

## **NASA Can Use Appendix H to Make Additional Awards for its Human Landing System (HLS) Program**

**NASA can make additional awards under the current Broad Agency Announcement (BAA); they do not need to run a new competition.**

The very nature of the BAA is to solicit a wide range of potential solutions to the problem statement NASA identified. As such, since the proposals from the two offerors not selected in the original award remain valid, NASA is able to make one or more additional awards under the current BAA, as they originally announced they may do. NASA does not need to run a new competition.

**BAAs – which NASA used for its Human Landing System program – often follow the Federal Acquisition Regulation (FAR).**

Since a BAA is not a “contract,” the standard federal contracting rules are generally not applicable to BAAs until an award decision is memorialized, typically through a contract. However, a BAA can, and often does, closely follow the steps and techniques used by federal agencies when conducting a FAR-based procurement.

For example, in the HLS BAA, NASA provided extensive details about how offerors should submit their responses and included detailed evaluation criteria for its source selection decision-making. The Government Accountability Office (GAO) has ruled that “we have looked to FAR Part 15 (regarding negotiated procedures) for guidance in reviewing the agency’s conduct of discussions under a BAA where an agency uses negotiated procedures as part of the selection process...”<sup>1</sup>

**NASA could have had, and should have had, discussions with all bidders prior to award.**

As is common on larger and more complex solicitations, after an agency evaluates initial proposal submissions, it may and often does engage in “discussions” with offerors about their proposal and any deficiencies or ambiguities the agency uncovers during the evaluation. The FAR requires that these discussions be “meaningful” and informative about key deficiencies. Typically, if an agency opens discussions with one offeror, it must open discussions with all qualified offerors, although the nature of those discussions would vary from offeror to offeror depending on what the agency identified during source selection.

In the HLS program, NASA found deficiencies in each of the three proposals but had no “discussions” with any of the offerors before making its award to Space X. Only after its award to Space X did NASA have “discussions” with only Space X.

Since BAAs are not contracts, NASA is not required to adhere to its traditional (but not statutorily or regulatorily required) “blackout” on conversations during the source selection process, including into any protest period. As such, NASA was (and is) in a position to discuss with the unselected offerors to the BAA any element regarding their proposal, even after making an award to Space X.

**Offerors’ proposals submitted in response to NASA’s “Appendix H” did not expire and remain valid.**

Each of the three companies pre-selected by NASA to design and develop the HLS program was awarded a “base” FAR-based contract, with a sunset date of February 28, 2021, that was set by NASA in anticipation of the agency’s April 2021 HLS design award. However, since NASA was delayed in making its HLS award decision, all three companies have had the period of performance of their base contracts extended on a no-cost basis to NASA until August 2021. This no-cost extension is common.

In addition to the extension of the “base” contracts, the validity date for the proposal submitted by the National Team in response to the BAA was also extended and remains valid into August 2021. Presumably, the Dynetics proposal was also extended and remains valid.

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<sup>1</sup> Interstate Elec. Corp. GAO B-286466, B-286466.2 (Jan 17, 2001), at 11.