26, 2021

B. Dynetics' Proposal Submission

Proposals were due on December 8, 2020, and Dynetics submitted a timely proposal in response to the Solicitation on December 8, 2020. Dynetics' proposal met or exceeded all of the requirements of the Solicitation.

C. Notice of Award

On April 16, 2021, NASA informed Dynetics that it had not been selected for award of an Option A contract. *See* Ex. C (Notification of Non-Selection).

D. Evaluation Results and April 19, 2021 Informal Feedback Session

NASA provided Dynetics with a copy of the Source Selection Statement and Dynetics' evaluation results. According to the Source Selection Statement provided to Dynetics, the evaluation results for the offerors was as follows:

	Technical Rating (Factor 1)	Management Rating (Factor 3)
Blue Origin	Acceptable	Very Good
Dynetics	Marginal	Very Good
SpaceX	Acceptable	Outstanding

Ex. B (Source Selection Statement) at 8. In connection with its evaluation of Factor 2 (Price), NASA stated as follows: "For Factor 2, SpaceX's Total Evaluated Price of \$2,941,394,557 was the lowest among the offerors by a wide margin. Blue Origin's Total Evaluated Price was significantly higher than this, followed by Dynetics' Total Evaluated Price, which was significantly higher than Blue Origin's." *Id.*



The General Counsel
Page 20
April 26, 2021

With respect to Factor 1 (Technical), NASA assigned [REDACTED] to Dynetics' technical proposal. Ex. E (Dynetics Source Evaluation Panel Report), attached hereto, at [REDACTED]. In particular, NASA found that Dynetics' proposal "has several meritorious aspects, [REDACTED]

[REDACTED] *Id.* at [REDACTED]. In addition, NASA determined that Dynetics' [REDACTED] *Id.* Nonetheless, NASA assigned [REDACTED] [REDACTED] *Id.*

With respect to Factor 2 (Price), NASA calculated Dynetics' Total Evaluated Price as [REDACTED] *Id.* at [REDACTED]. [REDACTED] In addition, NASA determined that Dynetics' price was fair and reasonable and balanced. *See, e.g., id.* at 50 ("The offeror's Total Evaluated Price falls below this IGCE's 70th percentile S-curve levels, confirming price reasonableness."); *id.* at 52 ("NASA determined the offeror's Total Evaluated Price to be balanced (3). Specifically, the offeror's proposed pricing is balanced among the Option A CLINs, and prices are balanced among milestones payments.").

With respect to Factor 3 (Management), NASA assigned [REDACTED] to Dynetics'

[REDACTED]

The General Counsel
Page 21
April 26, 2021

management proposal. *Id.* at [REDACTED]. In particular, NASA found that Dynetics' proposal had (1) "several meritorious aspects, including [REDACTED]

[REDACTED] *Id.* at [REDACTED]. Accordingly, NASA assigned [REDACTED]

[REDACTED] *Id.* at [REDACTED]; *see also id.* ([REDACTED]); *id.* ([REDACTED]).

The Source Selection Statement provided to Dynetics reveals that, on April 2, 2021, the Source Selection Authority made a determination that it would be in NASA's "best interests to make an initial, conditional selection of SpaceX to enable the Contracting Officer (CO) to engage in post-selection price negotiations with [SpaceX]." Ex. B (Source Selection Statement) at 3. The Source Selection Authority stated that this decision to engage in post-selection negotiations with SpaceX was prompted by "NASA's longstanding Option A acquisition strategy of making two Option A contract awards" and its purported "desire to preserve a competitive environment at this stage of the HLS Program." *Id.* Yet, NASA did not conduct parallel negotiations or discussions with Dynetics. Why not? According to the Source Selection Statement, "at the initial prices and milestone payment phasing proposed by each of the Option

The General Counsel
Page 22
April 26, 2021

A offerors, NASA’s current fiscal year budget did not support even a single Option A award.”

Id.

During these price negotiations with only one of the three offerors, NASA instructed SpaceX that it was permitted to revise “certain price and milestone-related aspects of its proposal (e.g., the Government requested a best and final price, as well as updated milestone payment phasing to align with NASA’s budget constraints), but was prohibited from changing content within its technical and management proposals or otherwise de-scoping its proposal.” *Id.* In response to NASA’s request, reportedly “SpaceX submitted a compliant and timely revised proposal by the due date of April 7, 2021.” *Id.* SpaceX’s revised proposal contained updated milestone payment phasing, but did not propose an overall price reduction. *Id.* Based on SpaceX’s revised proposal, the Source Selection Authority determined that “it would not be in the Agency’s best interests to select one or more of the remaining offerors for the purpose of engaging with them in price negotiations.” *Id.* At the conclusion of price negotiations with SpaceX, and following a final review of the offerors’ SEP reports and SpaceX’s revised pricing proposal, NASA selected SpaceX for award of an Option A contract. *Id.* at 3-4.

[REDACTED]

[REDACTED]

The General Counsel
Page 23
April 26, 2021

V. LEGAL GROUNDS FOR PROTEST

NASA's decision to award a single Option A contract to SpaceX but not award an Option A contract to Dynetics was arbitrary, capricious, and lacked a reasonable basis. NASA unreasonably failed to apprise the offerors -- either through issuing a Solicitation amendment or by engaging offerors in discussions -- that NASA's entire acquisition strategy for the HLS program had dramatically and fundamentally changed due to new budget constraints. This failure to publicly acknowledge and apprise the offerors of NASA's changed acquisition strategy and to allow all offerors to submit proposals responding to NASA's budget constraints and schedule was fundamentally unfair. Worse yet, the award of a single Option A contract has converted what was meant to be a competitive program driving innovation and affordability and reducing human spaceflight risk into a sole-source, LPTA project that bears little resemblance to the phased competitive approach and aggressive timeline NASA originally set out for the HLS program. This single contract award is inconsistent with the purpose of the HLS program, eliminates competition, and stifles future innovation.

Additionally, the Source Selection Statement and Source Evaluation Panel Report demonstrate that NASA's evaluation of Dynetics' proposal was unreasonable and impermissibly applied unstated evaluation criteria. NASA's multiple evaluation errors and departures from the terms of the Solicitation culminated in a flawed and unreasonable award decision that must be set aside.



The General Counsel
Page 24
April 26, 2021

A. **Because NASA's HLS Program Requirements Have Fundamentally Changed, Its Award of a Single Option A Contract Is Fundamentally Flawed**

From the outset of this acquisition, NASA informed offerors that it “plann[ed] to award Option A CLINs for up to two of the Base period contractors, with a preference for awarding two, pending availability of funds.” Ex. D (Solicitation), § 1.3.1; *see also* Ex. B (Source Selection Statement) at 3 (acknowledging that NASA had a “longstanding Option A acquisition strategy of making two Option A contract awards”). The Source Selection Statement reflects that, during the course of proposal evaluations, NASA was operating under a vastly different reality due to budgetary constraints that only came to light after offerors had already submitted their Option A proposals. Ex. B (Source Selection Statement) at 3 (stating that “NASA’s current fiscal year budget did not support even a single Option A award”). In other words, NASA’s entire acquisition strategy and preference for awarding two Option A contracts with a 2024 lunar landing goal became disconnected from the current funding available for the HLS program.

The omnibus spending bill signed into law on December 27, 2020 allocated \$23.3 billion to NASA’s fiscal 2021, but only \$850 million to the HLS program. *See* Consolidated Appropriations Act, 2021, Pub. L. No. 116-260 (Dec. 27, 2020). This \$850 million appropriated for the HLS program represented *one quarter* of NASA’s initial \$3.3 billion request for the HLS program. *See, e.g.*, Elizabeth Howell, “NASA receives \$23.3 billion for 2021 fiscal year in Congress’ omnibus spending bill: report,” Space.com (Dec. 22, 2020), available at <https://www.space.com/nasa-2021-budget-congress-omnibus-spending-bill> (“While NASA will receive \$642 million more than fiscal year 2020, the bill falls about \$2 billion short of the agency’s \$25.246 billion request, according to SpaceNews. In particular, the human landing



The General Counsel
Page 25
April 26, 2021

system (HLS) program of Artemis only received \$850 million, roughly a quarter of NASA's \$3.3 billion request.”). In other words, during the intervening time period between offerors' proposal submissions on December 8, 2020 and NASA's award of a single Option A contract to SpaceX on April 16, 2021, the HLS program budget had been sharply reduced for fiscal year 2021.


NASA's Source Selection Statement reveals a fatal flaw in NASA's award of the Option A contract: It is now clear that NASA's acquisition strategy fundamentally changed during the course of the evaluation of proposals, but NASA never communicated its changed requirements to the offerors. NASA's failure to advise Dynetics and the other remaining offeror that NASA's acquisition strategy had dramatically changed due to unanticipated budget constraints requires that the Option A contract award to SpaceX be set aside.

1. **NASA Deprived the Offerors of the Opportunity to Respond to NASA's New Requirements**

The fundamental changes to NASA's acquisition strategy for the HLS program as a result of the current budget should have prompted NASA to amend the Solicitation, enter into discussions, or cancel the Solicitation. Inexplicably, NASA elected none of these logical and lawful options.

a) **NASA Should Have Amended the Solicitation**

Among the fundamental principles of federal contracting is the axiom that the Government must conduct a procurement based on its *actual* requirements -- and not based on notional or fictitious requirements. *See* FAR 15.203(a)(1) (“Requests for proposals . . . shall, at a minimum, describe the . . . Government's requirements.”); *accord* FAR 35.016. The purpose of



The General Counsel
Page 26
April 26, 2021


the rule is to avoid award decisions not based on the agency's most current view of its needs. *See, e.g., N.V. Philips Gloellampenfabriken*, B-207485.3, May 3, 1983, 83-1 CPD ¶ 467 at 12. Unless an agency solicits proposals based on the Government's actual requirements, the agency will not obtain proposals that fulfill its true requirements, or assess proposals that can be realistically compared to one another against those requirements. Consistent with this principle, but recognizing that requirements change over time, particularly in highly complex procurements such as this acquisition, the FAR mandates that, "[w]hen, either before or after receipt of proposals, *the Government changes its requirements or terms and conditions, the contracting officer shall amend the solicitation.*" FAR 15.206(a) (emphasis added). This rule is unambiguous and allows for no exceptions or qualifications: When the *requirements* change, the *solicitation* must also change. *See, e.g., Chronos Sols., LLC et al.*, B-417870.2 et al., Oct. 1, 2020, 2020 CPD ¶ 395 at 8-14 (sustaining protest where the agency failed to consider the impact of the CARES Act on its evaluation and award decision).

For this reason, the GAO has held that where the agency knows, prior to award, that there are "material" or "significant" changes to its requirements, the agency is obligated to amend the solicitation to reflect the agency's "actual" needs and to allow offerors an opportunity to submit revised proposals. For instance, in *M.K. Taylor, Jr. Contractors, Inc.*, B-291730.2, Apr. 23, 2003, 2003 CPD ¶ 97 at 4, the GAO held that when an agency's "funding philosophy" changed that change "should have been communicated to all offerors." Similarly, in *Global Computer Enterprises, Inc., et al.*, B-404597 et al., Mar. 9, 2011, 2011 CPD ¶ 69 at 8, the GAO sustained a protest where the agency knew, prior to award, that the agency's anticipated schedule for

The General Counsel
Page 27
April 26, 2021

issuance of task orders was materially different from the assumptions set forth in the solicitation upon which offerors were required to base their proposals. And in *Northrop Grumman Information Technology, Inc., et al.*, B-295526 et al., Mar. 16, 2005, 2005 CPD ¶ 45 at 13, the GAO sustained a protest where, prior to award, the agency negotiated an inter-agency memorandum of understanding that significantly changed the approach set forth in the solicitation and the FAR for determining whether to exercise contract options, but neglected to update the solicitation. Importantly, the rule requiring agencies to issue an amendment to notify offerors of its changed requirements and afford them an opportunity to respond applies even after the submission of final proposal revisions, up until the time of award. See *Digital Techs., Inc.*, B-291657.3, Nov. 18, 2004, 2004 CPD ¶ 235 at 3; *Symetrics Indus., Inc.*, B-274246.3 et al., Aug. 20, 1997, 97-2 CPD ¶ 59 at 6.

Notwithstanding NASA's "longstanding Option A acquisition strategy of making two Option A contract awards" (Ex. B (Source Selection Statement) at 3), the Source Selection Statement reveals that NASA's unexpected budget constraints as a result of Congress' fiscal year 2021 appropriations for the HLS program *precluded even a single Option A contract award*. See *id.* at 3 ("[A]t the initial prices and milestone payment phasing proposed by each of the Option A offerors, NASA's current fiscal year budget did not support even a single Option A award."). NASA's failure to convey to offerors that NASA was operating under a vastly different budget and schedule reality violated its obligation to provide *all* offerors with current and accurate notice of its intentions and the opportunity to respond to NASA's current program requirements. See FAR 35.016(b)(1) & (2) ("The BAA, together with any supporting documents, shall . . .



The General Counsel
Page 28
April 26, 2021

[d]escribe the agency’s research interest, either for an individual program requirement or for broadly defined areas of interest covering the full range of the agency’s requirements” and “[d]escribe the criteria for selecting the proposals, their relative importance, and the method of evaluation[.]”). Because NASA never revised the Solicitation to reflect its altered budget situation and schedule and never conveyed to the offerors that NASA had fundamentally altered its original conception of the entire HLS program -- anchored as it was in ongoing competition -- the Option A award made by NASA must be set aside.

Notably, the GAO has made clear that generalized reservations in solicitations that allow agencies to make award decisions based on available funding would not give NASA unfettered discretion to make an award based on a Solicitation that no longer reflects its actual requirements. Here, the Solicitation provided that “NASA reserves the right to change its HLS acquisition strategy at any time.” Ex. D (Solicitation) § 1.3.1. Nevertheless, the GAO has made clear that an agency’s “discretion to determine its needs and craft its solicitation” cannot be used “to supersede its obligation to conduct a proper competition and . . . to reasonably assess its needs and the estimates on which its solicitation is based.” *Chronos Sols., LLC et al.*, B-417870.2 et al., Oct. 1, 2020, 2020 CPD ¶ 395 at 14.

b) **Alternatively, NASA Should Have Opened Discussions with the Offerors**

In lieu of amending the Solicitation, NASA could have opened discussions with all of the offerors akin to the type of negotiations contemplated by FAR 15.306. By opening discussions, NASA could have provided offerors an opportunity to submit revised proposals in light of NASA’s changed requirements. *See, e.g., American Fuel Cell & Coated Fabrics Co.*, B-293001;



The General Counsel
Page 29
April 26, 2021

B-293020, Jan. 12, 2004, 2004 CPD ¶ 13 at 4 (“Because AMFUEL was clearly put on notice during discussions that its proposed delivery schedules were unacceptable, and because the agency informed AMFUEL, also during discussions, of what delivery schedules the agency would find acceptable, we think that formal amendments to the same effect were not necessary.”); *Cardkey Sys.*, B-220660, Feb. 11, 1986, 86-1 CPD ¶ 154 at 2 (“If it becomes apparent that the contract being negotiated differs significantly from the requirements stated in the RFP, the contracting agency must amend the RFP or, at the least, advise offerors of the change during discussions and seek new offers.”).

In opening discussions, NASA could have apprised offerors of NASA’s budgetary constraints and changed requirements for the HLS program and could have requested revised proposals reflecting NASA’s revised budget and schedule. In this regard, the GAO’s decision in *Systems Research and Applications Corp., et al.*, B-299818 et al., Sept. 6, 2007, 2008 CPD ¶ 28, is instructive. There, an agency issued two solicitation amendments, one of which removed certain work under the task order and another which provided “budget constraint” information. *Id.* at 29. As part of discussions, the agency also issued a common evaluation notice to all offerors that specified “the required support within available budget constraints” and requested that offerors specifically address the support that would be provided “given the constrained funding available” and “identify the risks and your proposed mitigation plan associated with your proposed support given the constrained funding.” *Id.*

In rejecting the protester’s argument that the agency had engaged in misleading discussions with offerors, the GAO found that the agency had reasonably concluded that “its




The General Counsel
Page 30
April 26, 2021

requirements had not been adequately communicated to the offerors” and amended the solicitation to “better communicate its needs” and “to inform offerors of budget constraints in performing this work.” *Id.* at 29-30; *id.* at 30 (stating that “this common EN merely clarified the agency’s requirements and provided the offerors with funding information”); *id.* (“Read reasonably, the EN allowed offerors an opportunity to address how they would meet the agency’s requirements, and, if such support would exceed the agency’s constrained budget, what support could not be provided and the offerors’ mitigation plans for addressing this.”). That is precisely what NASA should have done here in order to ensure that it conveyed its actual (i.e., changed) requirements and schedule and to ensure that the HLS prime contractors were able to submit proposals responsive to those requirements.

c) **NASA Could Have Withdrawn or Cancelled the Solicitation**

NASA also had available to it a third option -- withdrawal or cancelation of the Solicitation. As the GAO has recognized, it is entirely reasonable for an agency to cancel a solicitation when it becomes clear that the solicitation no longer reflects the agency’s needs. *See, e.g., MedVet Dev. LLC*, B-406530, June 18, 2012, 2012 CPD ¶ 196 at 3 (“A reasonable basis to cancel [a solicitation] exists when, for example, an agency determines that a solicitation does not accurately reflect its needs.”); *see also Vinculum Sols., Inc.*, B-408337, B-408337.2, Aug. 5, 2013, 2013 CPD ¶ 191 at 2-3 (rejecting challenge to solicitation cancellation based on “budgetary constraints” arising from sequestration), *recon. denied*, B-408337.3 (Dec. 3, 2013), 2013 CPD ¶ 274; *Deva & Assocs. PC*, B-309972.3, Apr. 29, 2008, 2008 CPD ¶ 89 at 4-5 (rejecting challenge to cancellation of Federal Supply Schedule RFQ).



The General Counsel
Page 31
April 26, 2021

2. **NASA's Failure to Allow the Offerors to Propose Against the Actual Program Requirements Fatally Undermines the Award Decision**

Instead of treating the offerors fairly and allowing all of them to submit proposals responding to NASA's new reality for the HLS program, NASA instead engaged in negotiations with only one offeror and then made a single contract award. That decision is contrary to the fundamental goals of the HLS program. That decision also violated the terms of the Solicitation.

a) **NASA Departed from the Solicitation's Evaluation Scheme**

As is clear from the Source Selection Statement's acknowledgement, NASA's budgetary constraints precluded even a single Option A contract award. NASA responded to this new budget reality by effectively converting this acquisition into a *de facto* lowest-price, technically acceptable ("LPTA") procurement. As the Source Selection Statement makes clear, an award to the lowest-priced, technically acceptable offeror was foreordained by the fact that NASA's available budget did not even allow for consideration of an additional contract award. *See* Ex. B (Source Selection Statement) at 3 (explaining that, "at the initial prices and milestone payment phasing proposed by each of the Option A offerors, NASA's current fiscal year budget did not support even a single Option A award"); *see also id.* (explaining that, after SpaceX declined to lower its price during its exclusive negotiations with NASA, it became "evident" to the Source Selection Authority "that it would not be in the Agency's best interests to select one or more of the remaining offerors for the purpose of engaging with them in price negotiations").


Such a fundamental change to the acquisition ground rules is not permitted without amending the solicitation or allowing offerors a chance to respond. *See, e.g., Patriot Sols., LLC*, B-413779, Dec. 22, 2016, 2016 CPD ¶ 376 at 5; *LIS, Inc.*, B-400646.2, B-400646.3, Mar. 25,



The General Counsel
Page 32
April 26, 2021

2009, 2010 CPD ¶ 5 at 9; *Tech. Support Servs., Inc.*, B-279665, B-279665.2, July 8, 1998, 98-2 CPD ¶ 26 at 6. Where an agency effectively revises its evaluation criteria after offerors have submitted their proposals, the agency must afford the offerors an opportunity to submit revised proposals to respond to those changed criteria. *See, e.g., Computer World Servs. Corp.*, B-418287.3, June 29, 2020, 2020 CPD ¶ 204 at 5-6 (explaining that “a change to a solicitation’s evaluation criteria constitutes a material change that requires permitting firms an opportunity to submit revised proposals or quotations”); *Power Connector, Inc.*, B-404916.2, Aug. 15, 2011, 2011 CPD ¶ 186 at 3-5 (concluding that the offeror should have been allowed to revise its proposal in light of the agency’s revision to its evaluation criteria); *ALJUCAR, LLC*, B-401249.4, Aug. 17, 2009, 2009 CPD ¶ 165 at 3 (“As a general matter, where an agency’s award methodology materially changes after a solicitation has been issued, the agency must issue an amendment to notify offerors of the changed ground rules and afford them an opportunity to respond.”).

In this regard, it is not enough that all offerors may have been evaluated by NASA using its newly revised evaluation criteria. Rather, “the question is whether the vendors have been afforded a reasonable opportunity to compete for the agency’s requirements intelligently and on a comparatively equal basis.” *Computer World Services Corp.*, B-418287.3, June 29, 2020, 2020 CPD ¶ 204 at 6. Here, NASA’s fundamental shift in its acquisition strategy and its budgetary constraints necessarily would have fundamentally altered the offerors’ proposed approaches, had they been given an opportunity to submit proposals in response to NASA’s new requirements. *See id.*



The General Counsel
Page 33
April 26, 2021

b) **NASA's Single Contract Award Is Anti-Competitive**

NASA's award of a single Option A contract will have cascading and far-reaching consequences for the future of the HLS program. Indeed, the anti-competitive impact and downstream effect of NASA's changed acquisition strategy cannot be overstated. As a result of this Option A award to SpaceX, NASA's award of an Option B contract will necessarily occur in a non-competitive environment -- indeed, SpaceX is now the only HLS prime contractor eligible for award of the Option B contract.² It follows that NASA must inevitably select SpaceX -- if anyone -- for any future lunar space transportation services between Gateway and the lunar surface that NASA intends to procure for the next ten years plus following successful crewed lunar demonstrations in 2024 and 2027. *See* Ex. D (Solicitation) § 1.3.5 (Future Lunar Space Transportation Services) (stating that "NASA intends to procure transportation between Gateway and the lunar surface as commercial space transportation services" and estimating that NASA "will require such services approximately once per year for a period of ten years"). In effect, NASA has chosen a path leading to sole-source contracting of all of its HLS requirements until at least 2037, without having invoked any of the CICA exceptions for such sole-source contracting. *See* 10 U.S.C. § 2304. This is precisely the situation that FAR 15.206(a) and GAO jurisprudence prohibit. With competition eliminated, innovation and risk reduction in human spaceflight will be markedly diminished.

² The Solicitation provides that an Option B contract would be awarded to "either one or two Option A contractors." Ex. D (Solicitation) § 1.3.1; *id.* at § 1.3.4 (stating that, in order to support increased sustainability after the initial demonstration mission, "NASA anticipates funding the DDT&E necessary to evolve one or more contractors' initial HLS designs for a 2027 flight demonstration of a sustainable HLS").

The General Counsel
Page 34
April 26, 2021

Accordingly, NASA's award of an Option A contract to SpaceX without affording Dynetics a fair opportunity to compete for NASA's actual requirements is unduly restrictive of competition and inconsistent with the Competition in Contracting Act ("CICA") and the FAR. *See* 10 U.S.C. § 2304; FAR 6.102(d)(2) ("[c]ompetitive selection of basic and applied research"); *HMX, Inc.*, B-291102, Nov. 4, 2002, 2003 CPD ¶ 52 at 2 n.2 (citing FAR 6.102(d)(2)) ("A BAA is a contracting method by which agencies can acquire basic and applied research . . ." and it "is considered a competitive procedure meeting the requirements for full and open competition if the BAA is general in nature identifying areas of research interest including criteria for selecting proposals, solicits the participation of offerors capable of satisfying the government's needs, and provides for peer or scientific review."). By abandoning the competitive construct underlying the original competitive process NASA established for the different phases of the HLS program, the decision to award only one Option A contract -- and in essence to convert the remainder of the HLS program into a sole-source endeavor -- marks a fundamental departure from the original BAA and from this Solicitation.

In fact, even assuming NASA's award of a contract to SpaceX was reasonable, NASA also had a fourth option available to it under the Solicitation. As the Source Selection Statement recognizes, "the Option A contract scope of work also encompasses demonstration of the aggregation of HLS elements, docking, transfer of crew to HLS in lunar orbit, lunar surface extra-vehicular activity (EVA), and the return of crew and materials from the surface." Ex. B (Source Selection Statement) at 2. Although the Source Selection Statement pays lip service to a "desire to preserve a competitive environment" (*id.* at 3), there is no evidence in the Source

The General Counsel
Page 35
April 26, 2021

Selection Statement that NASA even considered making multiple awards under CLIN 010 (Sustaining Requirements and Preliminary Design) in order to ensure some competition in the continued development of multiple HLS vehicles.³ The Solicitation clearly contemplated that NASA could award “one or more of” the Option A CLINs, and further that the award of CLIN 010 was not dependent on an award of any other CLIN. *See* Ex. D (Solicitation), § 1.3.3. If NASA had engaged in negotiations or discussions with Dynetics, Dynetics would have advanced this CLIN 010 alternative valued at [REDACTED] [REDACTED] which would not have been a “budget-buster.”

Here, NASA’s failure to consider multiple awards of CLIN 010 as an alternative acquisition strategy in light of its budgetary constraints is all the more unreasonable where the Solicitation expressly allowed NASA to award one or more CLINs under an Option A contract. *See* Ex. D (Solicitation) § 1.3.3 (“While several of the Option A CLINs listed below are incorporated into current Base period contracts, the decision to award one or more of these CLINs (i.e., formally authorize work initiation) will be made in accordance with the criteria set forth in this document.”). In these circumstances, NASA could have, and should have, made multiple awards of CLIN 010 to achieve its objective of maintaining full and open competition in the HLS program.

³ The work encompassed by CLIN 010 includes “work to achieve a Sustaining System Requirements Review (SRR) and Sustaining Continuation Review (CR).” Ex. D (Solicitation) § 1.3.3.

[REDACTED]

The General Counsel
Page 36
April 26, 2021

c) **NASA's Single Award to SpaceX Is High Risk**

Compounding its errors in eliding competition and placing the HLS program entirely into the hands of one contractor, NASA also ignored the real program and technical risks associated with its chosen contractor.

The Source Selection Statement reveals that NASA failed to apply any meaningful scrutiny or otherwise unreasonably downplayed the very serious performance risks inherent in SpaceX's technical and management approach. In light of the Acceptable and Outstanding ratings assigned to SpaceX's proposal, it is clear that NASA's evaluation ignored or otherwise (a) overlooked the fact that four of SpaceX's lunar lander prototype Starships have exploded in just the past four months and (b) failed to evaluate reasonably the performance and schedule risks associated with an award to SpaceX.

Although the GAO generally will not re-evaluate proposals in response to a protest, it will sustain protests where the agency's evaluation judgments are unreasonable and not supported by the record. *See, e.g., Coastal Int'l Sec., Inc.*, B-411756, B-411756.2, Oct. 19, 2015, 2015 CPD ¶ 340 at 12 (concluding that the agency's assignment of a strength to the awardee's proposal, without examining whether this assertion was inconsistent with the awardee's proposed technical solution, was not reasonable). That is the case here.


There can be no question that the Solicitation required NASA to assess performance risks and credibility (or lack thereof) associated with the offerors' proposed solutions. More specifically, the Solicitation advised offerors that NASA would "evaluate the credibility, feasibility, effectiveness, comprehensiveness, suitability, risk, completeness, adequacy, and



The General Counsel
Page 37
April 26, 2021


consistency of the Offeror's unique proposed approach, as well as its ability to successfully meet the technical, management, schedule, and all other requirements and goals of this solicitation." Ex. D (Solicitation) § 5.2.1. For the purposes of evaluating strengths and weaknesses, the Solicitation also cautioned offerors that NASA would "consider how an Offeror's proposed approach affects risk, such as technical risk, risk to meeting the Offeror's proposed schedule, the need for increased Government oversight, or the risk of likelihood of unsuccessful contract performance." *Id.*, § 5.2.4.1.

With regard to Factor 1 (Technical), the Solicitation identified as Area of Focus specifically applicable to "Development, Schedule, and Risk." Notably, this Area of Focus required offerors to (1) "identify technical risk areas and describe its approach to minimize and mitigate the total system technical risk associated with the Offeror's HLS development;" and (2) demonstrate an understanding of such risks, as well as impactful strategies and solutions for mitigating them across all activities for compliance with contract requirements." *Id.*, § 4.4.3.2. To that end, offerors were required to identify in Attachment 33 (Risk Reports) any cost, technical, schedule, and safety risks associated with development of the HLS and the offeror's approach to mitigating these risk. *Id.* ("The Offeror shall describe risks associated with meeting HLS interfaces."). With regard to Factor 2 (Management), the Solicitation also identified an Area of Focus applicable to "Risk Reduction," which required the offerors to "describe its approach to risk acceptance and integrated risk management in order to address the identification and assessment of principal technical, schedule, and cost risks, as well as its approach for mitigating, and/or accepting such risks." *Id.*, § 4.4.5.3.



The General Counsel
Page 38
April 26, 2021

The Source Selection Statement demonstrates that NASA failed to consider the risks inherent in SpaceX's technical approach and, more specifically, information too close at hand for NASA to ignore -- i.e., that four SpaceX Starships have exploded at various stages of their tests flights in recent months.⁴ Notwithstanding the fact that NASA clearly recognized "the development and schedule risk accompanying SpaceX's highly integrated, complex propulsion system" because such systems were "currently at a state of design that will require substantial maturation" (Ex. B (Source Selection Statement) at 11-12), the Source Selection Authority nevertheless unreasonably downplayed any real risks associated with SpaceX's approach. *See id.* at 12 (stating that "SpaceX's proposal acknowledges this risk" and "provides a thorough proposed approach to achieving this development").

 NASA concluded that this risk constituted merely a weakness rather than a significant weakness or a deficiency within SpaceX's proposal. *Id.* Significant countervailing evidence was known (or should have been known) to NASA that should have prompted the evaluators and the Source Selection Authority to find that SpaceX's approach presented high and unacceptable risk to successful contract performance, and not the watered-down "weakness" identified by NASA. Indeed, the Source Selection Statement is devoid of any mention let alone consideration of the inherent risks associated with the fact that

⁴ The first two prototypes of the Starship that made it to high altitude, SN8 and SN9, slammed into the landing pad at high speed and exploded immediately. The third prototype, SN10, landed in one piece, but exploded ten minutes later. The fourth prototype, SN11, exploded in midair as it relit its engines for landing. *See* Morgan McFall-Johnsen, "SpaceX is preparing to test-fly a new Starship after the last 4 exploded," Business Insider (Apr. 20, 2021), available at <https://www.businessinsider.com/watch-spacex-launch-new-starship-prototype-nasa-moon-lander-2021-4>.

The General Counsel
Page 39
April 26, 2021

four SpaceX Starship prototypes have exploded in the last four months alone. Landing people on the Moon requires a great deal of space systems engineering, in order to identify and reduce the inherent and considerable risks of human spaceflight, and NASA has given SpaceX a pass on its demonstrable lack of such systems engineering.

[REDACTED]

[REDACTED] While NASA expressed concerns with the “very high number of events necessary to execute the front end of SpaceX’s mission,” which translated into “increased risk of operational schedule delays,” NASA nevertheless glossed over these concerns by claiming that they entailed “operational risks in Earth orbit that can be overcome more easily than in lunar orbit.” Ex. B (Source Selection Statement) at 11. In this respect, NASA’s acceptance of the uncertainty and risk surrounding SpaceX’s ambitious schedules is directly contradicted by the recent and shocking admission from SpaceX’s president and chief operating officer that “we never make our timelines, so they’re aspirational.” Jeff Foust, “SpaceX adds to latest funding round,” SpaceNews (Apr. 15, 2021), available at <https://spacenews.com/spacex-adds-to-latest-funding-round/>. [REDACTED]


This statement goes directly to the “credibility” element of the evaluation criteria as set forth in the Solicitation. The conclusions reached by NASA regarding the nature of the performance risks posed by SpaceX’s proposal were unreasonable. In light of SpaceX’s public statements, NASA should have discerned and assessed a much higher risk of schedule delays on the part of SpaceX. *See, e.g., BAE Sys. Info. & Elec. Sys. Integration Inc., B-408565 et al., Nov. 13, 2013, 2013 CPD ¶ 278 at 8* (sustaining protest where the agency’s failure to consider risks inherent in the awardee’s proposal “was

The General Counsel
Page 40
April 26, 2021

inconsistent with the terms of the RFP” and where “the agency failed to adequately document its resolution of weaknesses and risks in several areas of the technical evaluation”); *ASRC Commc’ns, Ltd.*, B-412093, B-412093.2, Dec. 23, 2015, 2016 CPD ¶ 36 at 3-7 (finding that there was no reasonable basis for the agency to have concluded that concerns with the awardee’s proposal were resolved and therefore “there is no basis in the record for the agency to have changed its original assignment of a red/unacceptable/high risk rating to [awardee’s] proposal”). In sum, the SpaceX proposal was permeated by risks that NASA missed.

B. NASA Unreasonably Evaluated Dynetics’ Technical Proposal and Engaged in Impermissible Unequal Treatment

The GAO will review the record to determine whether an agency’s evaluation of an offeror’s technical proposal is both reasonable and consistent with the terms contained in the RFP. *See, e.g., Ekagra Software Techs., Ltd.*, B-415978.3, B-415978.4, Oct. 25, 2018, 2018 CPD ¶ 377 at 3. Although the evaluation of strengths or weaknesses of an offeror’s technical proposal is within the discretion of the procuring agency, an agency must conduct a technical evaluation in accordance with the terms of the solicitation and must document its decision with an adequate record containing the agency’s reasoning. Furthermore, it is a bedrock principle of federal procurement that agencies must evaluate offers according to the terms of the solicitation. *See, e.g., AdvanceMed Corp.*, B-415062, B-415062.2, Nov. 17, 2017, 2017 CPD ¶ 362 at 11 (“It is a fundamental procurement principle that agencies must evaluate proposals consistent with the terms of a solicitation.”). When agencies deviate from the terms of the solicitation in conducting an evaluation, the evaluation must be set aside.



The General Counsel
Page 41
April 26, 2021

As discussed in detail below, multiple errors pervaded NASA's evaluation of Dynetics' proposal. NASA's unreasonable evaluation of Dynetics' proposal cannot stand because that evaluation is "inconsistent with the solicitation criteria" and "not reasonably based." *DRS ICAS, LLC*, B-401852.4, B-401852.5, Sept. 8, 2010, 2010 CPD ¶ 261 at 5 (sustaining protest where agency relied on unstated evaluation criteria to downgrade the protester's proposal). The stated, not unstated, evaluation criteria should have controlled.

1. **NASA Applied Unstated Evaluation Criteria to Downgrade Dynetics' Proposal**

Notwithstanding the fact that the technical evaluation criteria for the Option A phase of this acquisition remained unchanged from the initial Base period awards, NASA nevertheless unreasonably downgraded various aspects of Dynetics' technical proposal. These ratings are all the more arbitrary and unreasonable in light of Dynetics' superior past performance during the Base period of performance. *See* Ex. F (Dynetics Volume IV Proposal, Attachment 11), attached hereto. The only conceivable explanation here for these lower ratings is that NASA failed to follow the prescribed ground rules for this Solicitation and instead improperly introduced unstated evaluation criteria in its evaluation of Dynetics' technical proposal.

It is axiomatic that procuring agencies must openly advise offerors of the bases upon which proposals will be evaluated. *See Omniplex World Servs. Corp.*, B-290996.2, Jan. 27, 2003, 2003 CPD ¶ 7 at 5; FAR 15.203(a). "Although procuring agencies have broad discretion regarding selection of the evaluation criteria to be applied [in any procurement], they are required to disclose all [criteria] in order for offerors to meaningfully compete on an equal basis." *Mnemonics, Inc.*, B-290961, Oct. 28, 2002, 2003 CPD ¶ 39 at 5. It naturally follows,



The General Counsel
Page 42
April 26, 2021

therefore, that “[e]valuation of proposals against undisclosed evaluation criteria is clearly improper.” *York Bldg. Servs., Inc. et al.*, B-282887.10, B-282887.11, Aug. 29, 2000, 2000 CPD ¶ 141 at 5.

An agency does not have the discretion to announce one evaluation scheme in a solicitation and then make evaluation or source selection decisions based on another. *See Tantus Techs., Inc.*, B-411608, B-411608.3, Sept. 14, 2015, 2015 CPD ¶ 299 at 7; *see also Mnemonics, Inc.*, B-290961, Oct. 28, 2002, 2003 CPD ¶ 39 at 5 (“An agency may not induce offerors to prepare and submit proposals based on one premise, then make source selection decisions based on another.”); *Risk Analysis & Mitigation Partners*, B-409687, B-409687.2, July 15, 2014, 2014 CPD ¶ 214 at 7 (sustaining protest that the agency used unstated evaluation criteria in assessing weaknesses in the protester’s proposal where the agency’s evaluation was based on criteria that offerors could not have reasonably known to address in their proposals).

In fact, given the incongruity of NASA’s Base period and Option A evaluation judgments, it appears that, in performing its Option A evaluation, NASA failed to comply with NASA Procedural Requirement 7123.1C, “NASA Systems Engineering Processes and Requirements” (Feb. 14, 2020). This procedural requirement is “mandatory” for NASA, and Paragraph 4.2.7 in particular requires that “[t]he NASA technical team shall participate in the evaluation of offeror proposals in accordance with applicable NASA and Center source selection procedures [SE-28].” It is now clear that the best-informed NASA technical team did not participate in the evaluation of the HLS offerors as required and that, instead, only a limited number of evaluators were used. In conducting its evaluation in this way, especially in the



The General Counsel
Page 43
April 26, 2021

context of an acquisition under a research BAA pursuant to FAR 35.016, NASA appears to have unreasonably ignored the deep understanding and knowledge obtained by the NASA technical team who participated in the Base period contract and who would be the best sources for evaluating the technical merits of each offerors' proposals. Instead, NASA's contrary approach to the Option A evaluation ensured that only a cursory review of the offerors' proposed concepts would be used for evaluation.⁵

As relevant here, NASA's evaluation of Dynetics' technical and management proposals as "Marginal" and "Very Good" respectively cannot be squared with the fact that there were no material changes in the technical evaluation criteria between the initial Base period award and the Option A award. By way of illustration, while NASA awarded a Significant Strength to Dynetics' initial Base contract proposal for proposing a low-slung Crew Module, NASA unreasonably reduced this Significant Strength to a Strength in its evaluation of Option A proposals notwithstanding the fact that NASA's justification was largely identical.

⁵ Furthermore, NASA's apparent evaluation approach is inconsistent with the precept that, for the HLS program, NASA "will have '50 engineers in plant, living with you [the Base period contractors] all the time, riding along with your engineers' so 'we understand your requirements, we understand your design, we understand your verification plan. We'll know what the data is, we'll have looked at it already, so giving us the paper is just a formality' instead of getting it at the end and then needing to go back and ask for more data." Marcia Smith, "Jurczyk: Artemis I to Launch in Mid-Late 2021, HLS Contracts within Weeks," SpacePolicyOnline.com (Mar. 1, 2020), available at <https://spacepolicyonline.com/news/jurczyk-artemis-i-to-launch-in-mid-late-2021-hls-contracts-within-weeks/>.



The General Counsel
 Page 44
 April 26, 2021

Base Period Evaluation Significant Strength	Option A Evaluation Strength
“Ease of access for crew to the lunar surface”	“Enables easy access to the surface”
“Reduces the risk of crew falling from height”	“Minimizing risk of crew falling and sustaining injuries”
“[T]he slow slung design concept will decrease risk associated with incapacitated crew rescue in case of EVA contingencies”	“The low-slung DAE will also facilitate the offeror’s ability to address incapacitated crew potentialities by maintaining a simpler (i.e., shorter, less complex, and overall, less risky) translation path from the surface to the vehicle”
“[A]ids in crew ingress, especially while retrieving scientific samples”	“[E]nables easy access to the surface while minimizing risk of crew falling and sustaining injuries while translating to/from the surface, especially, while retrieving scientific samples”


Compare Ex. G (Dynetics Initial Source Evaluation Panel Report) at 4, with Ex. E (Dynetics Source Evaluation Panel Report) at 16-17. Notably, NASA recognized additional benefits in and enhancements to Dynetics’ low-slung Crew Module that could have only served to augment and strengthen Dynetics’ original rating. See, e.g., Ex. E (Dynetics Source Evaluation Panel Report) at 17 (“The low-slung DAE will also facilitate the offeror’s ability to address incapacitated crew potentialities by maintaining a simpler (i.e., shorter, less complex, and overall, less risky) translation path”); *id.* (“Two crew stations, each with dedicated hand controllers, will enable crew to monitor operations and manually control the vehicle, while providing redundancy and crew resource management during dynamic mission operational phases, including landing contingencies.”). Similarly, while NASA initially recognized a Strength with Dynetics’ proposed Cryogenic Fluid Management (CFM) Credible System, NASA failed to award a Strength to this aspect of Dynetics’ Option A proposal even though that design only matured,



The General Counsel
Page 45
April 26, 2021

and hence strengthened, during the interim period and NASA's rationale largely remained identical. *See also* Ex. E (Dynerics Source Evaluation Panel Report) at 41-42 (awarding only a Strength for Dynerics' strong approach to insight compared to a Significant Strength in the Base period evaluation); *id.* at 47-48 (awarding only a Strength for Dynerics' sustainable heavy cargo lander capabilities compared to a Significant Strength in the Base period evaluation); *id.* at 58-59 (awarding only a Strength for Dynerics' effective integrated risk management approach compared to a Significant Strength in the Base period evaluation). NASA has provided, and can provide, no reasonable technical justification for downgrading these aspects of Dynerics' technical and management proposals. Rather, the goal posts moved.

Nor are the Weaknesses and Significant Weaknesses assigned to Dynerics' Option A proposal reasonable in light of the across-the-board Green ratings achieved by Dynerics during the Base period performance. Significantly, NASA lauded Dynerics' base period performance as being of "high merit" for its demonstrated "consistent compliance with contract requirements, delivery of all contract products, and fulfillment of contract milestones in a matter that demonstrates the progress of the offeror's HLS capability." Ex. E (Dynerics Source Evaluation Panel Report) at 62; *see also* Ex. F (Dynerics Volume IV Proposal, Attachment 11), § 4.11 (showing that Dynerics had "Strong Base Period Performance with Green ratings in all eight categories" assessed by NASA); *see also id.* at Table 4.11-1. In the end, Dynerics' technical and management ratings cannot be squared with NASA's prior evaluation of the same features of the proposal or with Dynerics' performance on the Base period. The Dynerics design was not altered, only refined -- what must have changed were NASA's technical and programmatic



The General Counsel
Page 46
April 26, 2021

evaluation criteria. This protest against NASA's improper and unreasonable evaluation of Dynetics' technical proposal must be sustained. *See, e.g., DRS ICAS, LLC*, B-401852.4, B-401852.5, Sept. 8, 2010, 2010 CPD ¶ 261 at 5 (sustaining protest where agency relied on unstated evaluation criteria to downgrade the protester's proposal).

2. **NASA Unreasonably Assigned Weaknesses to Dynetics' Technical Proposal (Factor 1)**

NASA unreasonably assigned weaknesses to Dynetics' proposal with respect to its Factor 1 (Technical) rating, which in turn led NASA to assign an overall rating of Marginal. As described in detail below, NASA's assignment of multiple weaknesses to Dynetics' technical proposal amounted to makeweight complaints about perceived (but at most, minor) informational omissions in the proposal. Contrary to these assigned ratings, NASA had at its disposal substantial information from CRs conducted during the Base period that would have alleviated many of these alleged concerns with Dynetics' technical approach. In any event, NASA assessed these weaknesses to Dynetics based solely on a perceived lack of detail in the proposal rather than any actual concerns with Dynetics' technical approach and capabilities. In so doing, NASA overlooked the fact that none of the purported weaknesses with Dynetics' HLS features and capabilities, which are still undergoing significant design, development, test, and evaluation, are true obstacles to achieving a sustainable HLS for NASA.

To begin, NASA assigned a Significant Weaknesses to Dynetics' technical proposal for its purported lack of detail substantiating the mass opportunities necessary to close to deficit between the mass estimate for Dynetics' proposed integrated descent/ascent element ("DAE") design and the current flight dynamic mass allocation. Ex. E (Dynetics Source Evaluation Panel



The General Counsel
Page 47
April 26, 2021

Report) at 29-33. NASA's assignment of this Significant Weakness, however, overlooks the fact that Dynetics delineated its strategy for mass reduction at length during its CRs with NASA. During these reviews, Dynetics provided detail to NASA down to the component level to demonstrate its commitment to controlling and reducing vehicle mass. In addition, Dynetics' proposal clearly and thoroughly described its strategy for achieving mass reduction, including the ability to reach mass growth allowance ("MGA"). Ex. H (Dynetics Volume I Technical Proposal), attached hereto, at 25-27. In light of the comprehensive information available to NASA from reviews conducted with Dynetics during the Base period of performance, NASA's assignment of a Significant Weakness to this aspect of Dynetics' proposal lacks a rational basis.

This was not an isolated occurrence. The same pattern of NASA overlooking information that had been previously provided during the Base period occurred with other weaknesses assessed against Dynetics. For instance, NASA also assigned a Significant Weakness to Dynetics' technical proposal for purportedly providing "inconsistent and insufficient design and analysis detail regarding their proposed cryogenic fluid management ["CFM"] system and the long-term storage characteristics and capabilities of both their DAE [REDACTED] Ex. E (Dynetics Source Evaluation Panel Report) at 36.⁶ While NASA again faulted Dynetics for a perceived lack of detail in the proposal, [REDACTED]

⁶ In the Source Evaluation Panel Report, NASA incorrectly asserts that [REDACTED] Ex. E (Dynetics Source Evaluation Panel Report) at [REDACTED]. This is incorrect. NASA appears to have relied upon an outdated version of [REDACTED]

The General Counsel
Page 48
April 26, 2021

design had been extensively covered at each Program Management Review (“PMR”), culminating in a detailed system design and analysis summary presented to NASA at the CR. In addition, although NASA claims that Dynetics failed to substantiate [REDACTED] (*id.* at [REDACTED]), Dynetics in fact provided significant detail concerning its approach to risk mitigation during the CFM Preliminary Design Review (“PDR”) held in December 2020. The same could be said for the purported lack of detail concerning [REDACTED] *See id.* at [REDACTED] (stating that Dynetics’s [REDACTED] [REDACTED]). Contrary to NASA’s assessment, Dynetics addressed [REDACTED]

[REDACTED]

[REDACTED]⁷

Similarly, NASA assessed [REDACTED]

[REDACTED]

[REDACTED] *See* Ex. E (Dynetics Source Evaluation Panel Report) at [REDACTED]. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

7

[REDACTED]

The General Counsel
Page 49
April 26, 2021

[REDACTED]

NASA also improperly downgraded Dynetics' proposal for purportedly [REDACTED]
[REDACTED] See Ex. E (Dynetics

Source Evaluation Panel Report) at [REDACTED] ([REDACTED]
[REDACTED]). This conclusion is patently unreasonable. [REDACTED]

[REDACTED] See, e.g., Ex. I (Dynetics Volume IV Proposal, [REDACTED]

[REDACTED]. These reports were not only expressly
incorporated into Dynetics' proposal, but were also available to NASA over the course of insight
and data reviews conducted throughout the Base period of performance. [REDACTED]

[REDACTED]

Quite apart from the multiple instances in which NASA overlooked or ignored critical
information that had been previously provided to NASA and that, by its very nature, should have

[REDACTED]

The General Counsel
Page 50
April 26, 2021

had a strong bearing on Dynetics' ratings, NASA also [REDACTED] assigned multiple other weaknesses to the proposal. For instance, NASA assigned [REDACTED]

[REDACTED] Ex. E (Dynetics Source Evaluation Panel Report) at [REDACTED]. This is demonstrably incorrect. [REDACTED]

[REDACTED] See Ex. J (Dynetics Volume IV Proposal, [REDACTED]). In any event, Dynetics expressly [REDACTED]

[REDACTED] As such, NASA's assignment [REDACTED] [REDACTED] was irrational and contrary to the terms of the Solicitation

With respect to Dynetics' ladder design, NASA assigned a Weakness to the proposal for purportedly lacking information on how Dynetics would use the ladder to effectuate crew translation between the DAE and the lunar surface and failing to "explain how the ladder will be integrated into the HLS overall." See Ex. E (Dynetics Source Evaluation Panel Report) at 23. In assessing this Weakness against Dynetics, NASA seemingly ignored the fact that Dynetics' ladder design, as described in the DDB relies heavily on crew feedback through human-in-the-loop ("HITL") testing. See Ex. H (Dynetics Volume I Technical Proposal) at 7-8; Ex. I (Dynetics Volume IV Proposal, Attachment 37 Excerpts) at 191, 192. While Dynetics conducted HITL testing to the extent allowed by crew availability, Dynetics developed multiple concepts to

The General Counsel
Page 51
April 26, 2021

support progressively higher fidelity testing during the remainder of the Base period and well into the Option A contract period. As such, it would have been unreasonable for Dynetics to detail, for example, how the ladder would attach to the lander prior to baselining a design for its orientation relative to the EVA hatch as confirmed by crew evaluation. Regardless, the purported concerns with respect to the proposed ladder do not rise to level of a “weakness” as defined in the Solicitation -- i.e., a “flaw” in the proposal that “increases the risk of unsuccessful contract performance.” Ex. D (Solicitation), § 5.2.4.1. It should not be lost on NASA that the Apollo Lunar Lander successfully used a very similar ladder concept to conduct lunar operations during the life of that program, whereas no elevator design has ever been successfully used in actual lunar conditions.

NASA’s assignment of [REDACTED]
[REDACTED] suffers from the same fatal flaw. *See* Ex. E (Dynetics Source Evaluation Panel Report) at [REDACTED]. This finding is irrational because [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED].⁸ Because NASA was well aware of [REDACTED]

8 [REDACTED]
[REDACTED]
[REDACTED]

The General Counsel
Page 52
April 26, 2021

[REDACTED]

[REDACTED] NASA's assignment [REDACTED] was erroneous and unreasonable.

With respect to Dynetics' [REDACTED] NASA assigned [REDACTED] for purportedly lacking detail [REDACTED]

[REDACTED]

[REDACTED] See Ex. E (Dynetics Source Evaluation Panel Report) at [REDACTED]. NASA's overall assertion that [REDACTED] was unreasonable and plainly in error because NASA failed to consider [REDACTED] [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

NASA also improperly downgraded Dynetics' proposal for purportedly containing an unrealistic development schedule. See Ex. E (Dynetics Source Evaluation Panel Report) at 37-39. In its evaluation, NASA faults Dynetics for proposing inadequate schedule margins, but Dynetics' schedule retained [REDACTED] of margin to address any unknowns that may occur during development of the HLS. Ex. J (Dynetics Volume IV Proposal,

[REDACTED]

The General Counsel
Page 53
April 26, 2021

[REDACTED]

[REDACTED] In this respect, there is no basis upon which NASA could have reasonably found that Dynetics' schedule approach to plan for success, and utilize program schedule reserve to address issues as they emerged, merited a Significant Weakness. The assignment of such a scheduling Significant Weakness to Dynetics is particularly jarring given NASA's charitable assessment of scheduling by SpaceX and that company's admission that its scheduling is merely "aspirational" -- that is, lacking in the "credibility" expressly required by the Solicitation.

Similarly, NASA improperly assessed [REDACTED] [REDACTED] See Ex. E (Dynetics Source Evaluation Panel Report) at [REDACTED]. More specifically, NASA claims that [REDACTED]

[REDACTED] *Id.* at [REDACTED].

NASA's assignment [REDACTED]

The General Counsel
Page 55
April 26, 2021

In any event, NASA's assignment [REDACTED]

[REDACTED]

[REDACTED] In its proposal, Dynetics chose a proven launch vehicle provider with a Vulcan Centaur that combines decades of unparalleled and relevant engineering experience, proven design knowledge, manufacturing and launch efficiencies, and robust risk reduction methods. As the longest-standing provider for space transportation, ULA has successfully launched 140 missions aboard Delta II, Delta IV, and Atlas V launch vehicles, and has participated in more than 350 launches over the history of those families. [REDACTED]

[REDACTED]

demonstrates that NASA unreasonably downgraded this aspect of Dynetics' proposal.

Finally, NASA improperly assigned [REDACTED]

[REDACTED]

[REDACTED] Ex. E (Dynetics Source Evaluation Panel Report) at [REDACTED]; *id.* at [REDACTED] ([REDACTED]). To the extent that NASA deemed [REDACTED]

[REDACTED]

[REDACTED] As this example demonstrates, NASA gave the benefit of the doubt to SpaceX with respect to [REDACTED], but refused to do

[REDACTED]

The General Counsel
Page 56
April 26, 2021

the same with Dynetics. This unequal treatment of the offerors demonstrates that NASA overly downgraded Dynetics' proposal as compared to SpaceX's proposal.¹⁰

In any event, Dynetics clearly explained in its proposal that [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED] See Ex. H (Dynetics Volume I Technical Proposal) at [REDACTED]; Ex. I (Dynetics Volume IV Proposal, [REDACTED] ([REDACTED]
[REDACTED])). The Dynetics proposal further explained to NASA that

[REDACTED] See Ex. H (Dynetics Volume I Technical Proposal) at [REDACTED];
Ex. I (Dynetics Volume IV Proposal, [REDACTED]).

Given NASA's irrational conclusions regarding the various weaknesses assigned to Dynetics' proposal, there is no basis upon which NASA could have reasonably assigned a "Marginal" rating to Dynetics. Moreover, because Dynetics should not have been assessed these weaknesses, its rating should have been [REDACTED]

* * *

Because NASA unreasonably evaluated Dynetics' proposal, this protest ground must be sustained.

¹⁰ See, e.g., *SURVICE Eng'g Co., LLC*, B-414519, July 5, 2017, 2017 CPD ¶ 237 at 8 ("It is a fundamental principle of federal procurement law that a contracting agency must treat all offerors equally and evaluate their proposals evenhandedly against the solicitation's requirements and evaluation criteria."); see also FAR 1.102-2(c)(3) (requiring procuring agencies to treat all prospective contractors "fairly and impartially").

[REDACTED]

The General Counsel
Page 57
April 26, 2021

C. **Dynetics Has Suffered Competitive Prejudice**

Despite all of the reasonable and lawful options available to it, NASA inexplicably elected to down-select to one potential contractor for the remainder of the HLS program. This unreasonable decision was prejudicial to Dynetics. Indeed, NASA's failure to convey its actual requirements to offerors by either amending the Solicitation or entering into discussions with all HLS prime contractors to advise them of its changed acquisition strategy was prejudicial to Dynetics. In particular, NASA's course of action unthinkably eliminated the possibility of an Option A CLIN 010 award to Dynetics.

In this regard, the GAO has held that a reasonable possibility of prejudice flowing from an agency's failure to apprise offerors of the agency's actual requirements is a sufficient basis for sustaining a protest. *See System Studies & Simulation, Inc.*, B-409375.2, B-409375.3, May 12, 2014, 2014 CPD ¶ 153 at 7 (finding that the protester was prejudiced where the offerors were not afforded an opportunity to compete for the agency's actual requirements and the protester would have altered its proposed staffing had it known about the agency's revised requirements). In a similar vein, NASA's decision not to withdraw or cancel the Solicitation given the fundamental change in its acquisition strategy and its failure even to consider making a second award under CLIN 010 were prejudicial to Dynetics.

When, as is the case here, "there is no basis on the record . . . to conclude how the competition would have ended had the offerors been aware of the agency's actual requirements," the GAO will find prejudice. *See id.* at 7-8 (rejecting the agency's calculations to rebut a finding of prejudice where "those calculations are based on personnel that the offerors may, or may not,



The General Counsel
Page 58
April 26, 2021

have proposed had the agency advised them of its actual requirements”); *System Mgmt., Inc.*, B-287032.3, B-287032.4, Apr. 16, 2001, 2001 CPD ¶ 85 at 8-9. There is no telling how all three offerors would have responded to the Solicitation given the fundamental shift in NASA’s strategy brought about by its unanticipated budgetary constraints and changed schedule -- particularly if all three offerors had been engaged simultaneously in competitive negotiations or discussions. At the very least, any doubts about how to strike such a balance must be resolved in favor of finding prejudice here. *See, e.g., Supreme Foodservice GmbH*, B-405400.3 et al., Oct. 11, 2012, 2012 CPD ¶ 292 at 14 (explaining that the GAO resolves any doubts regarding prejudice in favor of protester since a reasonable possibility of prejudice is a sufficient basis for sustaining a protest); *Tantus Techs., Inc.*, B-411608, B-411608.3, Sept. 14, 2015, 2015 CPD ¶ 299 at 13. For these reasons, this protest ground should be sustained.

Putting aside NASA’s fundamental error in not soliciting proposals based on the actual requirements of the HLS program, Dynetics was also prejudiced because [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

The General Counsel
Page 59
April 26, 2021

[REDACTED]

[REDACTED] Had
NASA reasonably evaluated the proposal submitted by Dynetics, it would have had a substantial chance for award of an Option A contract.

VI. REQUEST FOR RELIEF

For the reasons discussed above, Dynetics requests that the GAO find that NASA's evaluation of proposals and its award decision were unreasonable and inconsistent with the Solicitation and resulted in competitive prejudice to Dynetics. But for the above-discussed fundamental errors in NASA's selection process, not only would Dynetics have had a substantial chance of award under the Solicitation, it would have been awarded an Option A contract. Dynetics therefore requests that the GAO sustain this protest and recommend that NASA either award an Option A contract to Dynetics or recommend that NASA revise the Solicitation, perform a proper evaluation, and make an award decision that is reasonable and consistent with the revised Solicitation. Dynetics further requests that it be awarded its costs of filing and pursuing this protest, including attorneys' fees, and that it be granted such other relief as the GAO deems appropriate.

VII. RESERVATION OF RIGHT TO REQUEST A HEARING

Pursuant to 4 C.F.R. § 21.1(d)(3), Dynetics reserves the right to request a hearing should it become apparent that a hearing is necessary to resolve this protest.

[REDACTED]

The General Counsel
Page 60
April 26, 2021

VIII. REQUEST FOR DOCUMENTS

Pursuant to 4 C.F.R. §§ 21.1(d)(2) and 21.3(c), Dynetics requests that copies of the documents identified below be produced in addition to those required to be produced as part of the Agency Report in this protest:

- A. All proposals, and other documents submitted by Dynetics and SpaceX;
- B. All documents relating to any proposal evaluation guidance provided to evaluators in this acquisition;
- C. All documents relating to the evaluation of Dynetics' and SpaceX's proposals, including: (1) individual technical evaluator notes and scoring sheets; (2) consensus and scoring sheets and reports; (3) price, cost, or fee evaluations, adjustments, and analyses; (4) all documents reviewed or relied upon by the source selection authority in making the award decision; and (5) the Source Selection Statement;
- D. All documents relating to the availability of funding for this acquisition and/or the HLS program, and all documents reflecting how the availability of funding may have been taken into consideration in the award decision;
- E. All documents to which NASA refers or on which NASA relies in the Agency Report (including in the Contracting Officer's statement of facts and NASA's legal memorandum) to be submitted in response to this protest;
- F. All documents relating to any discussions, clarifications, communications, negotiations, or other exchanges between NASA and SpaceX, including any responses thereto;
- G. All documents relating to NASA's determination not to engage in discussions, clarifications, communications, negotiations, or other exchanges with Dynetics;
- H. All documents that NASA intends to refer to or rely upon if a hearing is conducted in this protest; and
- I. Any documents, statements, or other information utilized and relied upon by NASA for Dynetics' April 19, 2021 informal feedback session.



The General Counsel
Page 61
April 26, 2021

IX. REQUEST FOR PROTECTIVE ORDER

Because this protest and many of the requested documents contain proprietary and/or source selection sensitive information, Dynetics hereby requests that the GAO issue a Protective Order in this protest. *See* 4 C.F.R. § 21.4.

All further correspondence related to this protest should be addressed to the attention of the undersigned.

Respectfully submitted,

FRIED, FRANK, HARRIS, SHRIVER
& JACOBSON LLP

By s/James J. McCullough
James J. McCullough
Michael J. Anstett
Anayansi Rodriguez
Christopher H. Bell

Counsel to Dynetics, Inc., A Leidos Company

Enclosures (Protest Exhibits A-G)

cc (by email): Tyler Cochran, Contracting Officer

