Comptroller General
of the United States

Washington, D.C. 20548

Decision

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Matter of: AVIATE L.L.C.

File: B-275058.6; B-275058.7

Date: April 14, 1997

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James H. Roberts III, Esq., Manatt, Phelps & Phillips, for the intervenor.
Vincent A. Salgado, Esq., and Kevin E. Love, Esq., National Aeronautics and Space Administration, for the agency.
Denise Benjamin Biddy, Esq., and David R. Kohler, Esq., Small Business Administration, for the agency.
Guy R. Pietrovito, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. A procuring agency may properly include an allegedly unacceptable proposal in the competitive range, where the agency reasonably concludes that the proposal is susceptible of being made acceptable and has a reasonable chance of being selected for award.

2. In a negotiated procurement for a task order contract, the procuring agency reasonably determined that the awardee's proposed small disadvantaged business concern (SDB) participation plan satisfied the solicitation's 40-percent SDB participation goal, where the awardee proposed to subcontract 20 percent of the contract value to an SDB subcontractor and to subcontract another 20 percent to other to-be-determined SDB concerns from a list of candidate firms identified in the awardee's proposal or to award the additional 20 percent of the contract work to the named SDB subcontractor.

3. Protest that the procuring agency failed to account in its evaluation for 20 percent of the contract work that the awardee intended to award to unidentified subcontractors is denied, where the awardee's proposal accounted for performance of all the contract work to be ordered and the solicitation did not require subcontractor commitments.

4. A protester's mere disagreement with the agency's assessment of weaknesses in its proposal regarding its [REDACTED] and its fragmented administrative and management structure does not show the agency's evaluation judgment was unreasonable.

5. Agency reasonably selected a proposal with an "excellent" mission suitability rating, instead of the protester's proposal with a slightly lower cost and a "very good" mission suitability rating, where the protester's lower rating was due to reasonably based major weaknesses found in the protester's proposal; in making the award selection the agency also reasonably accounted for the protester's "excellent" relevant experience and past performance rating, but noted that the awardee's "very good" rating was based on highly relevant contract experience.

6. Request for recovery of costs of pursuing a protest where the agency took corrective action in response to the protest is denied where the agency did not unduly delay in taking corrective action.

DECISION

AVIATE L.L.C.[1] protests the award of a contract to NYMA, Inc. under request for proposals (RFP) No. 1-132-D.1166, issued by the National Aeronautics and Space Administration (NASA) for systems analysis and engineering research support. AVIATE challenges the inclusion of NYMA's proposal in the competitive range, the evaluation of AVIATE's and NYMA's proposals, and the source selection decision, and argues that NYMA made material misrepresentations in its proposal. AVIATE also requests that our Office recommend that it recover a portion of its costs of filing and pursuing an earlier protest of this award as it relates to AVIATE's challenge of NASA's refusal to forward to the Small Business Administration (SBA) AVIATE's protest of the small disadvantaged business (SDB) status of a subcontractor proposed by NYMA as part of the awardee's plan to obtain SDB participation in the procurement.

We deny the protest and the request for recovery of protest costs.

The RFP, issued as a small business set-aside, provided for the award of a cost-plus-award-fee task order services contract to support aeronautical and space research systems analysis and engineering activities at NASA's Langley Research Center for a base year with 4 option years and six 1-month options. A detailed statement of work was provided that described the services that could be ordered under the contract.

The RFP advised that NASA contemplated making award without discussions, but reserved the right to conduct discussions if determined necessary. A best value basis for award was stated, and the following evaluation factors and subfactors identified:

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[1]AVIATE was established as a Virginia limited liability corporation by Analytical Services & Material, Inc. (AS&M) and Vigyan, Inc. for the sole purpose of seeking and performing this contract.

Factor 1.	Mission Suitability	
Subfactor 1	Understanding the Requirements and Technical Approach	500 pts.
Subfactor 2	Total Compensation Plan	150 pts.
Subfactor 3	Management Operations	350 pts.
Subfactor 4	Cost Realism	(300) pts.
Factor 2	Cost	
Factor 3	Relevant Experience and Past Performance	

The Mission Suitability, Cost, and Relevant Experience and Past Performance factors were stated to be of essentially equal importance, although only the Mission Suitability factor was to be point scored. For the Cost Realism subfactor, offerors were informed that their overall Mission Suitability factor score could be reduced where an offeror's proposed costs were upwardly adjusted by more than 15 percent in the agency's cost evaluation.

Information regarding the preparation of proposals, and how they would be evaluated, was provided for each of the evaluation factors and subfactors. For example, for the Total Compensation Plan subfactor, the RFP informed offerors that proposed salaries and fringe benefits for professional and nonprofessional employees would be evaluated, as well as an offeror's policies, procedures, and historical basis for uncompensated overtime, if proposed. A total compensation plan was required for each offeror and proposed subcontractor whose services would exceed $500,000. For the Management Operations subfactor, offerors were informed that their approach to meeting a "mandatory goal of 40 [percent] . . . established for SDB participation" would be evaluated, as well as the offeror's approach to staffing and management.

For the purposes of the cost evaluation, the RFP provided the estimated direct labor hours and skill mix that offerors were to use in pricing their proposals for the basic and option periods. Offerors were informed that the contract to be awarded would not contain a specified level of effort. The RFP required offerors to submit a separate cost proposal for each subcontractor whose subcontract was expected to exceed $500,000.

Proposals were received from seven firms, including AVIATE and NYMA, by the February 26, 1996, closing date for receipt of proposals. AVIATE's and NYMA's proposals, which were the two highest rated, were evaluated as follows:

	NYMA	AVIATE
Mission Suitability[2]	Very Good/ [REDACTED] pts.	Very Good/ [REDACTED] pts.
Relevant Experience/ Past Performance	Very Good	Excellent
Proposed Cost	$[REDACTED]M[3]	$[REDACTED]M
Probable Cost	$[REDACTED]M	$[REDACTED]M

On May 20, the SSO selected NYMA's proposal for award as the most advantageous offer to the government. On May 29, AVIATE protested NYMA's SDB status to the contracting officer.[4] NASA referred the protest to the SBA for that agency's determination. On June 27, the SBA determined that NYMA did not qualify as an SDB concern for this procurement. Based upon this determination, NASA reevaluated NYMA's proposal, reducing NYMA's Management Operations subfactor rating from [REDACTED] to [REDACTED] points to reflect that NYMA had not offered a plan that would provide for SDB participation in the procurement. NASA established a competitive range consisting of AVIATE's and NYMA's proposals, conducted discussions with each firm, and requested best and final offers (BAFO).

In response, NYMA revised its proposal to address the RFP's SDB participation goal by proposing to subcontract 20 percent of the value of the contract to ADF Corporation, a section 8(a) contractor, and to subcontract an additional 20 percent of the value to other "to-be-determined" SDB concerns, which would be chosen from among a number of SDB concerns and "historically black universities and colleges" (HBUC) identified in NYMA's proposal. NYMA further stated that if necessary to achieve its planned 40-percent SDB participation goal, it would subcontract the additional 20 percent of the value of the contract to ADF.

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[2]In response to concerns raised by the SSO in the initial source selection briefing, several aspects of NYMA's and AVIATE's proposal were reevaluated, which resulted in a reduction in the firms' evaluation scores under the Mission Suitability factor to [REDACTED] for NYMA and [REDACTED] for AVIATE. The reduction in AVIATE's score reflected the SSO's and evaluators' concerns with AVIATE's proposed division of adminstrative and management functions [REDACTED].

[3]"M" is a million.

[4]NYMA certified itself as an SDB concern and proposed to satisfy the 40-percent SDB participation goal through its own participation.

The BAFOs were evaluated as follows:

	NYMA	AVIATE
Mission Suitability	Excellent/ [REDACTED] pts.	Very Good/ [REDACTED] pts.
Relevant Experience/ Past Performance	Very Good	Excellent
Proposed Cost	$[REDACTED]M	$[REDACTED]M
Probable Cost	$[REDACTED]M	$[REDACTED]M

NYMA's BAFO was found to offer numerous major strengths and no major weaknesses under the Mission Suitability Factor and was thus rated "excellent." NYMA's "very good" proposal rating under the Relevant Experience and Past Performance factor reflected the evaluators' view that although NYMA's experience was limited to a contract for highly comparable work at NASA's Lewis Research Center, NYMA also had specific experience transitioning to, and managing, a complex performance-based contract of greater magnitude than this procurement.

AVIATE's BAFO was rated "very good" under the Mission Suitability factor. Although AVIATE's proposal was found to demonstrate in-depth knowledge of all areas of the statement of work, superior understanding of the contract requirements, and a superior technical approach, the evaluators noted a number of significant weaknesses in AVIATE's BAFO under this factor. Specifically, AVIATE's proposal was downgraded for AVIATE's offer of [REDACTED], which AVIATE first offered in response to discussions without adequately detailing [REDACTED] for this contract. The evaluators were also concerned that AVIATE proposed a distribution of administrative functions [REDACTED] without [REDACTED] or discussing how these functions would be coordinated. AVIATE's relevant experience and past performance were evaluated as "excellent" based upon the evaluators' finding that although AVIATE had no experience managing a contract of the magnitude of this procurement, AVIATE and its proposed subcontractors had performed extensive technical work in all the statement of work areas and primarily at the Langley Research Center.

The evaluators' findings were presented to the SSO, who concluded that NYMA's BAFO was the most advantageous to the government. Specifically, the SSO stated in her written selection determination:

> "Under Factor 1, Mission Suitability, I noted that NYMA received a rating of 'Excellent' and had no major weaknesses; AVIATE received a rating of 'Very Good' and had several major weaknesses, dealing with their proposed [REDACTED], as well as their proposed plan to

> [REDACTED]. More specifically, AVIATE's proposed [REDACTED] is not well supported, appears to be based on unrealistic assumptions, and fails to address concerns about how [REDACTED]. Furthermore, AVIATE's [REDACTED]. In general, I considered both of these management issues to be significant discriminators between the NYMA and AVIATE proposals. I then examined both the proposed and probable costs for both firms under Factor 2, Cost, and noted that they were essentially equal, thereby providing no significant discriminator in this area. Finally, I examined the findings of Factor 3, Relevant Experience and Past Performance. I noted that AVIATE received a rating of 'Excellent' and NYMA received a rating of 'Very Good;' however, I placed significant emphasis on NYMA's experience with transitioning and managing a contract of comparable size and nature (i.e., performance based). Based on NYMA's excellent mission suitability rating which contained no major weaknesses, essentially equal costs, and very good relevant experience and past performance, I have concluded that the NYMA proposal is the most advantageous to the Government and hereby select them for award. In making my decision, I have considered all three factors equally."

AVIATE was notified of NASA's selection of NYMA for award, received a debriefing, and on October 11, protested to our Office NASA's evaluation and source selection. On November 22, after receipt of the agency's report on its initial protest, AVIATE amended its protest to our Office to challenge, among other things, ADF's SDB status.

AVIATE also protested to NASA on December 5 that NYMA's proposed subcontractor, ADF, was not an SDB concern.[5] On December 10, NASA informed us that it intended to forward AVIATE's SDB-status protest to the SBA, but on December 11 informed us and AVIATE that it would not forward the protest to the SBA. On December 12, AVIATE amended its protest to our Office to challenge NASA's refusal to forward AVIATE's protest of ADF's SDB status to the SBA. On December 17, NASA formally informed AVIATE that NASA would not forward AVIATE's challenge of ADF's SDB status to the SBA because, in NASA's view, the SBA did not have jurisdiction to review ADF's SDB status within the context of this procurement and because ADF, as an 8(a) contractor, was clearly an SDB concern. On December 23, AVIATE amended its December 12 protest allegations to address NASA's December 17 letter.

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[5]Protests to the SBA of a subcontractor's SDB status can be initiated only by the contracting officer or the SBA, although firms may submit information to the contracting officer, which can be used to initiate a contracting officer's protest. Federal Acquisition Regulation (FAR) § 19.703(a) (FAC 90-45); 13 C.F.R. § 124.603(b) (1996).

NASA responded to AVIATE's amended protest on January 2, 1997, affirming its view that "SBA lacks regulatory authority to exercise its otherwise exclusive jurisdiction to determine SDB status." On January 6, in response to our request, the SBA provided a report detailing its views that "it possess[ed] exclusive statutory authority to determine the SDB status of NYMA's subcontractor" and "that under governing regulations NASA's contracting officer ha[d] the duty to promptly forward AVIATE's SDB protest to SBA for adjudication." On January 7, AVIATE filed comments addressing NASA's January 2 report. On January 9, in response to the SBA's report, NASA forwarded AVIATE's challenge of ADF's SDB status to the SBA and agreed to be bound by the SBA's determination in this matter, although NASA maintained "that SBA does not have exclusive jurisdiction" to decide ADF's SDB status.

Because the SBA's determination of ADF's SDB status could render academic all or some of AVIATE's protest issues, thus rendering a decision from our Office of no practical consequence, we dismissed AVIATE's protests on January 10, informing AVIATE that, after the SBA had ruled, the protester could timely refile those protest issues which the protester believed had continued vitality and for which it wished to have our decision. Within 15 days of the date of our dismissal, AVIATE requested that we recommend it be reimbursed those costs of filing and pursuing its protest, including reasonable attorneys' fees, that relate to its challenge to NASA's refusal to forward AVIATE's SDB-status protest to the SBA.

On February 5, the SBA determined that ADF was an SDB concern for this procurement, and on February 6, AVIATE requested that our Office decide its remaining protest allegations. Specifically, AVIATE argued that NYMA's initial proposal was technically unacceptable and could not properly be included in the competitive range; that NASA misevaluated NYMA's and AVIATE's proposals; that in selecting NYMA's proposal for award the SSO used improper discriminators; and that NYMA made material misrepresentations in its BAFO. Performance of NYMA's contract has been suspended pending our decision in this matter.

AVIATE first protests that, given the SBA's determination regarding NYMA's status as an SDB concern, NYMA effectively provided no SDB participation plan in its initial proposal and therefore, in AVIATE's view, NYMA'S proposal was technically unacceptable and could not properly be included in the competitive range. AVIATE argues that allowing NYMA to submit a revised proposal after discussions was tantamount to allowing the submission of a new and late proposal, which was prohibited by the RFP.

NASA and NYMA respond that while the RFP provided for the evaluation of an offeror's SDB participation plan, it also stated that the failure to submit such a plan would not render a proposal unacceptable. In this regard, NASA points outs that the RFP specifically provided that "[a]n initial proposal will not be rejected as unacceptable solely as a result of an offeror proposing a goal that is less than the

mandatory goal." NASA and NYMA argue that, in any event, including NYMA's proposal in the competitive range was reasonable, given the agency's determination that NYMA's proposal had a reasonable chance of being selected for award.

While the determination of whether a proposal is in the competitive range is principally a matter within the reasonable exercise of discretion of the procuring agency, see National Sys. Management Corp., 70 Comp. Gen. 443, 446 (1991), 91-1 CPD ¶ 408 at 4, the FAR provides that the competitive range must include all proposals that have a reasonable chance of being selected for award and that any doubt as to whether a proposal is in the competitive range should be resolved by inclusion. FAR § 15.609(a) (FAC 90-44). Contrary to AVIATE's apparent belief, there is no per se prohibition against the inclusion of a technically unacceptable proposal in the competitive range. Rather, a fundamental purpose in conducting discussions is to determine whether deficient proposals are reasonably susceptible of being made acceptable through discussions. Construcciones Aeronauticas, S.A., 71 Comp. Gen. 82, 85-86 (1991), 91-2 CPD ¶ 461 at 6-7; Scan-Optics, Inc., B-211048, Apr. 24, 1984, 84-1 CPD ¶ 464 at 4-5. An unacceptable proposal that is reasonably susceptible of being made acceptable through discussions and which the agency reasonably determines has a reasonable chance of being selected for award properly is included in the competitive range. See SAIC Computer Sys., B-258431.2, Mar. 13, 1995, 95-1 CPD ¶ 156 at 4.

Here, although AVIATE argues that NASA did not have a reasonable basis to conclude that NYMA's proposal had a reasonable chance of being selected for award, the record reflects that, apart from the SDB participation plan, NYMA submitted a strong initial proposal that was favorably evaluated by NASA. Moreover, it was apparent that a deficient SDB participation plan was easily fixable in response to discussions. We have no basis on this record to find NASA's competitive range determination unreasonable.

We also disagree that providing NYMA with the opportunity after discussions to submit an SDB participation plan was tantamount to the submission of a new and late proposal. It is axiomatic that competitive range offerors may revise any aspect of their proposals that they see fit after the conduct of discussions. FAR § 15.610(c)(5); American Nucleonics Corp., B-193546, Mar. 22, 1979, 79-1 CPD ¶ 197 at 2. In this regard, the submission of proposal revisions in response to an agency's conduct of discussions is not governed by the RFP's late proposal rules, as AVIATE supposes, but are considered to be part of the normal negotiation process. Simmonds Precision Prods., Inc., B-244559.3, June 23, 1993, 93-1 CPD ¶ 483 at 14-15.

AVIATE also challenges NASA's evaluation of NYMA's BAFO, arguing that NASA's evaluation unreasonably found NYMA's SDB participation plan acceptable based on the proposed use of unidentified and uncommitted SDB subcontractors, and did not account for approximately 20 percent of the contract work that NYMA intended to subcontract to these unidentified subcontractors. Specifically, AVIATE complains

that while NYMA stated in the SDB participation plan submitted with its BAFO that it would subcontract approximately 40 percent of the contract value to SDB concerns, NYMA specifically identified only one SDB concern--ADF, to which NYMA stated it would subcontract approximately 20 percent of the contract value. AVIATE states that the remaining 20 percent to be subcontracted--approximately $10 million of contract value--was undefined in NYMA'S proposal and was not accounted for by NASA in its technical and cost evaluation. AVIATE contends that without knowing specifically who NYMA would use for the remaining 20 percent of the contract NASA did not have a reasonable basis to assess the cost realism of NYMA's proposal or to evaluate NYMA's proposal under the Management Operations subfactor (under which offerors' SDB participation plans were rated), under the Total Compensation Plan subfactor, and under the Relevant Experience/Past Performance factor.

In considering a challenge to a particular evaluation conclusion, we examine the record to determine whether the judgment was reasonable and in accord with the evaluation criteria listed in the solicitation. Abt Assocs., Inc., B-237060.2, Feb. 26, 1990, 90-1 CPD ¶ 223 at 3-4. A protester's mere disagreement with the agency's evaluation determination does not demonstrate that the evaluation was unreasonable. Brunswick Defense, B-255764, Mar. 30, 1994, 94-1 CPD ¶ 225 at 9.

In its revised proposal, NYMA offered to perform approximately 50.5 percent of the contract value itself and to subcontract 40 percent to SDB concerns and 9.5 percent to a large business subcontractor.[6] With regard to obtaining SDB participation, NYMA proposed to subcontract between 20 to 40 percent of the contract value to ADF, a qualified and experienced SDB concern. NYMA explained that initially it would assign approximately 20 percent of the total contract value to ADF to perform, and would endeavor to subcontract an additional 20 percent of the contract value to other to-be-determined SDB concerns or HBUCs, which NYMA identified in its proposal as candidate firms and from which NYMA had received expressions of interest and some technical and cost information. NYMA stated that if it was unable to subcontract the work to other SDB concerns or if the cost of subcontracting with other SDB concerns exceeded a performance-based cost ceiling established by NYMA for the work, it would assign up to the remaining 20 percent of the contract value to ADF. As required by the RFP, NYMA provided technical information--such as, total compensation plans and past performance and relevant experience information--and cost proposals for itself, its large business subcontractor, and ADF. NYMA did not provide specific technical information or

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[6]As AVIATE notes, NYMA indicated in one place in its responses to the agency's discussions that it intended to subcontract 41 percent of the contract value to SDB concerns. In other places in its discussions responses and in its revised cost proposal, NYMA stated that it would subcontract approximately 40 percent to SDB concerns. We think that this discrepancy is immaterial.

cost information for any of the to-be-determined "candidate firms" it identified in its proposal because it did not have subcontract agreements with these candidate firms.

In its evaluation of NYMA's BAFO, NASA recognized that NYMA offered to subcontract at least 40 percent of the contract value to SDB concerns, but provided technical and cost information for only one SDB concern--ADF, to which NYMA stated it would initially provide 20 percent of the technical labor hours. NASA also recognized that ADF might receive the remaining 20 percent of the contract value NYMA was assigning to SDB concerns if NYMA could not arrange subcontracts with other appropriate SDB concerns within reasonable performance-based cost ceilings. Because NYMA had not identified formal subcontract arrangements with any SDB concerns other than ADF, NASA did not evaluate (nor could they from the information provided) the "candidate firms" under the Total Compensation subfactor and the Past Performance and Relevant Experience factor, and did not downgrade NYMA's proposal for this reason under these evaluation areas. However, based on the information submitted, NASA credited NYMA's proposal under the Management Operations subfactor with providing an SDB participation plan that satisfied the RFP's 40-percent participation goal. In its cost realism evaluation, NASA adjusted NYMA's proposed costs upward by approximately $1.5 million on the assumption that ADF would perform 40 percent of the contract value. The SSO was fully briefed as to these evaluation findings.

As noted above, AVIATE objects to NASA's evaluation of NYMA's SDB participation plan under the Management Operations subfactor, arguing that the agency unreasonably provided NYMA with credit for its SDB candidate firms when NYMA did not have commitments from these firms to perform work under the contract. The record shows that NASA in its evaluation provided NYMA with full credit for its SDB participation plan;[7] in doing so, NASA correctly recognized that NYMA's plan to satisfy the agency's 40-percent participation goal was to subcontract 20 percent of the contract value to ADF and to seek to subcontract another 20 percent of the contract to other, to-be-determined subcontractors or to ADF if suitable subcontracts could not be arranged.

We find the agency's evaluation of NYMA's SDB participation plan to be reasonable and in accord with the RFP evaluation criteria. While AVIATE disagrees with the

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[7]After the SBA determination that NYMA was not an SDB concern, NASA deducted [REDACTED] points from NYMA's Management Operations subfactor rating of [REDACTED] points, reducing NYMA's rating for this subfactor from "excellent" to "very good." After the submission of NYMA's revised SDB participation plan, NYMA's BAFO again received [REDACTED] points and was assessed as excellent. Thus, the record indicates that NASA gave NYMA full credit for its plan to obtain 40-percent SDB participation.

agency's assessment of NYMA's plan, arguing that the failure to identify firm commitments/subcontracts for the SDB concerns that could receive work under the contract task orders should have resulted in either the rejection of NYMA's BAFO or in point reductions in NYMA's technical score, the RFP did not require subcontractor commitments. Rather, the RFP sought an offeror's proposed best effort to satisfy the agency's stated SDB participation goal. Here, NYMA provided such a plan, which NASA's evaluators and SSO found satisfied the RFP requirements. AVIATE's disagreement with NASA's judgment does not show the evaluation to be unreasonable. Moreover, any possible reduction in NYMA's total score for this subfactor to account for its failure to more specifically identify the SDB concerns that could receive contract work would have had only a marginal effect on the overall evaluation and no apparent effect on the SSO's selection decision,[8] such that we cannot say that AVIATE was prejudiced by NASA's evaluation of NYMA's SDB participation plan.

AVIATE nevertheless complains that NYMA made material misrepresentations in its proposal regarding its SDB participation plan that should compel the rejection of its proposal. Specifically, AVIATE states that while NYMA identified an SDB concern--[REDACTED]--as a candidate firm that could receive work under the contract, [REDACTED] was informed by NYMA before the date for submission of the BAFO that NYMA was not interested in proposing [REDACTED] and would not include [REDACTED] in NYMA's offer. AVIATE also argues that because ADF stated in its cost proposal that it anticipated receiving 20 percent of the contract work and did not specifically commit to performing more than 20 percent of the contract work that NYMA misrepresented ADF's availability in its SDB participation plan.

An offeror's material misrepresentation could provide a basis for disqualification of the proposal and cancellation of the contract award based upon the proposal. Universal Technologies Inc.; Spacecraft, Inc., B-248808.2 et al., Sept. 28, 1992, 92-2 CPD ¶ 212 at 13. A misrepresentation is material where an agency has relied upon the misrepresentation and that misrepresentation likely had a significant impact upon the evaluation. ManTech Advanced Sys. Int'l, Inc., B-255719.2, May 11, 1994, 94-1 CPD ¶ 326 at 5. We find that NYMA did not make material misrepresentations concerning its SDB participation plans.

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[8]As noted above, NYMA's BAFO received [REDACTED] points under the Mission Suitability factor while AVIATE's BAFO received only [REDACTED] points, a difference of [REDACTED] points. Accepting AVIATE's arguments concerning a reduction in NYMA's technical score, NYMA's BAFO would at best would only be reduced by [REDACTED] points to a total score of [REDACTED] points. Moreover, the technical discriminators the SSO found important in selecting NYMA's higher cost proposal for award did not relate at all to the SDB participation plan.

Regarding [REDACTED], NYMA merely identified [REDACTED] as one of several SDB concerns from which NYMA had received "expressions of interest" and stated that NYMA "plan[ned] to add them to the list of candidate firms." NYMA made no representations concerning any commitment or formal arrangement with [REDACTED]; rather, NYMA merely informed NASA that [REDACTED] was one of a number of SDB concerns with which NYMA might seek to negotiate work. Even though AVIATE argues that NYMA had no intention of negotiating work with [REDACTED], the record does not establish that NYMA's identification of [REDACTED] on its list of candidate firms was relied upon by NASA in its evaluation of NYMA's SDB participation plan or had any impact on NASA's evaluation.

Regarding ADF's availability to perform work under the contract, ADF did not, as AVIATE supposes, limit the amount of work it would perform to 20 percent of the contract value. Consistent with NYMA's representations that it would initially subcontract 20 percent of the contract value to ADF and seek to subcontract the remaining 20 percent to other SDB concerns, ADF stated that it "anticipates" receiving 20 percent of the contract work. While ADF's cost proposal is silent about receiving additional contract work, there is nothing in ADF's proposal that contradicts NYMA representations that ADF may perform up to 40 percent of the contract value. In sum, the record does not show that NYMA misrepresented ADF's proposed participation.

As indicated above, AVIATE also asserts that NASA had no basis to evaluate NYMA's probable cost because that firm did not submit cost information for the to-be-determined subcontractors, which represented 20 percent of the contract value. The record shows that NYMA's proposed costs for the hours to be worked by the to-be-determined SDB subcontractors were based on the lower rates of AVIATE's own personnel. NASA, in performing the cost realism evaluation, projected NYMA's costs for these subcontractors to the higher rates paid by ADF because NYMA's proposal stated that ADF, whose costs were submitted, would perform this portion of the contract work if NYMA were unable to find other qualified SDB contractors within performance-based cost ceilings. Where, as here, an agency is evaluating proposals for the award of a cost reimbursement contract, the agency should determine the extent to which an offeror's proposed costs represent what the contract should cost, assuming reasonable economy and efficiency. Purvis Sys. Inc., 71 Comp. Gen. 203, 209 (1992), 92-1 CPD ¶ 132 at 7; CACI, Inc.-Fed., 64 Comp. Gen. 71, 75 (1984), 84-2 CPD ¶ 542 at 5-6. Since NYMA's proposal indicated that it would only employ SDB subcontractors within performance-based cost ceilings, we find that NASA reasonably projected NYMA's probable costs for this aspect of the contract work to the rates identified for ADF. Purvis Sys. Inc., supra at 7.

AVIATE also asserts that the agency's technical evaluation of NYMA's BAFO was rendered unreasonable by NYMA's failure to provide sufficient information in its BAFO, contrary to specific RFP instructions, to allow NASA to reasonably assess

NYMA's offer under the Past Performance/Relevant Experience factor and Total Compensation Plan subfactor.

We cannot, on this record, find unreasonable NASA's decision not to downgrade NYMA's proposal under the Past Performance/Relevant Experience factor and Total Compensation Plan subfactor. While it is true that the RFP requested offerors to provide total compensation plans and past performance/relevant experience information proposals for all significant subcontractors, NYMA complied with these instructions when it offered the requested information for ADF and its large business subcontractor. The "candidate firms" for which AVIATE complains that NYMA failed to provide information concerning relevant experience, past performance, or total compensation plans were only identified by NYMA as SDB concerns with which NYMA might subcontract; these firms were not represented to be subcontractors nor were they evaluated as such by the agency. We find no requirement that NYMA include such information in its proposal for potential subcontractors that NYMA had not yet specifically identified. Moreover, NASA identified no problems with NYMA's reserving 20 percent of contract value for qualified "to-be-determined" SDB or HBUC subcontractors, and had no problems with NYMA's "fallback position" of using ADF. As discussed above, there is no suggestion in the record that ADF, whose past performance, relevant experience, and total compensation plan were evaluated and found to be a strength of NYMA's proposal, could not or would not perform this portion of the work.

AVIATE also challenges the evaluation of its own proposal, arguing that NASA misevaluated its offered uncompensated overtime and its planned performance of administrative functions by both the joint venture owners.

The record shows that AVIATE first offered [REDACTED] in its response to the agency's discussions. Specifically, AVIATE proposed to provide [REDACTED]. NASA considered AVIATE's offer of [REDACTED], which was first offered in AVIATE's revised proposal, to be a major weakness [REDACTED] and, contrary to the specific RFP instructions, had not [REDACTED]. AVIATE admits that it [REDACTED].[9]

We find from our review of AVIATE's revised proposal that AVIATE did not provide a detailed discussion supporting the offer of [REDACTED], as was required by the RFP. Given this failure and that AVIATE had [REDACTED], we find that NASA was justifiably concerned by AVIATE's [REDACTED]. While AVIATE disagrees with NASA's judgment concerning the risks entailed in AVIATE's offered [REDACTED], this does not show NASA' s evaluation to be unreasonable. Brunswick Defense, supra at 9.

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[9]AVIATE also admits that [REDACTED].

AVIATE also objects to the evaluation of its proposal under the Management Operations subfactor, for which AVIATE was evaluated as "good." The record shows that AVIATE proposed to divide the administrative and management functions, [REDACTED]. NASA assessed AVIATE's planned management structure as a major weakness because AVIATE did not propose [REDACTED] or discuss how [REDACTED]. The evaluators concluded that "[REDACTED]."[10]

We find NASA's evaluation of this subfactor to be reasonable. [REDACTED]. AVIATE does not explain how this administrative structure, which AVIATE describes as "unique and cost-effective," would result in [REDACTED]. Nor does AVIATE address NASA's concerns that AVIATE's unique administrative structure would cause [REDACTED] and result in administrative inefficiencies. In short, AVIATE has not shown NASA's concerns in this regard to be invalid.

AVIATE also objects to the SSO's source selection decision, arguing that the SSO used improper discriminators in determining that NYMA's higher cost proposal was more advantageous to the government than AVIATE's proposal.

The SSO noted that in contrast to NYMA's proposal, which was rated "excellent" under the Mission Suitability factor with many strengths and no major weaknesses, AVIATE's proposal, which was rated "very good" under the Mission Suitability factor, contained several major weaknesses, most notably AVIATE's offer of uncompensated overtime and proposed division of administrative functions. The SSO "considered both of these management issues to be significant discriminators between the NYMA and AVIATE proposals." Since, as noted above, we find that NASA's evaluation of AVIATE's proposal in these regards was reasonable, we have no basis to question the SSO's conclusion that these major weaknesses were significant discriminators, particularly where, as here, the evaluated costs of the offerors were reasonably determined to be essentially equal.

AVIATE also complains that the SSO discounted AVIATE's "excellent" rating under the Relevant Experience/Past Performance factor in favor of NYMA's "very good" rating because NYMA had "experience with transitioning and managing a contract of comparable size and nature (i.e., performance-based)." AVIATE argues that "transitioning and managing a performance-based contract" is not a stated evaluation factor and that, in any event, AS&M and Vigyan also have experience performing performance-based contracts.

We disagree with AVIATE that experience in transitioning and managing performance-based contracts could not be considered under the RFP's stated

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[10]This weakness, which, as stated above, was first noted at the initial source selection prior to discussions and resulted in a reduction in AVIATE's score for this subfactor, was expressly raised with AVIATE during discussions.

Relevant Experience/Past Performance factor. Specifically, the RFP informed offerors that in evaluating proposals under this factor the agency would consider experience performing work that was comparable or related to the work or effort required by the RFP, and past performance of contracts of similar size, content, and complexity. Given that the support contract to be awarded as a result of this RFP is a performance-based contract, experience with and past performance of performance-based contracts is comparable to, and of similar content with, the work sought by the RFP. Accordingly, evaluation of performance and/or experience with performance-based contracts was provided for by the RFP.

We also disagree with AVIATE that the SSO gave improper consideration to NYMA's experience in transitioning and managing a performance-based contract of comparable size and nature, and ignored or improperly discounted AVIATE's "excellent" rating for the Relevant Experience and Past Performance factor. The SSO specifically accepted AVIATE's "excellent" proposal rating under this factor, which was based upon the two joint venturers' experience performing similar contract work, although NASA's evaluators' noted that AVIATE itself did not have experience managing a contract of the size of the contract to be awarded here. The SSO's comment concerning NYMA's specific experience with transitioning and managing a contract of comparable size and nature was made in the context of the SSO's weighing of the difference between AVIATE's "excellent" rating and NYMA's "very good" rating. We find the SSO was appropriately considering NYMA's past performance/relevant experience in assessing the possible risks of NYMA's performance of this contract. As the SSO's decision makes clear, AVIATE's and NYMA's respective evaluation ratings for the Relevant Experience/Past Performance factor formed only one part of the SSO's overall weighing of the benefits of the two offers, and AVIATE's higher rating for this factor did not offset the "significant discriminators" between the proposals under the Mission Suitability factor. In short, we find no basis to question the SSO's decision in this regard.

The protest is denied.

AVIATE also contends that, pursuant to 4 C.F.R. § 21.8(e) (1997), it is entitled to recover the costs of filing and pursuing its protest that NASA was required to forward AVIATE's challenge to the SDB status of NYMA's subcontractor ADF to the SBA.

Pursuant to 4 C.F.R. § 21.8(e), we may recommend that a protester be reimbursed its costs of pursuing a protest, including reasonable attorneys' fees, where, based on the circumstances of the case, we determine that the agency unduly delayed taking corrective action in the face of a clearly meritorious protest. Oklahoma Indian Corp.--Claim for Costs, 70 Comp. Gen. 558, 559 (1991), 91-1 CPD ¶ 558 at 2. Thus, as a prerequisite to costs where a protest has been settled by corrective action, not only must the protest have been meritorious, but it also must have been clearly

meritorious. J.F. Taylor, Inc.--Entitlement to Costs, B-266039.3, July 5, 1996, 96-2 CPD ¶ 5 at 3. A protest allegation is clearly meritorious where it is not a close question. GVC Cos.--Entitlement to Costs, B-254670.4, May 3, 1994, 94-1 CPD ¶ 292 at 3. That is, a protest is clearly meritorious where a reasonable agency inquiry into the protester's allegations establishes the absence of a defensible legal position. Baxter Healthcare Corp.--Entitlement to Costs, B-259811.3, Oct. 16, 1995, 95-2 CPD ¶ 174 at 5.

NASA asserts that AVIATE's protest was not clearly meritorious, arguing that while it agreed to forward AVIATE's SDB-status protest to the SBA for that agency's determination, there was no legal requirement, within the context of this procurement, compelling NASA to forward the protest to the SBA. Specifically, NASA argues that the SBA's regulations--specifically, 13 C.F.R. § 124.601 (1996)--identify the procurements for which the SBA will resolve SDB-status questions and this procurement is not within the identified programs. NASA also argues that the contracting officer was not persuaded by AVIATE's agency-level protest that ADF was not an SDB concern and therefore the contracting officer was not required to file his own SDB-status protest with the SBA. See 13 C.F.R. § 124.603(b).[11] NASA alternatively contends that, because it forwarded AVIATE's SDB-status protest to the SBA within 30 days of the date of AVIATE's protest of this issue to our Office, NASA did not act with undue delay in any case.

AVIATE and the SBA respond, citing Y.S.K. Constr. Co., Inc. v. United States, 30 Fed. Cl. 449 (1994), that the statutory and regulatory framework established to foster SDB participation in federal procurements evidences the Congressional intent that only the SBA determine the SDB status of a concern under any program that employs the SBA's definition of an SDB. Specifically, the SBA cites 15 U.S.C § 636(j)(11)(F)(vii) (1994), as providing it with broad authority to decide challenges to a concern's SDB status. That section provides the SBA with the responsibility to

> "decide protests regarding the status of a concern as a disadvantaged business concern for purposes of any program or activity conducted under the authority of subsection (d) of section 637 of this title, or any other provision of Federal law that references such subsection for a definition of program eligibility."

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[11] 13 C.F.R. § 124.603(b) provides

> "(b) In connection with an 8(d) subcontract, the procuring agency contracting officer or SBA may protest the disadvantaged status of a proposed subcontractor. Other small business subcontractors and the prime contractor may submit information to the contracting officer in an effort to persuade the contracting officer to initiate a protest."

Section 8(d) of the Small Business Act, 15 U.S.C. § 637(d)(1), states the general policy of the federal government to provide the maximum practicable opportunity to small business concerns, SDBs, and small business concerns owned and controlled by women to participate in federal procurements. The SBA notes that this RFP incorporated by reference the standard FAR § 52-219-8, "Utilization of Small, Small Disadvantaged and Women-Owned Small Business Concerns," clause that implements the section 637(d) requirements. The SBA also states, citing 13 C.F.R. §§ 124.605(c), 124.607(b), that the contracting officer has no discretion to dismiss or otherwise decline to forward any timely SDB-status protest to the SBA, but rather is required to "forward all protests received to the SBA for a decision on whether to pursue the determination of disadvantaged status."

We cannot say from this record that NASA unduly delayed taking corrective action in response to AVIATE's protest. The determination of the merits of AVIATE's protest involves the relationship between federal statutes and regulations. For example, the National Aeronautics and Space Act of 1958, as amended, 42 U.S.C. § 2473b (1994), requires NASA to annually establish a goal of at least 8 percent of the total value of prime contracts and subcontracts awarded in support of authorized programs be awarded to small business concerns or other organizations owned or controlled by socially and economically disadvantaged individuals, as defined by section 8(a) of the Small Business Act.[12] This grant of authority to the NASA administrator, however, does not reference subsection (d) of section 637, from which the SBA states it derives authority to resolve SDB-status challenges. Given the complex legal analysis necessary to resolve this protest allegation, we cannot say that NASA unduly delayed taking corrective action. Although we recognize that NASA's corrective action was taken after AVIATE had filed its comments on NASA's report, and had thus incurred further costs in support of its protest allegation, NASA's corrective action was taken within 30 days of AVIATE's protest of this issue to our Office and within 3 days of receipt of the SBA's report detailing its legal authority for asserting jurisdiction over this matter. Under the circumstances, we find that NASA did not unduly delay in taking corrective action.

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[12]The RFP also incorporated by reference NASA's Small Disadvantaged Business Goal clause, as set forth in the NASA FAR Supplement, 48 C.F.R. § 1852.219-76 (1996), which implements 42 U.S.C. § 2473b.

Compare Control Corp.; Control Data Sys., Inc.--Protest and Entitlement to Costs, B-251224 et al., May 3, 1993, 93-1 CPD ¶ 353 at 6-7 (corrective action after filing of comments on the agency's expedited report was unduly delayed where resolution of protest allegation only required review of the solicitation's statement of work).

The protest and request for recovery of protest costs are denied.

Comptroller General
of the United States