

99-5064

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

ADVANCED DATA CONCEPTS, INCORPORATED,

Plaintiff-Appellant,

v.

THE UNITED STATES,

Defendant-Appellee.

APPEAL FROM THE UNITED STATES COURT OF FEDERAL CLAIMS
IN 98-CV-495, JUDGE DIANE G. WEINSTEIN.

BRIEF OF PLAINTIFF-APPELLANT
ADVANCED DATA CONCEPTS, INCORPORATED

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May 25th, 1999

NONCONFIDENTIAL

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT
ADVANCED DATA CONCEPTS, INCORPORATED v. UNITED STATES

NO. 99-5064

Counsel for the (~~petitioner~~) (~~intervenor~~) (appellant) (~~appellee~~) (amicus), (name of party) Advanced Data Concepts, Incorporated), certifies the following (use "None" if applicable; use extra sheets if necessary):

1. The full name of every party or amicus represented by me is:

Advanced Data Concepts, Incorporated

2. The name of the real party in interest (if the party named in the caption is not the real party in interest) represented by me is:

Advanced Data Concepts, Incorporated

3. The parent companies, subsidiaries (except wholly owned subsidiaries), and affiliates that have issued shares to the public, of the party or amicus curiae represented by me are:

None

4. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court are:

Kilcullen, Wilson & Kilcullen; Cyrus E. Phillips, IV; Christopher H. Jensen

May 25th, 1999

Date

/s/

Cyrus E. Phillips, IV

Printed name

Counsel for Appellant, etc.

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This nonconfidential principal Brief of Plaintiff-Appellant Advanced Data Concepts, Incorporated, deletes confidential material designated as such in the course of the proceedings before the United States Court of Federal Claims. Each page herein from which confidential material has been deleted redacts confidential material designated by asterisks within brackets ([**]).

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STATEMENT OF RELATED CASES

This is an appeal from a final judgment of the United States Court of Federal Claims in a post-award protest denying a challenge by Advanced Data Concepts, Incorporated (Advanced Data) to an award by the United States Department of Energy, Institutional Services Division, Office of Headquarters Procurement Services (DoE), of a successor fixed-rate labor-hour completion type contract to DynCorp EENSP, Incorporated, doing business as DynMeridian, Alexandria, Virginia (DynMeridian). The Court of Federal Claims entered its final judgment denying Advanced Data's motion for summary judgment, and granting DoE's cross-motion for summary judgment, on March 18th, 1999. The final judgment is supported by the opinion and order of the Court of Federal Claims (Judge Diane G. Weinstein) in *Advanced Data Concepts, Inc. v. United States*, No. 98-495C (Fed. Cl. Mar. 18, 1999).¹

Advanced Data's counsel is not aware of any other appeal in or from the same civil action or proceeding in the Court of Federal Claims that has previously been before this or any other appellate court. Advanced Data's counsel is similarly un-

¹ Copies of the final judgment and the opinion and order supporting it are attached as Addendum A. FED. CIR. R. 28(a)(12).

aware of any case pending in this or any other court that will directly affect or be directly affected by this Court's decision in the pending appeal.

JURISDICTIONAL STATEMENT

DoE awarded the successor fixed-rate labor-hour completion type contract to DynMeridian on January 30th, 1998. The contract requires delivery to DoE's Office of Declassification at Germantown, Maryland, of specialized, technical, analytical, and administrative support services. DynMeridian is the incumbent. After DoE provided Advanced Data a post-award debriefing on February 5th, 1998, Advanced Data filed a protest with the United States General Accounting Office (GAO) on February 6th, 1998.² Performance of the successor contract was suspended. 31 U.S.C. § 3553(d)(4)(B); 41 U.S.C. § 253b(e)(1); 4 C.F.R. § 21.2(a)(2). GAO denied Advanced Data's protest on June 1st, 1998. *Advanced Data Concepts, Inc.*, B-277801.4, June 1, 1998, 98-1 CPD ¶ 145.

On June 11th, 1998, Advanced Data filed its complaint with the Court of Federal Claims, together with an application for a preliminary injunction. 28 U.S.C. § 1491(b)(1). At a June 17th, 1998, hearing on the application for a preliminary injunction, the parties agreed that DynMeridian would commence performance of the

² Advanced Data had filed an earlier GAO protest when DoE awarded the contract to DynMeridian on July 31st, 1997, without conducting discussions. DoE rescinded the award and reopened the competition, and on September 16th, 1997, GAO dismissed Advanced Data's protest as moot because DoE had taken corrective action.

successor contract, and, should Advanced Data's post-award protest be sustained, DoE would then recompete its requirements for a full term of five program years.³

The case before the Court of Federal Claims proceeded on cross-motions for summary judgment on the administrative record. On March 18th, 1999, the Court of Federal Claims entered its final judgment denying Advanced Data's motion for summary judgment, and granting DoE's cross-motion for summary judgment. The final judgment of March 18th, 1999, disposes of all parties' claims.

This Court has exclusive jurisdiction, under 28 U.S.C. § 1295(a)(3), of appeals from final decisions of the Court of Federal Claims. On March 24th, 1999, Advanced Data noticed its appeal as of right from the final judgment of March 18th, 1999. The notice of appeal was timely filed, 28 U.S.C. § 2522, within sixty calendar days after entry of the Court of Federal Claims' final judgment and supporting opinion and order, 28 U.S.C. §§ 2107(b).

³ Statute and regulation limit a support services contract to a term of five program years. 41 U.S.C. § 254c(d), 41 U.S.C. § 353(d), Federal Acquisition Regulation 17.204(e).

STATEMENT OF THE ISSUES

¶ In post-award protests before the Court of Federal Claims under 28 U.S.C. § 1491(b)(1), the court must apply, 28 U.S.C. § 1491(b)(4), the standard of review for agency action established by the Administrative Procedure Act, 5 U.S.C. § 706(2). Did the Court of Federal Claims apply the Administrative Procedure Act standard of review for agency action when it considered the Source Selection Official's supplemental source selection statement of March 18th, 1998, submitted to GAO with DoE's agency report, 31 U.S.C. § 3553(b)(2), and then decided that DoE's failure to rate proposals in accordance with the weighting announced in the solicitation, a violation of a clearly applicable procurement statute, 41 U.S.C. § 253a(b)(1)(B), was *de minimis* and not prejudicial?

¶ The Rating Plan for the solicitation established a specific evaluation group structure to score competitive proposals. The DoE Technical Evaluation Team unlawfully double-counted classification experience under both the Availability of Personnel and Key Personnel Qualifications Subcriteria, again, a violation of 41 U.S.C. § 253a(b)(1)(B). Was it proper for the Court of Federal Claims to undertake a *de novo* inquiry into the scoring and then conclude that Advanced Data failed to show prejudicial error by reason of this statutory violation?

¶ Did the Court of Federal Claims properly hold DoE’s evaluation of DynMeridian’s offer of mandatory uncompensated overtime as rational and reasonable when the DoE Technical Evaluation Team did not, as required by the rating plan, evaluate DynMeridian’s offer of mandatory uncompensated overtime?

¶ Was it proper when the Court of Federal Claims concluded that the Source Selection Official’s supplemental source selection statement of March 18th, 1998, submitted to GAO with DoE’s agency report, 31 U.S.C. § 3553(b)(2), was an element “of the agency’s original action,” rather than an impermissible *post hoc* rationalization?

¶ Was it clear error when the Court of Federal Claims concluded that DoE did not violate 41 U.S.C. § 405(j)(1) and Federal Acquisition Regulation 42.1503(c) since the interim past performance reports under the existing DoE contracts identified by Advanced Data (past performance reports that had been prepared by DoE personnel at DoE offices in [*****]) did not “comply with DoE’s guidelines”?

¶ Did the Court of Federal Claims apply the Administrative Procedure Act standard of review for agency action when, upon a *de novo* review, it concluded that Advanced Data’s interim past performance reports “evidenced less than favorable performance,” and then decided that Advanced Data was not prejudiced by DoE’s failure to comply with Federal Acquisition Regulation 42.1503(c)?

¶ Did the Court of Federal Claims correctly limit DoE's duty to conduct discussions under 41 U.S.C. § 253b(d)(1)(A)⁴ only to perceived deficiencies in Advanced Data's competitive proposal?

¶ Was it clear error for the Court of Federal Claims to conclude that Advanced Data did not, in its revised competitive proposal, delete any reference to Critical Nuclear Weapon Design Information (CNWDI) as an objective of the Office of Declassification, when the opinion and order of the Court of Federal Claims quotes from Advanced Data's response to a specific question on this topic posed by DoE's Technical Evaluation Team, and does not regard the clear deletion of this erroneous reference later in Advanced Data's revised competitive proposal?

STATEMENT OF THE CASE

On January 30th, 1998, DoE, awarded a successor fixed-rate labor-hour completion type contract to DynMeridian. The contract requires delivery at Germantown, Maryland, of specialized technical, analytical, and administrative support services to DoE's Office of Declassification. A0306. Over a five-year term, the

⁴ This citation is to the statutory text as enacted in the Competition in Contracting Act of 1984, Pub. L. No. 98-369, 98 Stat. 1179 (1984). The statute has been amended by the Clinger-Cohen Act of 1996, Pub. L. No. 104-201, 110 Stat. 2609, 2660. As set out in 41 U.S.C. § 251 note and implementing regulations published at 62 Fed. Reg. 51224 (1997), the amendments are effective for solicitations issued on or after January 1st, 1998. This solicitation was issued on April 1st, 1997.

evaluated price of the successor contract is \$15,881,789. A0307. DynMeridian is the incumbent: its prior contract, Contract Number DE-AC01-94SA10056, was awarded in early 1994, with an expiration date of January 1999. This contract was recompeted early because available dollars and hours were almost exhausted as soon as February 1997. A0234.

The contract is the contract proposed by Solicitation Number DE-RP01-97NN-50008. For each of ten labor categories, the contractor must provide support services at fixed labor rates over a base period of two years, with three successive one-year options. A0041. Of the ten labor categories to be delivered, four categories (one person each) are designated as key personnel: Project Manager, Senior Policy Analyst, Senior Technical Analyst, and Senior Training Specialist. A0159. Specific persons were to be proposed for each of these categories, and the resumes of each proposed key person was to be evaluated. A0128.

The solicitation sought competitive proposals. By its terms, the solicitation provided for evaluation of Personnel Qualifications and Availability, of Technical Approach, of Past Performance, and of Organization and Management Capabilities. A0148-51. These four announced evaluation Criteria were point scored. Personnel Qualifications and Availability was weighted at 33.3 percent, Technical Approach was weighted at 31.7 percent, Past Performance was weighted at 25 percent, and Organization and Management Capabilities was weighted at 10 percent.

A0306. The solicitation told prospective offerors that DoE would conduct discussions, and make an award upon an evaluation of best and final offers. A0121.

DoE established a specific evaluation group structure to rate proposals and select the source for contract award. A Technical Evaluation Team of five persons from DoE's Office of Declassification evaluated the technical proposals and rated them under each of the four announced Evaluation Criteria. The Director of the Institutional Services Division at DoE's Office of Headquarters Procurement Services was the designated Source Selection Official. A0198-99.

The solicitation announced a best value selection decision:

The Government will award a contract resulting from this solicitation to the responsible offeror whose offer conforming to the solicitation will be most advantageous to the Government, cost or price and other factors, specified elsewhere in this solicitation, considered.

. . . .

Award will be made to that responsible offeror(s), whose offer(s), conforming to the RFP, is (are) considered most advantageous to the Government, considering the Evaluation Criteria in this Section M.

. . . .

The overall technical proposal is of greater importance than the cost proposal. However, if, after evaluation of the technical, business management and cost proposals, two or more competing overall proposals are within the competitive range, evaluated probable cost to the Government may be a deciding factor for selection, depending on whether the most acceptable overall proposal (excluding cost consideration) is determined to be worth the cost differential, if any. . . .

Solicitation No. DE-RP01-97NN50008, ¶ L.14(a), A0121; ¶ M.1(b), A0148; ¶ M.2, A0148. It was the Source Selection Official who traded-off evaluated probable cost against technical merit as rated by DoE’s Technical Evaluation Team.

Advanced Data is an Oregon corporation that has 14 years’ experience in providing support services to DoE activities. A1594. Advanced Data was founded in 1978, and its technical expertise has expanded to include safeguards and security, engineering support services, weapons program management services, project management services, administrative support services including file room and document management, and a wide variety of support services for information management systems. A1664.

Solicitation Number DE-RP01-97NN50008 was issued on April Fool’s day, April 1st, 1997. A0306. Advanced Data submitted its initial competitive proposal on April 30th, 1997. A1594.

These are the results of the evaluation of initial proposals, as recorded in the Source Selection Official’s “Source Selection Statement” of July 24th, 1997:

<u>Company</u>	<u>Evaluated/Verified Ceiling Price</u>	<u>Combined Technical/Business Mgmt Score</u>
DynMeridian	\$17,183,793	890
SAIC	\$12,755,211	589.8
ADC	\$9,495,000	431.6
RAI	\$8,313,335	220

The contract proposed by the solicitation was awarded to DynMeridian on an evaluation of initial competitive proposals, without discussions, contrary to the solicitation's announcement, at Subsection L.14(c), A0121, that DoE would conduct discussions, evaluate revised proposals, and make an award on best and final offers.

41 U.S.C. § 253a(b)(2)(B)(i) provides that an award on initial proposals without discussions is permissible only where the solicitation includes "a statement that proposals are intended to be evaluated, and award made, without discussions, unless discussions are determined to be necessary." *Delbert Wheeler Construction, Inc. v. United States*, 39 Fed. Cl. 239, 250 (1997), *aff'd*, 155 F.3d 566 (Fed. Cir. 1998). On August 15th, 1997, Advanced Data timely filed, 4 C.F.R. § 21.2(a)(2), a post-award protest with GAO complaining about this obvious statutory violation. On September 9th, 1997, less than one week before the date set for receipt of the agency report, DoE announced that it was taking corrective action by reopening the competition, by determining a competitive range, opening discussions on written questions, and, upon conclusion of those discussions, receiving and evaluating revised proposals and best and final offers. A2440.

DoE took twenty-five days to decide to take corrective action, when the need for corrective action would have been apparent to anyone on reading the solicitation document, a task that could not have consumed more than thirty minutes.

A2442-43. On September 16th, 1997, GAO dismissed the protest. GAO denied Advanced Data any recovery of the protest costs and attorney fees that Advanced Data had incurred in filing and pursuing its protest. A2450-51.

On September 18th, 1997, the DoE contracting officer issued a competitive range determination. A0256. He included Advanced Data's initial proposal within the competitive range. On October 29th, 1997, DoE issued technical and cost discussion questions that were sent to Advanced Data in a letter together with an amendment to the solicitation. A0265-70

On November 7th, 1997, DoE offered Advanced Data "the opportunity to address, revise and modify your technical and price proposals in accordance with the questions and concerns that DOE has with your proposal as stated in our letter to you on October 29, 1997." A0274. Advanced Data timely submitted a revised proposal and its best and final offer on November 17th, 1997. A1878. Advanced Data responded to all of the questions and concerns that DoE had provided in its letter of October 29th, 1997, A1879-88, and it proposed new key personnel, A1895-97. Advanced Data's offered price increased to \$12,645,332. A1972.

Under the Rating Plan, the Technical Evaluation Team was directed "to perform an analysis and rescoring of each offeror," and to indicate "any deficiencies and weaknesses." The Technical Evaluation Team was to review the price propos-

als to note any inconsistencies between the promises of the technical proposals and offered prices. A0287.

These are the results of the evaluation of the revised proposals and best and final offers, as announced by the Source Selection Official:

<u>Company</u>	<u>Evaluated/Verified Ceiling Price</u>	<u>Combined Technical/ Business Mgmt Score</u>
DynMeridian	\$15,881,789	970
ADC	\$12,645,332	644.9
SAIC	[*****]	[****]

A0301. On January 30th, 1998, the Source Selection Official issued a written statement of his reasons for selecting DynMeridian. A0302. The Source Selection Official traded-off DynMeridian's superior technical score against Advanced Data's lower evaluated price. A0307-08.

Advanced Data requested a debriefing, and a debriefing was provided on February 5th, 1998. On February 6th, 1998, Advanced Data filed a second protest with GAO. A2091-2102. Performance of the successor contract was suspended. On March 18th, 1998, DoE submitted its report, 31 U.S.C. § 3553(b)(2), on Advanced Data's second post-award protest. A2161. Submitted with the report was a supplemental statement from the Source Selection Official. A2085-86. GAO denied Advanced Data's second protest on its merits in a decision dated June 1st, 1998. A2410-23; *Advanced Data Concepts, Inc.*, 98-1 CPD ¶ 145.

On June 11th, 1998, Advanced Data filed its complaint with the Court of Federal Claims. On June 17th, 1998, at a hearing on Advanced Data's application for a preliminary injunction, the parties agreed that DynMeridian would commence performance of the successor contract, and, should the Court of Federal Claims sustain Advanced Data's post-award protest, DoE would then re-compete its requirements for a full term of five program years.

The case before the Court of Federal Claims proceeded on cross-motions for summary judgment on the administrative record developed in the GAO proceedings. On March 18th, 1999, the Court of Federal Claims entered its final judgment denying Advanced Data's motion for summary judgment, and granting DoE's cross-motion for summary judgment.

In its opinion and order supporting the final judgment of March 18th, 1999, the Court of Federal Claims credited the Source Selection Official's supplemental source selection statement of March 18th, 1998, A2085-86, submitted to GAO with DoE's agency report, and then decided that DoE's failure to rate proposals in accordance with the weighting announced in the solicitation, a violation of a clearly applicable procurement statute, 41 U.S.C. § 253a(b)(1)(B), was *de minimis* and not prejudicial. A0014-16.

The DoE Technical Evaluation Team unlawfully double-counted classification experience under both the Availability of Personnel and Key Personnel Qualifica-

tions Subcriteria, again, a violation of 41 U.S.C. § 253a(b)(1)(B), and a violation conceded by DoE. A0016. Here the Court of Federal Claims rescored Advanced Data's competitive proposal, and then concluded from its rescoring that Advanced Data had failed to show prejudicial error. A0017.

The Court of Federal Claims properly regarded the requirement, in applicable procurement statute, 41 U.S.C. § 405(j), and regulation, Federal Acquisition Regulation 42.1503(c), that agencies must share interim past performance reports. A0023-24. But it was DoE's Technical Evaluation Team that rated past performance, and yet the Court of Federal Claims conducted a *de novo* review of Advanced Data's interim past performance reports, and then decided that Advanced Data was not prejudiced by DoE's failure to comply with 41 U.S.C. § 405(j) and Federal Acquisition Regulation 42.1503(c). A0025.

On March 24th, 1999, Advanced Data timely noticed its appeal as of right from the Court of Federal Claims' final judgment of March 18th, 1999.

STATEMENT OF THE FACTS

Under the Personnel Qualifications and Availability Criterion, there were two Subcriteria: "Availability of Personnel" and "Key Personnel Qualifications." A0148-49. The solicitation announced that Availability of Personnel (Subcriterion A) is "weighted approximately twice the weight of subcriterion B" (Key Per-

sonnel Qualifications). Solicitation No. DE-RP01-97NN50008, ¶ M.3, A0150.

The solicitation defined these two Subcriteria, Availability of Personnel and Key Personnel Qualifications, as follows:

Subcriterion A: Availability of Personnel

The availability of key personnel and administrative/clerical personnel will be evaluated in terms of offeror's current employees and those committed to the project, and the availability of subcontractors and consultants. Availability of qualified key and administrative clerical personnel to cover peak work loads, overlapping or simultaneous assignments, and sick or vacation leave, will also be evaluated.

Subcriterion B: Key Personnel Qualifications

Key management and technical personnel proposed by the offeror will be evaluated on their educational background, directly related work (classification) experience, professional development, and performance record. Of these, years of classification experience will be weighted most heavily. In particular, key staff will be evaluated on recent experience in planning and executing support services to Headquarters type organizations; demonstrated understanding of technical issues relative to classified and unclassified sensitive information control; and competence in technical program support. Administrative clerical support will not be evaluated in this sub criterion.

Solicitation No. DE-RP01-97NN50008, ¶ M.3, A0148-49.

The solicitation provided for an evaluation of past performance. For similar services in size and scope, the solicitation required offerors to list current active contracts and subcontracts, and contracts and subcontracts completed within the past three years. A0129-30. The solicitation set out a sample questionnaire to be used to collect *ad hoc* past performance evaluations. A0162-63.

DoE established a specific evaluation group structure to evaluate proposals and select the source for contract award. In a “Rating Plan for Evaluation of Technical Proposals Received Under Request for Proposal Number 97-NN-50008.000” dated February 4th, 1997, A0198, DoE established a Technical Evaluation Team of five persons from DoE’s Office of Declassification, A0306, to evaluate and rate the technical proposals submitted in response to the solicitation. The Rating Plan specified the following Criteria, Subcriteria, and weights:

Criterion I: Personnel Qualifications and Availability	Weight (in points)
Sub-criterion A: Availability of Personnel	133
Sub-criterion B: Key Personnel Qualifications	<u>200</u>
Sub-total	333
Criterion II: Technical Approach	
Sub-criterion A: Technical Approach	200
Sub-criterion B: Understanding of Statement of Work	<u>117</u>
Sub-total	317
Criterion III: Past Performance	
Sub-criterion A: Quality	50
Sub-criterion B: Cost Control	50
Sub-criterion C: Timeliness of Performance	50
Sub-criterion D: Business Relations	50
Sub-criterion E: Customer Satisfaction	<u>50</u>
Sub-total	250
Criterion IV: Organization and Management Capabilities	
Sub-criterion A: Management Planning and Control	50

Sub-criterion B: Organization Structure	25
Sub-criterion C: Corporate Resources	<u>25</u>
Sub-total	100
 Total Points	 1,000

A0199.

The Rating Plan established the following procedures for evaluating the technical proposals:

The total points scored by each evaluator shall be discussed with the other panel members and a consensus arrived at for the TEC's overall score for that proposal. The final report of the TEC shall provide a criterion by criterion evaluation and a narrative listing of the strengths and weaknesses by criterion for each offeror. Each evaluator's individual scoresheets and lists of strengths and weaknesses shall be submitted as an attachment to the TEC final report.

. . . .

The TEC shall only evaluate an offeror's proposal by comparing specified parts of the submitted data against the Evaluation Criteria referenced in Section M of the RFP.

Each numerical consensus point value must be accompanied by a narrative listing of the strengths and weaknesses by criterion and subcriterion for each proposal.

A0200, A0205. The Rating Plan is the source selection plan required by Federal Acquisition Regulation 15.612(c).⁵ Source selection plans are source selection infor-

⁵ Part 15 of the Federal Acquisition Regulation was extensively revised on September 30th, 1997. As set out in implementing regulations published at 62 Fed. Reg. 51224 (1997), the revisions are effective for solicitations issued on or after January

mation, Federal Acquisition Regulation 3.104-3, that cannot be disclosed to offerors during the source selection process, Federal Acquisition Regulation 3.104-5(a).

The Federal Acquisition Streamlining Act of 1994 requires that agencies rate past performance under a system established for collection and maintenance of past performance information, 41 U.S.C. § 405(j)(1)(B); requires that offerors be afforded an opportunity to submit *ad hoc* past performance information and that *ad hoc* past performance information is considered, 41 U.S.C. § 405(j)(1)(C); and requires that offerors lacking past performance information receive a neutral evaluation, 41 U.S.C. § 405(j)(2). Federal Acquisition Regulation 15.608(a)(2)(ii) sets out procedures for the evaluation of *ad hoc* past performance information, and Federal Acquisition Regulation 15.608(a)(2)(iii) requires that “[f]irms lacking relevant past performance information shall receive a neutral evaluation for past performance.”

Since July 1st, 1995, agencies have been required to prepare systematic past performance reports—either on an interim basis (permissive) or upon contract completion (mandatory)—for all contracts valued in excess of \$1,000,000. Federal Acqui-

1st, 1998. This solicitation was issued on April 1st, 1997. The regulatory text cited herein is the earlier version that appears in 48 C.F.R., ch. 1 (1997).

sition Regulation 42.1502(a).⁶ Federal Acquisition Regulation 42.1503(b) sets out procedures for using past performance information that has been systematically collected “to support future award decisions.” Agencies are required to share this past performance information to support future award decisions. Federal Acquisition Regulation 42.1503(c).

In its initial competitive proposal, Advanced Data identified two active DoE prime contracts in excess of \$1,000,000: [*****_

*****] A1622.

⁶ As originally published, Federal Acquisition Regulation 42.1502(a) set out an implementation schedule requiring past performance reports for completed contracts in excess of \$1,000,000 beginning July 1, 1995, for completed contracts in excess of \$500,000 beginning July 1, 1996, and for completed contracts in excess of \$100,000 beginning January 1, 1998. 60 Fed. Reg. 16720 (1995). On December 18th, 1996, the Administrator of the Office of Federal Procurement Policy issued a temporary suspension of the past performance implementation thresholds for contracts less than \$1,000,000. The requirement to prepare past performance reports for contracts at or above \$1,000,000 remained in full force and effect. This memorandum is published at http://www.arnet.gov/References/Policy_Letters/pperfsus.html.

DoE's [*****] There were three such interim past performance reports available in 1997: one for the period January 1996 to June 1996, another for the period July 1996 to January 1997, and a third for the period February 1997 to July 1997. All of these interim past performance reports announce overall excellent ratings. A2297-358.

Under [*****] *****] In each category, Advanced Data's performance was rated as "Excellent." In a narrative section of the interim past performance report, the DoE contracting officer wrote: "[t]his contractor has been outstanding in all aspects of the contract." A2382-83.

DoE's Technical Evaluation Team rated *ad hoc* past performance evaluations for DynMeridian's initial competitive proposal. Just as had Advanced Data, DynMeridian identified as a point of contact (by name and telephone number) the contracting officers and program managers for prime contracts. DynMeridian identified

[***] DoE prime contracts, [***] prime contracts with the [*****-*****], and a prime contract with the [*****]. A0372-78. DoE's Technical Evaluation Team rated one *ad hoc* past performance evaluation for DynMeridian's performance on Contract Number DE-AC01-94SA10-056, the contract under which DynMeridian was furnishing support services to DoE's Office of Declassification, A2066-73, and one *ad hoc* past performance evaluation each under two other DoE contracts. A2074-77, A2081-84. DoE's Technical Evaluation Team rated an *ad hoc* past performance evaluation under one of the prime contracts with the [*****] that DynMeridian had identified in its initial competitive proposal. A2078-80. On the Past Performance Criterion, DoE's Technical Evaluation Team gave DynMeridian's initial competitive proposal a technical point score of [*] points out of the [*] points available. A0233.

DoE's Technical Evaluation Team did not rate *ad hoc* past performance evaluations for Advanced Data's initial competitive proposal because no *ad hoc* past performance evaluations were provided to the Technical Evaluation Team. A2183. Neither did DoE's Technical Evaluation Team rate interim past performance reports for Advanced Data's initial competitive proposal, although interim past performance reports under Advanced Data's prime contracts at DoE's [*****-****] and at DoE's [*****] had been completed by DoE person-

nel, and the three interim past performance reports from DoE's [*****-*****] were available for review. [An electronic copy of the interim past performance report that had been completed at DoE's [*****] was not available: the electronic copy was maintained on a computer that was stolen from the premises. A2267.]

DoE's Technical Evaluation Team constructed a *hypothetical* assessment of Advanced Data's past performance. A 2183. They reviewed the past performance information that Advanced Data had submitted with its initial competitive proposal. They reported no weaknesses for each of the five Subcriteria under the Past Performance Criterion, and they reported strengths for each of the five Subcriteria under the Past Performance Criterion. A0223. For each Subcriterion under the Past Performance Criterion, DoE's Technical Evaluation Team scored Advanced Data's Past Performance as [*****]. The comparable rating given by DoE's Technical Evaluation Team to DynMeridian's initial competitive proposal on the two Subcriteria under the Past Performance Criterion where no weaknesses were observed was [*****]. On the Past Performance Criterion, DoE's Technical Evaluation Team gave Advanced Data's initial competitive proposal a technical point score of [**] points out of the [**] points available. A0233.

Under the Rating Plan, Availability of Personnel was given a weight of 133 points as a maximum available score, and Key Personnel Qualifications was given a weight of 200 points as a maximum available score. A0199. Contrariwise, the solicitation announced that Availability of Personnel is “weighted approximately twice the weight of” Key Personnel Qualifications. A0150. DoE’s Technical Evaluation Team followed the Rating Plan, not the solicitation, in scoring the initial proposals. A0233.

At a debriefing on August 12th, 1997, after the award on initial proposals, Advanced Data was told that it had confused security with classification issues, that its reference to “Ensure limited access to CNWDI” on one of the overheads in its oral presentation of June 17th, 1997, was misguided. A0203, 0246, 0251, 1769.

The technical and cost discussion questions presented to Advanced Data on October 29th, 1997, were supported with a chart prepared by DoE’s Technical Evaluation Team. In columnar format, this chart presented the weakness observed by DoE’s Technical Evaluation Team, and then adjacent to the observed weakness, it set out the discussion question to be presented to Advanced Data. Only the discussion questions were presented to Advanced Data; Advanced Data was not told of the observed weaknesses. A0267-69. Portions of the chart of the discussion questions follow:

Weakness	RELATED QUESTION
ADC 9. Proposed senior technical analyst experience is limited to Materials Control and Accountability and computers. No demonstrated experience in weapons design, development or testing. (1B)	Does your proposed senior technical analyst have the required education. (1B)
ADC 14. Appeared to be orientated [sic] to a large project management approach as opposed to integrated day to day support (2A)	Discuss how your team would provide daily support and respond time to short term deadlines (less than 2 hours). (2A)
ADC 22. Continual confusion of classification with security: “ensure limited access to CNWDI” as a stated and emphasized objective, which is not a classification matter. (2B)	Describe why limited access to CNWDI is an objective of the Office of Declassification. (2B)

A0257-64.

Advanced Data received no discussion questions on its Past Performance rating. Advanced Data was not told that DoE’s Technical Evaluation Team had not rated *ad hoc* past performance evaluations for Advanced Data’s initial competitive proposal. Neither was Advanced Data told that DoE’s Technical Evaluation Team had not rated interim past performance reports, although interim past performance reports had been completed by DoE personnel under Advanced Data’s prime contracts at DoE’s [*****] and at DoE’s [*****], and three interim past performance reports from DoE’s [*****] were available for review. Advanced Data was not told that DoE’s Technical Evalua-

tion Team had constructed a *hypothetical* assessment of Advanced Data's past performance. A0267-69.

In its initial competitive price proposal of May 2nd, 1997, DynMeridian had offered to deliver the full-time services of [*****_*****] per position per year, A0687-92; in its revised technical and price proposals of November 17th, 1997, DynMeridian offered to deliver direct productive labor hours for positions exempt from the Service Contract Act, 41 U.S.C. § 351, at the rate of [*****_*****] per position per year, A0946, 1272, 1386. DynMeridian was now offering fewer people, these working longer hours, to satisfy solicitation requirements. A0946. DynMeridian reduced the "bid rate availability" of [*****] non-key persons to reflect the increase in direct productive labor hours that resulted from its offer of mandatory uncompensated overtime. A0946, 1272.

The DoE Headquarters contracting officer transmitted the revised proposals and best and final offers to DoE's Office of Declassification on November 17th, 1997. The DoE Headquarters contracting officer established the following Rating Plan procedures for evaluation of the revised proposals and best and final offers by the DoE Technical Evaluation Team:

As discussed it is requested that the Chairperson of the Technical Evaluation Committee (TEC) reconvene the panel to perform an analysis and rescoring of each offeror. The rescoring of each offeror should be similar to

the scoring format performed under the initial evaluation. The analysis should indicate any deficiencies and weaknesses that after analysis, will remain. In addition, any other areas which has [sic] changed to the detriment, should be noted as well.

After the entire technical evaluation had been completed, the Price proposals should be disclosed to the TEC so that any inconsistencies could be noted. Inconsistencies may consist of problems with compensating professional employees and difficulties with recruiting these employees to perform assigned task as proposed by each offeror.

A0287.

In its narrative evaluation of DynMeridian's revised proposal and best and final offer, DoE's Technical Evaluation Team reported:

The revised DynMeridian proposal was improved in both the areas of availability and the quality of personnel proposed for the contract. This improvement resulted in their rating in these areas changing from Good for their initial proposal to Outstanding for their revised proposal. . . .

A0278. In fact, availability of personnel was not improved in DynMeridian's revised proposal and best and final offer, and [****] non-key personnel are not immediately available, as noted by DynMeridian in its revised technical and price proposals, where it reduced the "bid rate availability" of [*****] non-key persons. A1272, 1386.

In its revised proposal and best and final offer, Advanced Data proposed a new key person, [*****], as the Senior Technical Analyst. A1858. The solicitation required that the Senior Technical Analyst have experience in two or more of the following four areas: (1) nuclear weapons design, development,

testing, and production; (2) production reactor operations; (3) nuclear weapons safeguards and security; or (4) special nuclear materials production/processing. A1881-82. [*****] has experience in three of the four areas: production reactor operations, nuclear weapons safeguards and security, and special nuclear materials production/processing. A1871-73. [*****] does not have experience in nuclear weapons design, development, testing, and production. A1881-82. Advanced Data was never told of the weakness observed by DoE's Technical Evaluation Team, *viz.*, that the Senior Technical Analyst earlier proposed had "no demonstrated experience in weapons design, development or testing." A0258.

Advanced Data provided a response, in its revised proposal, to the written discussion question asking for a narrative describing the relationship of CNWDI to the objectives of DoE's Office of Declassification. A1885. Advanced Data understood from the debriefing of August 12th, 1997, that its reference to "Ensure limited access to CNWDI" on one of the overheads in its oral presentation had been understood by DoE's Technical Evaluation Team as an objective of the Office of Declassification, which was not what Advanced Data had intended. A2236-37. Advanced Data addressed this issue in its revised proposal and best and final offer by submitting a new overhead that eliminated the reference. A1927.

When DoE's Technical Evaluation Team evaluated Advanced Data's revised technical proposal and best and final offer, it assessed the following weakness:

Still demonstrates significant confusion concerning the use and purpose of the CNWDI marking and who is responsible for this marking (Q#21 and #24). This is a DOD concept. Even if it were a DOE concept, it would not fall under the Office of Declassification.

A0281. The only reference to CNWDI in Advanced Data's revised technical proposal and best and final offer was Advanced Data's response to the discussion question presented by DoE's Technical Evaluation Team.

Advanced Data responded, in its revised proposal and best and final offer, to the discussion question it had received asking how it would provide daily support and respond to short term deadlines. A1883. When DoE's Technical Evaluation Team evaluated Advanced Data's revised technical proposal, it assessed the following weakness:

Appeared to be oriented to a large project management approach as opposed to an integrated day-to-day support.

A0280. Advanced Data was never told of the weakness observed by DoE's Technical Evaluation Team, *viz.*, that Advanced Data's technical approach "[a]ppeared to be orientated [sic] to a large project management approach as opposed to integrated day to day support." A0259.

Per the solicitation, classification experience was to be evaluated under the Key Personnel Qualifications Subcriterion. There was no provision for evaluation of classification experience under the Availability of Personnel Subcriterion.

A0148-49. In its November 26th, 1997, report on its evaluation of the revised

technical proposals, DoE's Technical Evaluation Team assessed as a weakness against Advanced Data under the Availability of Personnel Subcriterion that Advanced Data offered "[l]imited availability of 'classification professionals. . . .'" DoE's Technical Evaluation Team likewise assessed as a weakness under the Key Personnel Subcriterion that only the proposed Senior Policy Analyst "has experience as a classification professional. . . ." A0280.

When DoE's Technical Evaluation Team scored Advanced Data's revised proposal and best and final offer, Advanced Data's score on the Personnel Qualifications and Availability Criterion increased from 66.6 points, A0233, to 206.4 points, A0286. When weighting the scores on the Availability of Personnel and Key Personnel Qualifications Subcriteria, DoE's Technical Evaluation Team once again followed the weighting in the Rating Plan, and not the weighting announced in the solicitation. A0286.

Advanced Data did not resubmit past performance information with its revised proposal and best and final offer. Advanced Data explained, in a cover letter of November 13th, 1997, accompanying its revised technical proposal and best and final offer:

ADC has compiled an enviable record of performance in serving our clients over the last 19 years. The Department of Energy has been a major client during this period of time. If you have inquired about the level of performance we deliver at our current contracts with DoE at the [*****-*****], you have undoubtedly been informed that it

Nowhere does this written statement reflect the Source Selection Official's consideration of the effect of DynMeridian's offer, in its revised technical and price proposals, of mandatory uncompensated overtime. Nowhere does this written statement reflect the Source Selection Official's consideration of the reduced "bid rate availability" of [*****] non-key persons. The solicitation required only that the four proposed key personnel have "direct experience in development of classification policy." Advanced Data was never told of the weakness observed by DoE's Technical Evaluation Team, viz., that Advanced Data's technical approach [*****-
*****-
*****].

On March 18th, 1998, DoE submitted its report, 31 U.S.C. § 3553(b)(2), on Advanced Data's second post-award protest. A2161. Submitted with the report was a supplemental statement from the Source Selection Official. This supplemental statement presented the Source Selection Official's post-protest rationalization for his theretofore-undocumented acceptance of DynMeridian's offer of mandatory uncompensated overtime. A2085-86. Nowhere did this supplemental statement reflect the Source Selection Official's consideration of the reduced "bid rate availability" of [*****] non-key persons.

In this supplemental statement, the Source Selection Official likewise presented a post-protest narrative re-evaluating Advanced Data's revised competitive proposal,

had the Availability of Personnel and Key Personnel Qualifications Subcriteria been evaluated in accordance with the weighting announced in the solicitation, rather than the weighting used in the Rating Plan. This post-protest narrative was limited to a mechanical rescoring of Advanced Data's revised competitive proposal. The Source Selection Official reversed the weights used in the Rating Plan, "13.3," and "20." The result was a 20.1 point increase in Advanced Data's technical point score. A2085. In fact, the solicitation announced that the Availability of Personnel Subcriterion was "weighted approximately twice the weight of" the Key Personnel Qualifications Subcriterion. A0150. To mechanically correct the scoring to conform to the weights announced in the solicitation, it is necessary to use weights of "11.1" and "22.2." A2413. The result is a 26.7 point increase in Advanced Data's technical point score.

But a mechanical rescoring of Advanced Data's revised competitive proposal does not account for all of the possible outcomes had the solicitation conformed to the Rating Plan, i.e., had the solicitation announced, as did the Rating Plan, that the Key Personnel Qualifications Subcriterion "is approximately 50% greater in weight than" the Availability of Personnel Subcriterion. Advanced Data was misinformed about the things that DoE was looking for in competitive proposals for a successor contract to deliver support services on-site at DoE's Office of Declassification in Germantown—as explained in a declaration submitted on March 30th,

1998, together with Advanced Data's comments, A2192, on the agency report, 4

C.F.R. § 21.3(i):

I am aware from my review of redacted materials that although the solicitation document announces that under the "personnel qualifications and availability" factor, the "personnel qualifications and availability" subfactor is "weighted approximately twice the weight" of the "key personnel qualifications" subfactor, the Technical Evaluation Committee in fact gave the "key personnel qualifications" subfactor twice the weight of the "personnel qualifications and availability" subfactor. It should be obvious from our past performance references that ADC has substantial numbers of people providing on-site support for DoE programs. Thus we viewed the weighting announced in the solicitation as something that was to our advantage. We emphasized our depth of personnel. Had we known that in fact the "key personnel qualifications" subfactor was twice the weight of the "personnel qualifications and availability" subfactor, we would have submitted a different set of key personnel with our revised proposal and best and final offer, and we would have placed a keen emphasis on finding key persons all of whom had weapons design/classification experience.

A2227-28 (Declaration of James A. Rivera, March 26th, 1998).

GAO denied Advanced Data's second protest on its merits in a decision dated June 1st, 1998. A2410-23; *Advanced Data Concepts, Inc.*, 98-1 CPD ¶ 145. GAO found, as DoE by then had conceded, that DoE had misapplied the weighting announced in the solicitation for the Availability of Personnel and Key Personnel Qualifications Subcriteria. A2413; *Advanced Data Concepts, Inc.*, 98-1 CPD, at 4. GAO also found that DoE had improperly rated Advanced Data's revised competitive proposal for classification experience under both the Availability of Personnel and Key Personnel Qualifications Subcriteria. A2415-16; *Advanced Data Con-*

cepts, Inc., 98-1 CPD, at 6-7. But GAO opined that the improper weighting was no more than “a mathematical error,” and it credited the Source Selection Official’s post-protest mechanical rescoring of Advanced Data’s revised competitive proposal. GAO rejected Mr. Rivera’s declaration on this issue as “not dispositive.” A2413; *Advanced Data Concepts, Inc.*, 98-1 CPD, at 4-5. GAO concluded that Advanced Data had not demonstrated a reasonable possibility of prejudice. A2423; *Advanced Data Concepts, Inc.*, 98-1 CPD, at 13-14.

SUMMARY OF THE ARGUMENT

Although the Court of Federal Claims found that DoE violated clearly applicable procurement statutes and regulations: (a) when it failed to rate proposals in accordance with the weighting announced in the solicitation, (b) when DoE’s Technical Evaluation Team unlawfully double-counted classification experience under both the Availability of Personnel and Key Personnel Qualifications Subcriteria, and (c) when DoE failed to consider Advanced Data’s interim past performance reports, its conclusion that these mistakes were not sufficiently prejudicial to justify relief is based on improper *de novo* inquiries. In post-award protests before the Court of Federal Claims under 28 U.S.C. § 1491(b)(1), the court must apply, 28 U.S.C. § 1491(b)(4), the standard of review for agency action established by the Administrative Procedure Act, 5 U.S.C. § 706(2). It is the contemporaneous agency

record, and only the contemporaneous agency record, that is the proper focus of limited review under the Administrative Procedure Act.

The Court of Federal Claims was wrong about the law when it limited DoE's duty to conduct discussions under 41 U.S.C. § 253b(d)(1)(A) only to perceived deficiencies in Advanced Data's competitive proposal. If DoE wanted the proposed Senior Technical Analyst to have experience in nuclear weapons design, development, testing, and production, it was obligated to raise the issue with Advanced Data (the solicitation allowed for alternative experiences). The DoE Technical Evaluation Team's *hypothetical* assessment of Advanced Data's past performance may not be excused as the neutral rating for offerors lacking past performance experience under Federal Acquisition Regulation 15.608(a)(2)(iii)—such a neutral rating is allowed only for offerors “lacking relevant past performance history.” Advanced Data *had* relevant past performance history, and it was entitled to notice, i.e., discussions, that the DoE Technical Evaluation Team had not considered either *ad hoc* past performance evaluations or the three interim past performance reports that were available at DoE's [*****].

The Court of Federal Claims held DoE's evaluation of DynMeridian's offer of mandatory uncompensated overtime as rational and reasonable, based on the Source Selection Official's supplemental source statement of March 18th, 1998, submitted to GAO with DoE's agency report. This is an erroneous conclusion of

law—the supplemental source selection statement was submitted as a part of the “complete report . . . on the protested procurement” required by 31 U.S.C. § 3553(b)(2), and it is not the contemporaneous explanation required by the Administrative Procedure Act, 5 U.S.C. § 706(2). 41 U.S.C. § 253b(e)(1) requires that the contemporaneous explanation for a selection decision, the “basis for the selection decision and contract award,” is to be furnished at the postaward debriefing, which, in turn, should be held some eight calendar days after contract award. As well, the Rating Plan promised an evaluation by DoE’s Technical Evaluation Team, a formal process that ensures impartial consideration, but all that Advanced Data received was an impermissible *post hoc* rationalization.

The Court of Federal Claims’ factual finding that the interim past performance reports for Advanced Data conducted by DoE’s [*****] and by DoE’s [*****] did not “comply with DoE’s guidelines” is clearly erroneous—“DOE’s required form” to which the Court of Federal Claims refers, A2278, is in fact the sample questionnaire set out in the solicitation, A0162-63, to be used to collect *ad hoc* past performance evaluations. Federal Acquisition Regulation 42.1502(a) requires no particular form for systematic past performance reports, prepared either on an interim basis (permissive), or upon contract completion (mandatory). And the Court of Federal Claims compounded its clearly erroneous factual finding, when, upon a *de novo* review, it concluded

that Advanced Data’s interim past performance reports “evidenced less than favorable performance.”

Likewise, it was clear error for the Court of Federal Claims to conclude that Advanced Data had failed to delete any reference to CNWDI in its revised proposal and best and final offer—the reference quoted by the Court of Federal Claims, A1885, is Advanced Data’s response to the discussion question presented by DoE’s Technical Evaluation Team, and Advanced Data in fact eliminated all other references to this topic. Surely no tribunal could hold the assessment of a weakness on this issue as rational and reasonable when the response that is condemned by DoE’s Technical Evaluation Team is a response to a specific question they had asked.

ARGUMENT

I. Standard of Review.

When reviewing judgments of the Court of Federal Claims under its recently expanded jurisdiction to hear and consider post-award protests, 28 U.S.C. § 1491(b)-(1), this Court considers conclusions of law *de novo*. *Alfa Laval Separation, Inc. v. United States*, No. 98-5087 (Fed. Cir. May 7, 1999), slip op. at 3. This Court reviews factual findings by the Court of Federal Claims for clear error. A factual find-

ing is “‘clearly erroneous’ when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.” *H. B. Mac, Inc. v. United States*, 153 F.3d 1338, 1343 (Fed. Cir. 1998) *citing United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948).

II. Questions of Prejudice *Vel Non* Must Be Decided on the Contemporaneous Agency Record, Not on Impermissible *Post Hoc* Rationalizations.

Unlike the General Services Administration Board of Contract Appeals’ (GSBCA’s) former *de novo* protest jurisdiction under the Brooks Act, 40 U.S.C. § 759(f)(1), the Court of Federal Claim’s protest jurisdiction is grounded in the Administrative Procedure Act, 5 U.S.C. § 706, and review there is bounded by the contemporaneous administrative record. But to date, with one exception, the Court of Federal Claims has decided questions of prejudice *vel non* by looking to this Court’s decisions arising from the GSBCA’s former protest jurisdiction, under the familiar standard that in order to remedy demonstrated violations of procurement statutes and regulations in *de novo* proceedings, the plaintiff must show that had it not been for the violations, there was a reasonable likelihood, a substantial chance, that it would have received the contract. *Data General Corp. v. Johnson*, 78 F.3d 1556, 1563 (Fed. Cir. 1996); *Statistica, Inc. v. Christopher*, 102 F.3d 1577, 1581-1582

(Fed. Cir. 1996). The problem with this standard is that it is dependent on post-protest testimony or narratives, and not on the contemporaneous agency record.

Consider *Strategic Analysis v. U.S. Department of the Navy*, 939 F. Supp. 18 (D.D.C. 1996). This acquisition concerned a proposed cost-plus-fixed-fee contract. Offerors were required to propose four categories of key personnel, and these persons were to deliver support services over a term of five years. The solicitation required that if a proposed key person was not currently employed, the offeror was to submit with its proposal a letter of intent showing that the person proposed would accept employment if the offeror were awarded the contract. A best value selection was to be made. Strategic Analysis, Incorporated, was the incumbent contractor. Seven initial competitive proposals were received. Strategic Analysis' proposed costs of \$2,048,807 were fifth low. Another offeror's, Management Resources, Incorporated's, proposed costs of \$1,679,039 were second low. Management Resources proposed a new hire for one key person, but did not submit with its competitive proposal the required letter of intent. The agency asked Management Resources about this omission, and it responded with the required letter of intent, along with an explanation that the letter was "inadvertently left out of our proposal." Strategic Analysis' proposal was rated overall technically superior to Management Resources' proposal. Nonetheless, the contracting officer concluded that

the technical superiority of Strategic Analysis' proposal was not worth an additional \$369,768. She made award on initial proposals to Management Resources.

Strategic Analysis protested the award at GAO, and GAO found, to no one's surprise we're sure, that the communications with Management Analysis about the missing letter of intent were "discussions." Although Strategic Analysis had thus established a legal right to likewise receive discussions and the opportunity to submit a revised proposal, GAO denied the protest because it concluded that Strategic Analysis had not established competitive prejudice. Here is the reasoning:

The only reason SAI did not receive the award is that its price was considered too high \$369,768 (\$74,000 per year) more than MRI's. SAI does not argue in its protest that if it had been given the opportunity to do so during discussions it could have or would have reduced its price. Accordingly, there is no basis to conclude that SAI was prejudiced because the agency held limited discussions only with MRI.

Strategic Analysis, Inc., B-270075, Feb. 5, 1996, 96-1 CPD ¶ 41, at 5.

Strategic Analysis promptly sought a new review in federal district court. There the district judge credited a post-protest affidavit from Strategic Analysis' president in which this company officer averred that if it had been given the opportunity, the company would have "lowered its price sufficiently to have been awarded the contract." *Strategic Analysis*, 939 F. Supp., at 23. The district judge recognized the time-honored rule of *Camp v. Pitts*, 411 U.S. 139 (1973), 142-143, that the validity of agency action must stand or fall on the propriety of the *contempo-*

raneous agency record, but he looked to *Data General*, and on finding this Court's suggestion there that it might have accepted a post-protest narrative, *Data General*, 78 F.3d, at 1563, he held that "the submission of an affidavit of a company executive under circumstances such as these is a proper way to demonstrate prejudice." *Strategic Analysis*, 939 F. Supp., at 23 n. 7.

There is just such a post-protest narrative from Advanced Data in the record here, and it demonstrates significant prejudice, that Advanced Data would have submitted an entirely different competitive proposal had it known that the Key Personnel Qualifications Subcriterion was in fact twice the weight of the Availability of Personnel Subcriterion. However, both GAO and the Court of Federal Claims took a different view after crediting the Source Selection Official's supplemental source selection statement—just as the Source Selection Official, both forums viewed the problem solely as a mathematical error, and neither looked beyond a mechanical re-scoring of Advanced Data's revised proposal and best and final offer.

The proper approach, however, is that taken by the Court of Federal Claims in *Day & Zimmerman Services*, 38 Fed. Cl. 591, 608-609 (1997), where the Court of Federal Claims found the "prejudicial error" required by 5 U.S.C. § 706 when the record did not support an agency's actions. So likewise with this Court's recent decision in *Alfa Laval Separation*.

There, on facts much like those before the district court in *Strategic Analysis*, the Court of Federal Claims had found the absence of prejudice due to a substantial price advantage in favor of the challenged contract. *Alfa Laval Separation, Inc. v. United States*, 40 Fed. Cl. 215, 234-35 (1998). This Court looked to the contemporaneous agency record, and it reversed the final judgment of the Court of Federal Claims:

Alfa Laval contends, and we agree, that the Navy's error was prejudicial. The only bid competing with Alfa Laval was unacceptable under the standards set out in the RFP. Thus it was error to find that Alfa Laval, the incumbent, responsible supplier, had no "substantial chance" to receive the contract award absent the Navy's error in awarding the contract to Westfalia.

....

In issuing the RFP here, the government sought proposals that met certain requirements. Alfa Laval, an irrefutably competent supplier, submitted the only bid meeting all of the government's requirements, at a lower per-unit price than it had charged for the same purifiers in two recent procurements: it must have had a substantial chance to receive the contract award.

Alfa Laval Separation, Inc. v. United States, No. 98-5087 (Fed. Cir. May 7, 1999), slip op. at 4-5.

It is the contemporaneous record, and only the contemporaneous record, that is the proper focus of the standard of review for agency action under the Administrative Procedure Act, 5 U.S.C. § 706, and the standard that the Court of Federal Claims must apply under 28 U.S.C. § 1491(b)(4). Such a limited review demands that a tribunal confines its inquiry to the existing record, and not use post-protest supplementation to decide prejudice *vel non*:

If the record before the agency does not support the agency action, if the agency has not considered all relevant factors, or if the reviewing court cannot evaluate the challenged agency action on the basis of the record before it, the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation. The reviewing court is not generally empowered to conduct a de novo inquiry into the matter being reviewed and to reach its own conclusions based on such an inquiry.

Florida Power & Light Co. v. Lorion, 470 U.S. 729, 744 (1985).

III. The Duty to Conduct Meaningful Discussions Goes Beyond Notifying Offerors of Proposal Deficiencies.

41 U.S.C. § 253b(d)(1)(A) allows discussions with offerors after receipt of initial competitive proposals and before contract award, and it provides that “written or oral discussions [must be] conducted with all responsible offerors who submit proposals within the competitive range.” Federal Acquisition Regulation 15.610(c)(1) requires that discussions, when conducted, “[a]dvice the offeror of deficiencies in its proposal so that the offeror is given an opportunity to satisfy the Government’s requirements;” Federal Acquisition Regulation 15.610(c)(3) requires that discussions “[a]ttempt to resolve any uncertainties concerning the technical proposal and other terms and conditions of the proposal;” and Federal Acquisition Regulation 15.610(c)(5) requires that discussions “[p]rovide the offeror a reasonable opportunity to submit any cost or price, technical, or other revisions to its proposal that may result from the discussions.”

Discussions are required to be meaningful, and they may not be misleading. In *Analytical & Research Technology, Inc. v. United States*, 39 Fed. Cl. 34 (1997), the Court of Federal Claims correctly sets out the law, as enunciated by GAO:

Specifically, as the GAO has previously found:

Discussions, when they are conducted, must be meaningful and must not prejudicially mislead offerors. * * * Although discussions, to be meaningful, need not be all-encompassing, they must generally lead offerors into the areas of their proposals requiring amplification or correction, which means that discussions should be as specific as practical considerations permit, especially where proposal defects are largely informational in nature, in which case it is incumbent upon the agency to be as clear and precise as possible in informing an offeror of informational gaps in its proposal. * * *

An agency may not inadvertently mislead an offeror, through the framing of a discussion question, into responding in a manner that does not address the agency's concerns; or that misinforms the offeror concerning its proposal weaknesses or deficiencies; or the government's requirements.

SRS Techs., 94-2 CPD ¶ 125 at 6 (1994).

Analytical & Research Technology, 39 Fed. Cl., at 48. *See also Cincom Systems, Inc. v. United States*, 37 Fed. Cl. 663, 675 (1997).

GAO recognizes that the point of the requirement for meaningful discussions is to assure that offerors are afforded an opportunity to either correct erroneous agency conclusions, else to address the agency's concerns. *American Combustion Industries, Inc.*, B-275057.2, March 5, 1997, 97-1 CPD ¶ 105, at 8-9. When DoE failed to apprise Advanced Data of its concerns: (a) about Advanced Data's purported failure to offer integrated day-to-day support, or (b) about DoE's expectation that the proposed Senior Technical Analyst have experience in nuclear wea-

pons design, development, testing, and production (the solicitation required experience in two of four designated areas, and it did not require experience in any one designated area), or (c) that DoE's Technical Evaluation Team had not considered either *ad hoc* past performance evaluations or the three interim past performance reports that were available at DoE's [*****], DoE unreasonably deprived Advanced Data of an opportunity to resolve these concerns, by correcting an entirely erroneous rating of Advanced Data's proposal, else to submit further proposal revisions or information responsive to these concerns.

Recently, GAO held:

Discussions cannot be meaningful unless they lead an offeror into those aspects of its proposal that must be addressed in order for it to have a reasonable chance of being selected for award, and afford an offeror an opportunity to revise its proposal to satisfy the government's requirements. . . .

Had the agency clearly identified the issue, BSAS could have either explained its methodology to the agency's satisfaction, or reconfigured its cost proposal to identify all labor costs in a single figure. Based on our review of the record, we conclude that the agency failed to conduct meaningful discussions on this issue. . . .

Boeing Sikorsky Aircraft Support, B-277263.2, Sept. 29, 1997, 97-2 CPD ¶ 91, at 12.

If an agency has concerns about a particular item in a competitive proposal, or if an agency knows of inconsistencies or other apparent errors, the agency is required to speak out. *Fidelity Technologies Corp.*, B-276425, May 30, 1997, 97-1

CPD ¶ 197, at 6; *Professional Services Group, Inc.*, B-274289.2, Dec. 19, 1996, 97-1 CPD ¶ 54, at 3. If Advanced Data could not have convinced DoE's Technical Evaluation Team that it was offering precisely the sort of integrated day-to-day support that they were looking for, or if Advanced Data could not have convinced DoE's Technical Evaluation Team that experience in any two of the four designated technical areas was all that was required for the proposed Senior Technical Analyst, then, to satisfy these concerns, Advanced Data could have easily revised the language in its proposal, and have proposed a new Senior Technical Analyst. GAO presumes competitive prejudice. When an agency that fails to conduct meaningful discussions argues that a protester is not prejudiced as a result, GAO "will not substitute speculation for discussions, and [GAO] will resolve any doubts concerning the prejudicial effect of the agency's actions in favor of the protester" *Ashland Sales & Service, Inc.*, B-255159, Feb. 14, 1994, 94-1 CPD ¶ 108, at 3.

IV. DoE's Evaluation of DynMeridian's Offer of Mandatory Uncompensated Overtime Was Neither the Impartial Nor the Contemporaneous Consideration Required by the Rating Plan; Ergo, It Cannot be Sustained as Rational and Reasonable.

The Rating Plan is the source selection plan that documents the procedures DoE was to follow to make the source selection decision. Source selection plans

are required neither by statute nor by the Federal Acquisition Regulation. However, they are commonly used for high-dollar-value contracts proceeding under competitive negotiated acquisitions. Typically, a source selection plan documents an evaluation group structure where separate teams are established to evaluate proposals, to conduct a comparative analysis, and then to make the source selection decision.

Federal Acquisition Regulation 15.303(b) authorizes establishment of evaluation teams and acquisition plans. Federal Acquisition Regulation 15.303(a) allows individuals other than the contracting officer to make the source selection decision. Federal Acquisition Regulation 15.308 sets out requirements for the source selection authority's decision, including, *inter alia*, a requirement that the documented source selection decision "shall include the rationale for any business judgments and tradeoffs made or relied on by the [Source Selection Authority];" and Federal Acquisition Regulation 15.101-1 provides standards for "best value" source selection decisions, i.e., when there is a tradeoff among cost or price and non-cost factors (typically, technical merit or past performance).

A typical source selection organization consists of a source selection evaluation board comprised of teams or panels to evaluate the technical proposals, the cost or price proposals, and past performance; a source selection advisory council to conduct a comparative evaluation of the proposals; and a source selection authority

designated to make the selection decision. A source selection plan documents the source selection organization that is established.

Source selection plans invariably provide for consensus evaluation of technical proposals, including identified strengths and weaknesses. Consensus evaluation promotes consistent, objective evaluation and assessment of proposals. Assessments of the competing proposals are rolled-up into a presentation for the source selection advisory council, whose responsibility it is to compare the proposals, one with another.

The comparative analysis of the competing proposals is reduced to a written report or overhead presentation foils, and then this written report or presentation is submitted to the source selection official. Usually, the source selection advisory council offers a recommended source selection decision for consideration. The source selection official then makes the source selection decision.

While details of source selection plans can vary, the essential point is that source selection plans document the source selection process, and they are intended to ensure that the selection decision is reasoned and rational, more than the result of an *ad hoc* process.

A recent decision from the Court of Federal Claims, *United International Investigative Services, Inc. v. United States*, 41 Fed. Cl. 312 (1998), acknowledges just this point. *United International Investigative Services* arose from an acquisi-

tion for court security services. This competitively negotiated acquisition proceeded under a source selection plan that provided, *inter alia*, for group discussions, and a consensus evaluation, among the technical evaluators. 41 Fed. Cl., at 314-15. A technical evaluation board of six persons had reviewed and scored proposals in June. Two months later, proposals were re-evaluated by two of the original evaluators, and the re-evaluation resulted in significant changes in proposal rankings. 41 Fed. Cl., at 320-21. The re-evaluation results were inconsistent with the initial group evaluation, as well as wholly contradictory, i.e., a proposed transition plan was found on re-evaluation both to *exceed*, and *not to exceed*, solicitation requirements. 41 Fed. Cl., at 321-22.

The *United International Investigative Services* court paid particular attention to the source selection plan:

A group discussion, as envisioned by the Technical Evaluation, could have clarified these inconsistencies. Specifically, the discussions could have been used to ventilate Mr. Guccione's perceived concerns regarding plaintiff's technical proposal and the TEB could have come to a consensus regarding each area of concern. The failure of Ms. Hendrick [the contract specialist] to provide an opportunity for the TEB to operate this function denied plaintiff "the impartial consideration to which it was entitled under the implied contract obligations of the government." *Arrowhead Metals, Ltd. v. United States*, 8 Cl. Ct. 703, 714 (1985); see also *126 Northpoint Plaza*, 34 Fed. Cl. at 112.

Defendant, however, argues that the re-evaluation resulted in a more comprehensive product than the first evaluation, and that it resulted in a far more thorough analysis of the proposals. The court finds this argument unpersuasive. There is no way of knowing how comprehensive the second pro-

cess actually was because it did not include a group discussion. The group discussion, as demonstrated above, was necessary in order to ventilate the evaluators' opinions regarding each proposal. During these discussions, evaluators could have explained their individual reasons for ascribing a score to a particular proposal. Moreover, the TEB, as a group, would then have been able to arrive at a consensus regarding that particular aspect of an offeror's proposal.

Although minor irregularities or errors in the procurement process are not sufficient grounds to warrant judicial intrusion to overturn a procurement decision, *Grumman Data Sys. Corp. v. Dalton*, 88 F.3d 990, 1000 (Fed. Cir. 1996), the violation in this case was not minor. Rather, the violation described above deprived plaintiff of the opportunity to have its proposal considered fairly and honestly. *Thus, the decision to have two evaluators circumvent the consensus and discussion requirements of the Technical Evaluation merits judicial intrusion.*

41 Fed. Cl., at 322 (emphasis added).

Here, the Source Selection Official was the Director of the Institutional Services Division at DoE's Office of Headquarters Procurement Services, while the Technical Evaluation Team were employees from DoE's Office of Declassification. One would expect that the Technical Evaluation Team, not the Source Selection Official, would have first-hand experience with DoE's day-to-day requirements for the support services to be delivered. When, to sustain DoE's evaluation of DynMeridian's offer of mandatory uncompensated overtime, the Court of Federal Claims relied on the Source Selection Official's supplemental source selection statement submitted to GAO with DoE's agency report, it deprived Advanced Data of a consensus evaluation of DynMeridian's offer of mandatory uncompensated overtime

by persons with first-hand knowledge of day-to-day contract operations, persons best suited to judge whether or not the reduced “bid rate availability” of [*****] non-key persons would suit DoE’s continuing requirements.

More to the point, the Source Selection Official’s supplemental source selection statement was not the contemporaneous record demanded by the standard of review for agency action that is established by the Administrative Procedure Act, 5 U.S.C. § 706(2). The Technical Evaluation Team never considered DynMeridian’s offer of mandatory uncompensated overtime, and the Source Selection Official did not consider this point except in DoE’s statutorily mandated response, filed thirty calendar days after Advanced Data’s GAO protest, 31 U.S.C. § 3553(b)(2). 41 U.S.C. § 253b(e)(1) requires that the contemporaneous explanation for a selection decision, the “basis for the selection decision and contract award,” is to be furnished at the postaward debriefing, which, in turn, should be held some eight calendar days after contract award. Agency action must stand or fall based on the propriety of the contemporaneous agency record, and not on *post-hoc* rationalizations of agency action advanced in the heat of litigation. *U.H.F.C. Co. v. United States*, 916 F.2d 689, 700 (Fed. Cir. 1990); *see also Boeing Sikorsky Aircraft Support*, 97-2 CPD, at 15 (“The lesser weight that we accord these post-protest documents reflects the concern that, because they constitute reevaluations and redeterminations prepared in the heat of an adversarial process, they may not

represent the fair and considered judgment of the agency, which is a prerequisite of a rational evaluation and source selection process”).

V. DoE Violated its Duty to Share Interim Past Performance Reports, And It Was Not For the Court of Federal Claims to Decide, on a *De Novo* Review, That Advanced Data Was Not Prejudiced.

The Court of Federal Claims correctly held DoE to the requirements of Federal Acquisition Regulation 42.1503(c), *viz.*, that if interim past performance reports are prepared, then they must be shared. However, it went on to conclude that there was no violation because the interim past performance reports that were identified in the GAO proceedings were “not on DOE’s required form.” A0024. Here the Court of Federal Claims clearly confused the documents before it in the administrative record—Federal Acquisition Regulation 42.1503(c) specifies no particular form for interim past performance reports, and “DOE’s required form” to which the Court of Federal Claims refers, A2778, is in fact the sample questionnaire set out in the solicitation, A0162-63, to be used to collect *ad hoc* past performance evaluations. This is not a finding on *viva voce* evidence that is due any particular regard for the trial court’s assessments of “the candor and credibility of the witnesses. . . .” *United States Gypsum Co.*, 333 U.S., at 395.

To support its erroneous conclusion, upon a *de novo* review, that Advanced Data was not prejudiced because Advanced Data’s interim past performance re-

ports “evidenced less than favorable performance,” A0025, the Court of Federal Claims “cherry picked” one of the three available reports. The interim past performance report from DoE’s [*****] for the period February 1997 through July 1997, A2336 to A2358, rates three topical areas, A2339, under five separate tasks, A2340. Overall, Advanced Data’s performance was rated as “Exceeds” in two topical areas. A2348. As might be expected for such an extensive review, Advanced Data received some less than favorable evaluations under certain tasks. A2334, A2347, A2354. But it was for DoE’s Technical Evaluation Team, and not the Court of Federal Claims, to rate Advanced Data’s past performance. The Court of Federal Claims’ *de novo* review deprived Advanced Data of the consensus evaluation promised by the Rating Plan, a consensus evaluation intended to ensure that the selection decision is reasoned and rational, more than the result of an *ad hoc* process.

VI. DoE’s Assessment of a Weakness Based on Proposal References to Critical Nuclear Weapon Design Information Cannot be Upheld as Rational and Reasonable.

In its opinion and order supporting the final judgment of March 18th, 1999, the Court of Federal Claims holds as rational and reasonable DoE’s assessment of a weakness based on references in Advanced Data’s revised proposal and best and final offer to Critical Nuclear Weapon Design Information. The Court of Federal Claims

finds as fact that Advanced Data “did not delete references to CNWDI in its BAFO.” A0028. This factual finding is clearly erroneous. The reference quoted by the Court of Federal Claims, A1885, is Advanced Data’s response to the discussion question that was presented by DoE’s Technical Evaluation Team, and Advanced Data in fact eliminated all other references to this topic. Surely no tribunal could hold the assessment of a weakness on this issue as rational and reasonable when the response that is condemned by DoE’s Technical Evaluation Team is a response to a specific question they asked.

CONCLUSION AND STATEMENT OF RELIEF SOUGHT

For all these reasons, Advanced Data requests that the Court reverse the judgment of the Court of Federal Claims, and remand this case for further proceedings consistent with the Court’s opinion.

Respectfully submitted,

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PROOF OF SERVICE

Pursuant to FED. CIR. R. 25, the undersigned hereby certifies, under the penalty of perjury, that on May 25th, 1999, he caused to be hand-delivered two copies of the foregoing nonconfidential principal Brief of Plaintiff-Appellant Advanced Data Concepts, Incorporated, at the following address:

Tonya J. Williams, Esq.
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Civil Division
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Cyrus E. Phillips, IV

CERTIFICATE OF COMPLIANCE

Pursuant to FED. R. APP. P. 32(a)(7), the undersigned hereby certifies, under the penalty of perjury, that this principal brief is set in Adobe's Goudy face, a proportionally-spaced serif font; that this principal brief is set in type 14-point or larger; and that this principal brief contains no more than 14,000 words, *viz.*, that it contains 11,818 words out of 1,018 lines and 67,878 characters. I make this representation based on "Word Count," as presented on the "Tools" menu in Microsoft® Word 97, Service Release 2.

Cyrus E. Phillips, IV

No. 98-495C

(Filed April 14, 1999)

* * * * *

**ADVANCED DATA
CONCEPTS, INC.,**

Plaintiff,

v.

THE UNITED STATES,

Defendant.

*

- * Post-award bid protest; 28
- * U.S.C. § 1491(b)(1); Scope
- * of review; Agency discretion in
- * negotiated procurements; De
- * minimis errors do not warrant
- * overturning contract award;
- * Uncompensated overtime;
- * Past performance evaluation;
- * Meaningful discussions

*

*

* * * * *

Cyrus E. Phillips, IV, Washington, D.C., for plaintiff. **Christopher H. Jensen**, of counsel.

Tonya J. Williams, Washington, D.C., with whom were **Assistant Attorney General Frank W. Hunger**, **Director David M. Cohen**, and **Assistant Director James M. Kinsella**, for defendant.

Opinion and Order⁽¹⁾

This post-award bid protest case, brought pursuant to the court's recently expanded jurisdiction under 28 U.S.C. § 1491(b)(1) (1994 & Supp. 1998), section 12 of the Administrative Dispute Resolution Act of

1996 (ADRA), Pub. L. No. 104-320, 110 Stat. 3870, 3874-75, is before the court on cross-motions for summary judgment on the administrative record.

On June 11, 1998, plaintiff moved for a preliminary injunction. During a June 17, 1998, hearing, the parties indicated that they had negotiated an agreement whereby: (1) plaintiff withdrew its application for preliminary injunction; (2) defendant, at its discretion, would begin performance under the protested contract; and (3) plaintiff had the option (if the court sustained the protest) to compete in any re-solicitation of the contract.

On June 11, 1998, plaintiff filed a motion for entry of a protective order, which the court granted on June 12, 1998. On June 18, 1998, the court adopted the protective order proposed by plaintiff.

Upon reviewing the administrative record (AR)⁽²⁾ and the parties' briefs,⁽³⁾ the court concludes that plaintiff's claims⁽⁴⁾ do not merit relief. Accordingly, for the reasons discussed below, plaintiff's motion for summary judgment is denied and defendant's motion for summary judgment is granted.⁽⁵⁾

Facts

The relevant facts set forth below, which are taken from the AR, are not in dispute.

DOE issued Solicitation No. DE-RP01-97NN50008 on April 1, 1997. The procurement was to be a negotiated, not a sealed bid, procurement. AR at 81. The solicitation sought proposals for the on-site delivery of specialized technical, analytical, and administrative support services at DOE's Office of Declassification in Germantown, MD. AR at 5. DOE's Office of Declassification manages procedures for identifying classified information and certain unclassified, but sensitive, information within DOE's jurisdiction. The office supports the federal government's nonproliferation objectives by shaping classification policies to inhibit the spread of nuclear technology. AR at 13.

The solicitation identified the contract period as two years, with three one-year options. AR at 5-9. It required the contractor to provide support services, totaling 62,000 direct productive labor hours (DPLH) per year, under ten different labor categories. AR at 119. Direct productive labor hours were defined as "actual work hours exclusive of vacation, holiday, sick leave, and other absences." AR at 37. Of the ten labor categories, four were designated as "key personnel": project manager, senior policy analyst, senior technical analyst, and senior training specialist. AR at 27. The solicitation required the contractor to provide the names and resumes of these "key personnel." AR at 88.

The relative weights for technical criteria were as follows:

Criterion Weight in Points

(1) personnel qualifications and availability (333, or 33.3% of the total)

- (a) availability of personnel 133
- (b) key personnel qualifications 200
- (2) technical approach (317, or 31.7% of the total)
 - (a) technical approach 200
 - (b) understanding of statement of work 117
- (3) past performance (250, or 25% of the total)
 - (a) quality 50
 - (b) cost control 50
 - (c) timeliness of performance 50
 - (d) business relations 50
 - (e) customer satisfaction 50
- (4) organization and management capabilities (100, or 10% of the total)
 - (a) management planning and control 50
 - (b) organization structure 25
 - (c) corporate resources 25
- Total 1000 points

AR at 159.

The solicitation stated that the "[a]ward will be made to th[e] responsible offeror(s), whose offer(s), conforming to th[e] RFP is (are) considered most advantageous to the Government." AR at 108. In determining advantage, the "technical proposal [was] of greater importance than the cost proposal." AR at 108. The solicitation required a determination of whether the best technical proposal was worth the cost differential. AR at 108.

The third criterion of the solicitation called for the evaluation of bidders' past performance. It required the use of a specific form (a "Contractor Performance Report") to collect past performance information. AR at 87, 122-23. The solicitation also stated that "if an offeror's client is unwilling to provide to the Government requested information in support of the Government's past performance evaluation, that experience will be given a neutral rating." AR at 90. The solicitation did not define a "neutral" rating.

The solicitation contained the clause at Federal Acquisition Regulation (FAR)([6](#)) § 52.215-16, which required, inter alia, DOE to conduct discussions with all offerors "whose proposals have been determined

to be within the competitive range." AR at 81. Discussions were to be held after the competitive range determination. The final award was to be based on bidders' best and final offers (BAFOs). AR at 81.

DOE received four proposals. Plaintiff's was submitted on April 30, 1997. AR at 1550. Its oral presentation took place on June 17, 1997. AR at 1567-1686. DOE's technical evaluators scored the initial proposals on June 23, 1997. AR at 116. The technical evaluators noted, *inter alia*, the following weaknesses in plaintiff's proposal: (1) "Appeared to be oriented to a large project management approach as opposed to integrated day-to-day support;" (2) "Continual confusion of classification with security. 'Ensure limited access to CNWDI [Critical Nuclear Weapon Design Information]' as a stated and emphasized objective - which is not a classification matter;" and (3) "Fails to understand the difference between Critical Information and Technology (CRIT) and restricted data under NISPOM." AR at 182-85. No competitive range determination was made.

On July 31, 1997, without conducting discussions, DOE awarded the contract to DynMeridian. AR at 195. On August 12, 1997, at plaintiff's request, DOE debriefed plaintiff. DOE informed plaintiff that its proposed "key personnel qualifications" were rated as poor because, *inter alia*, the personnel lacked nuclear weapons design, development, or testing experience. AR at 197-213.

Plaintiff filed a protest with the General Accounting Office (GAO) on August 15, 1997, arguing primarily that DOE unlawfully awarded the contract without holding discussions, as required by the solicitation. AR at 2012-23. In response, DOE rescinded the award and reopened the procurement. DOE agreed to determine a competitive range of offerors, to open discussions on written questions, and to receive and evaluate BAFOs upon conclusion of the discussions. AR at 2361. On September 16, 1997, the GAO dismissed plaintiff's protest as moot because DOE had taken adequate corrective action. AR at 2371.

On September 18, 1997, DOE made a competitive range determination that included plaintiff, DynMeridian, and Science Applications International Corp. (SAIC). AR at 214. DOE issued written technical and cost questions and amended the solicitation on October 29, 1997. AR at 226. The amendment required that all "key personnel" have experience with nuclear weapons, production reactors, nuclear weapons safeguards and security, or special nuclear materials. AR at 153. (Prior to the amendment, only the senior technical analyst needed such experience. AR at 114.)

Plaintiff submitted a revised technical proposal and BAFO, replacing some of its key personnel, on November 17, 1997. AR at 1801. DynMeridian's BAFO proposed uncompensated overtime for some of its employees. AR at 1353-55.

On November 26, 1997, the DOE technical evaluators scored the revised proposals as follows:

Offeror Price ⁽⁷⁾ Proposal Score

DynMeridian \$15,881,789 970

ADC \$12,645,332 644.9

SAIC [*****] [****]

AR at 239, 249-66.

The Source Selection Official (SSO) awarded the contract to DynMeridian on January 30, 1998, AR at 267, concluding that DynMeridian's "vastly superior technical approach and quality of the technical personnel proposed," more than justified the \$3,236,457 (approximately 25%) price differential. AR at 269. The agency found that DynMeridian's proposal gave the best overall value to, and thus was in the best interests of, the government. AR at 269.

Plaintiff received a debriefing on February 5, 1998, AR at 197-204, and filed a second protest with the GAO on February 6, 1998. AR at 2012-23. Plaintiff claimed, inter alia, that DOE: (1) failed to provide meaningful discussions, (2) unlawfully evaluated classification experience, and (3) exhibited bias in favor of the incumbent contractor. In a February 23, 1998, supplemental protest, plaintiff claimed, inter alia, that DOE unlawfully failed to consider DynMeridian's offer of uncompensated overtime until February 18, 1998, in the price negotiation memorandum, i.e., after the contract was awarded. AR at 2124-34.

On March 17, 1998, after reviewing plaintiff's protest, DOE prepared a supplemental source selection statement that corrected an error in the rating plan. AR at 2006. The SSO concluded that the change would not alter his decision. AR at 2006. The SSO also stated that he had in fact considered DynMeridian's offer of uncompensated overtime but, nevertheless, concluded that this offer "would not affect DynMeridian's technical capabilities to perform the contract requirements." AR at 2007.

The GAO denied plaintiff's protest on June 1, 1998. AR at 2331. Although it rejected most of plaintiff's claims, the GAO determined that DOE unlawfully scored the "personnel qualifications and availability" criterion by reversing the relative weights of two subcriteria announced in the solicitation: "availability of personnel" and "key personnel qualifications." AR at 2333-35. The GAO also concluded that, under the "availability of personnel" subcriterion, DOE unlawfully evaluated classification experience. AR at 2335-37. Nevertheless, the GAO denied plaintiff's protest because plaintiff was unable to show that these two DOE errors were prejudicial. AR at 2344.

Summary Judgment

Summary judgment is appropriate when the court finds both that "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." RCFC 56(c); **Anderson v. Liberty Lobby, Inc.**, 477 U.S. 242, 247 (1986). Motions for judgment on the administrative record are evaluated under the same standards as motions for summary judgment pursuant to RCFC 56(a). See RCFC 56.1(a). Because there are no disputed issues of material fact, the court must

determine whether either party is entitled to judgment as a matter of law. See RCFC 56.

Summary judgment is not a disfavored means of resolving disputes; on the contrary, it is an "integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.'" Celotex Corp. v. Catrett, 477 U.S. 317, 327 (1986) (quoting Fed. R. Civ. P. 1); see also Avia Group Int'l, Inc. v. L.A. Gear California, Inc., 853 F.2d 1557, 1560 (Fed. Cir. 1988); Sweats Fashions, Inc. v. Pannill Knitting Co., 833 F.2d 1560, 1562 (Fed. Cir. 1987). The fact that both parties have moved for summary judgment, however, does not relieve the court of its responsibility to determine the appropriateness of summary disposition. See Prineville Sawmill Co. v. United States, 859 F.2d 905, 911 (Fed. Cir. 1988).

Post-Award Bid Protests

In post-award bid protests brought pursuant to the new Tucker Act jurisdiction,⁽⁸⁾ courts must apply the standard of review for agency action established by the Administrative Procedure Act, 5 U.S.C. § 706 (1994). See 28 U.S.C. § 1491(b)(4). An agency procurement decision, like the SSO's in this case, will be set aside only if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). In cases, as here, where the GAO has rendered a decision, it is the agency's decision, not the GAO's, that is the subject of judicial review. Nevertheless, the court must give deference to the GAO's decision. See Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 419 (1971); Honeywell, Inc. v. United States, 870 F.2d 644, 648 (Fed. Cir. 1989). The scope of review is confined to the administrative record, *i.e.*, to the record before the decision maker when the final award decision was made. See Camp v. Pitts, 411 U.S. 138, 142 (1973). The court "may award any relief that [it] considers proper, including declaratory and injunctive relief except that any monetary relief shall be limited to bid preparation and proposal costs." 28 U.S.C. § 1491(b)(2).

Courts allow agencies broad discretion in conducting negotiated procurements and determining which bid is most advantageous to the government. See Lockheed Missiles & Space Co. v. Bentsen, 4 F.3d 955, 958-59 (Fed. Cir. 1993); FAR § 15.605(b). If the agency's decision is reasonable, the court will not disturb it. See, e.g., Grumman Data Sys. Corp. v. Dalton, 88 F.3d 990, 995-96 (Fed. Cir. 1996). To receive injunctive relief, plaintiff must show, not only that the agency's decision is unreasonable, but also: 1) that failure to enjoin the procurement will cause irreparable harm; 2) that such harm outweighs any potential harm to third parties; and 3) that injunctive relief is in the public interest. See FMC Corp. v. United States, 3 F.3d 424, 427 (Fed. Cir. 1993).

Moreover, absent any evidence of actual irregularity, the court presumes the regularity of government action. See Kalvar Corp. v. United States, 543 F.2d 1298, 1301-02 (Ct. Cl. 1976) (holding that government officials are presumed to act in good faith). To rebut this presumption, a plaintiff must present "well-nigh irrefragable proof" that the government acted in bad faith. Torncello v. United States, 681 F.2d 756, 771 (Ct. Cl. 1982). In sum, a court may set aside an agency's action only when it has no rational basis, see M. Steinthal & Co. v. Seamans, 455 F.2d 1289, 1306 (D.C. Cir. 1971), *i.e.*, when the decision is "totally lacking in reason." Keco Indus. Inc. v. United States, 492 F.2d 1200, 1206 (Ct. Cl. 1974).

The Competition in Contracting Act of 1984, Pub. L. No. 98-369, 98 Stat. 1175, requires agencies to "evaluate sealed bids and competitive proposals, and award a contract, based solely on the factors specified in the solicitation." 41 U.S.C. § 253b(a). The FAR also requires proposals to be evaluated "solely on the factors specified in the solicitation." FAR § 15.608(a). An agency's failure to comply with the terms of the solicitation may constitute grounds for overturning the bid award. See **Keco Indus.**, 492 F.2d at 1203-04.

Not every error requires rejection of the agency's action. See **SMS Data Prods. Group, Inc. v. United States**, 900 F.2d 1553, 1557 (Fed. Cir. 1990); **Excavation Constr., Inc. v. United States**, 494 F.2d 1289, 1293 (Ct. Cl. 1974). The court will not overturn a contract award based on de minimis errors made during the procurement process. See **Grumman Data Sys. Corp. v. Widnall**, 15 F.3d 1044, 1048 (Fed. Cir. 1994) ("overturning awards on de minimis errors wastes resources and time, and is needlessly disruptive of procurement activities and governmental programs and operations") (quoting **Andersen Consulting Co. v. United States**, 959 F.2d 929, 932 (Fed. Cir. 1992)).

In addition, a protester must show, not only an error in the procurement process, but also that the error was prejudicial. See **Data Gen. Corp. v. Johnson**, 78 F.3d 1556, 1562 (Fed. Cir. 1996); **Central Ark. Maintenance, Inc. v. United States**, 68 F.3d 1338, 1342 (Fed. Cir. 1995). To establish prejudice, the protester must show that, but for the procurement error, there was a "substantial chance that [it] would receive an award." **Statistica, Inc. v. Christopher**, 102 F.3d 1577, 1581 (Fed. Cir. 1996) (quoting **CACI, Inc. v. United States**, 719 F.2d 1567, 1574-75 (Fed. Cir. 1983)).

"Availability of Personnel" and "Key Personnel"

Plaintiff claims that defendant's weighting of the "availability of personnel" and "key personnel qualifications" subcriteria under the solicitation's "personnel" criterion was unlawful under 41 U.S.C. § 253a (b)(1)(B) (1994) (requiring agencies to follow the relative weighting set forth in the solicitation). Plaintiff correctly points out that the rating plan and the solicitation contained different weights for these subcriteria. The solicitation provided that "availability of personnel" was given "approximately twice the weight" of "key personnel qualifications." AR at 110. The rating plan, which was used by the technical evaluators, but not provided to bidders, conversely gave "availability of personnel" a weight of 133 and "key personnel qualifications" a weight of 200. AR at 159. In scoring the proposals, DOE used the weights in the rating plan, rather than the solicitation. AR at 2006.

Defendant concedes that DOE incorrectly used the weights set forth in the rating plan, rather than the solicitation, but contends that the error is de minimis, and as such is insufficient in and of itself to overturn a contract award; the protester also must show prejudice.

The facts here do not support plaintiff's claim that it was prejudiced by DOE's scoring error. Even correcting the personnel weightings as requested by plaintiff would have raised plaintiff's score only from 644.9 to 665 and left DynMeridian's score unchanged at 970. AR at 2006. This made DynMeridian's technical score 46% higher than plaintiff's (clearly surpassing plaintiff's 26% cost advantage).

Plaintiff argues that it should have received an even greater increase, of 26.7 points. It states that, to correct the error in the solicitation, the SSO:

reverse[d] the weights used in the weighting plan, "13.3," and "20." . . . In fact, the solicitation announced that the Availability of Personnel Subcriterion was "weighted approximately twice the weight of" the Key Personnel Qualifications Subcriterion. To correct the scoring to conform to the weights announced in the solicitation, it is necessary to use weights of "11.1" and "22.2."

Plaintiff's Motion for Summary Judgment upon the Administrative Record (Pl. Br.) at 21(emphasis added).

Plaintiff's argument fails because even an increase of 26.7 points would not have converted plaintiff's bid into the best overall bid. An increase of 26.7 points would have raised plaintiff's score only from 644.9 to 671.6, but would leave DynMeridian's score at 44% higher, clearly surpassing plaintiff's 26% cost advantage. There is therefore no prejudice. The GAO agreed, stating that "[t]his more accurate adjustment would have an immaterial effect on ADC's corrected score." AR at 2334.

Plaintiff submitted an affidavit from ADC President James A. Rivera stating, "Had we known that in fact the 'key personnel qualifications' subfactor was twice the weight of the 'personnel qualifications and availability' subfactor, we would have submitted a different set of key personnel." AR at 2147-48. This does not demonstrate prejudice. Defendant's solution to the scoring error was to adjust the weights to those set forth in the solicitation. Because plaintiff submitted its bid in contemplation of that weighting scheme, it cannot claim here that it would have submitted a different proposal.

In sum, the SSO considered the corrected scoring and found that DynMeridian's proposal still provided the best overall value to the government. AR at 2006-07.

Classification Experience

Plaintiff also asserts that DOE unlawfully evaluated classification experience. It argues that the solicitation required classification experience under the "key personnel qualifications" subcriterion, but not under the "availability of personnel subcriterion" and challenges DOE's rating of classification experience under both subcriteria.

In this instance, too, defendant concedes, as the GAO found, that the agency improperly evaluated classification experience under the "availability of personnel" subcriterion. Defendant has stated: "While DOE does not agree . . . that DOE did not adequately inform offerors that the classification experience of non-key personnel would be evaluated, . . . the Government recognizes that the GAO[']s finding] is entitled to substantial deference." Defendant's Motion for Summary Judgment on the Basis of the Administrative Record (Def. Br.) at 15 n.7.

Plaintiff, however, has not shown that such an improper evaluation was prejudicial. See Data Gen., 78 F.3d at 1562 (error did not prejudice plaintiff because plaintiff failed to show that, without the error, there was a reasonable likelihood of success). Even assuming that plaintiff received a perfect score under the "availability of personnel" subcriterion -- that is, a "10" -- plaintiff's total score would have risen from 671.6 (correcting for the earlier discussed error) to 711.6 only. DynMeridian's score of 970 would still be 36% higher than plaintiff's, still substantially outweighing plaintiff's 26% cost advantage. Moreover, technical factors were significantly more important than price in this procurement. AR at 108. Thus, DOE's decision to award the contract to DynMeridian clearly was reasonable.

Uncompensated Overtime⁽⁹⁾

Plaintiff's contentions that DOE unlawfully failed to consider DynMeridian's offer of uncompensated overtime, and that FAR § 37.115-2(a) precludes the use of uncompensated overtime, are without merit. FAR § 37.115-2(a) is inapplicable, as it did not become effective until August 22, 1997, four months after the solicitation was issued. In addition, the solicitation adopted a neutral stance toward uncompensated overtime, see AR at 101 (DOE "does not encourage or discourage the use of uncompensated overtime as a bidding method for DOE's request for proposals"), even though the solicitation cautioned that "lowered compensation for essentially the same professional work may indicate lack of sound management judgment and lack of understanding of the requirement." AR at 111 (emphasis added).

Thus, the solicitation allowed DOE to consider uncompensated overtime as an asset, as a liability, or not at all. Plaintiff points to no contractual or other legal requirement that DOE consider offers of uncompensated overtime in its technical evaluations.

Plaintiff claims that GAO precedent⁽¹⁰⁾ requires agencies to consider the possible adverse effect of uncompensated overtime in their technical evaluations. In its motion for summary judgment, plaintiff cites Combat Systems Development Associates Joint Venture, B-259920.2, June 13, 1995, 95-2 CPD ¶ 162, for the proposition that "the possible adverse effect of [an offer of uncompensated overtime must be] reflected in the evaluation, as required by FAR § 15.608(a)(1)." Pl. Br. at 29 (purportedly quoting Combat Sys. Dev. Assocs. Joint Venture, B-259920.2, June 13, 1995, 95-2 CPD ¶ 162, at 10).

Plaintiff's "re-wording" of the bracketed material, however, does not reflect Combat Systems' express holding. The passage actually states:

With respect to CSDA's contention that the Navy should not have accepted Vitro's pay and benefits cuts, we note first that the evaluation record shows that the Navy expressly considered Vitro's proposed pay and benefits cuts and ensured that the possible adverse effect of the cuts was reflected in the evaluation, as required by FAR § 15.608(a)(1).

Combat Sys. Dev. Assocs. Joint Venture, B-259920.2, June 13, 1995, 95-2 CPD ¶ 162, at 10 (emphasis added). This passage deals, not with uncompensated overtime, as plaintiff would characterize the holding, but instead with a contractor's proposal to cut salary and benefits immediately after the contract award. No language in this passage, or anywhere else in the case, approves, or refers to, a per se requirement to consider uncompensated overtime, or to give it a negative effect.

In any event, the SSO did evaluate DynMeridian's offer of uncompensated overtime at the time he made the award decision, but concluded that the small amount offered ([*****]) would not affect DynMeridian's ability to perform the contract. AR at 2007. The contracting officer concurred with this assessment. AR at 251.

Post Hoc Rationalizations

Plaintiff characterizes the supplemental source selection statement, AR at 2006, and the contracting officer's price negotiation memorandum, AR at 249, as unlawful, post hoc rationalizations for agency action. See **Overton Park**, 401 U.S. at 419 (because APA review is confined to the "whole record" before the agency at the time the agency made its decision, 5 U.S.C. § 706, courts normally will not consider post hoc rationalizations). This is incorrect.

The supplemental source selection statement and the price negotiation memorandum are not post hoc rationales, but rather are elements of the agency's original action. These statements merely provide additional detail concerning the agency's pre-existing rationale for its decision and may be considered by this court. See **Esch v. Yeutter**, 876 F.2d 976, 991 (D.C. Cir. 1989) (extra-record evidence is permissible where an agency considered evidence which it failed to include in the record). Plaintiff offers no evidence to the contrary. Accordingly, these statements are not impermissible post hoc rationales.

Personnel Requirements

Plaintiff asserts a new claim, not raised in its complaint, that the DOE-DynMeridian contract unlawfully modifies the solicitation's stated personnel requirements. Plaintiff argues that the solicitation required the on-site delivery of 31 full-time employees at the rate of 2,000 DPLH per person per year. Plaintiff claims that the DOE-DynMeridian contract provides:

for the delivery of services from [*****] personnel on-site at DOE's Office of Declassification at the rate of [***] [DPLH] per person per year, for the delivery of services from [***] non-key personnel on-site at DOE's Office of Declassification at the rate of 2,000 [DPLH] per person per year, and for the delivery of services from [***] non-key personnel at the following percentages of the required 2,000 [DPLH] per person per year: [*****]

Pl. Br. at 27. Plaintiff claims that the DOE-DynMeridian contract calls for the services of only [***] full-time employees, [***] fewer than required by the solicitation, and thus that the awarded contract

impermissibly varies the solicitation's requirements.

Plaintiff's claim is contradicted by the record. Exhibit B1 to DynMeridian's BAFO lists the proposed DPLH for all of DynMeridian's personnel. [*****] full-time employees provide 2,000 DPLH per year. AR at 1300. [*****], AR at 1300, [*****], AR at 1306, supply the balance of the required DPLH. Nevertheless, DynMeridian's BAFO still [*****] than 31 full-time on-site employees.

Defendant argues that the solicitation did not require 31 full-time employees but rather, allowed bidders to determine how to allocate the required 62,000 DPLH among their employees. Instead of providing 31 full-time employees at 2,000 DPLH each, DynMeridian allocated the hours among [*****] (providing a total of [***] DPLH), with [*****] and [*****] the remaining required hours. AR at 1300-10.

For example, for its "key personnel" (project manager, senior policy analyst, senior technical analyst, and senior training specialist), DynMeridian proposed [*****] each. AR at 1300. To satisfy the solicitation's requirement of 14,000 DPLH for the technical analyst position, DynMeridian proposed [*****] DPLH. AR at 1300, 1318. To satisfy the solicitation's requirement of 6,000 DPLH for the policy analyst position, DynMeridian proposed [*****]. AR at 1300, 1318. For the contract's base year, DynMeridian's bid stated that DynMeridian employees would provide a total of [*****] DPLH and that [*****] would provide a total of [*****] DPLH. These hours total 62,000 DPLH. AR at 1312, 1318. The total DPLH for each personnel category satisfies the minimum number of employees required for each category.

If the parties dispute a contract's meaning, the court employs the following analysis. First, the court considers the plain language of the contract. **Northrop Grumman Corp. v. Goldin**, 136 F.3d 1479, 1483 (Fed. Cir. 1998); **Gould, Inc. v. United States**, 935 F.2d 1271, 1274 (Fed. Cir. 1991). The court must give reasonable meaning to all parts of the contract, and not render any portion meaningless. **Fortec Constructors v. United States**, 760 F.2d 1288, 1292 (Fed. Cir. 1985); **Thanet Corp. v. United States**, 591 F.2d 629, 633 (Ct. Cl. 1979).

Next, the court determines whether the language, given its ordinary meaning, creates an ambiguity. See **McAbee Constr. v. United States**, 97 F.3d 1431, 1434-35 (Fed. Cir. 1996). "A contract is ambiguous if it is susceptible of two different and reasonable interpretations, each of which is found to be consistent with the contract language." **Community Heating & Plumbing Co. v. Kelso**, 987 F.2d 1575, 1579 (Fed. Cir. 1993) (citations omitted). If a contract term is unambiguous, the court cannot assign it another meaning, no matter how reasonable it may appear. **Triax Pacific, Inc. v. West**, 130 F.3d 1469, 1473 (Fed. Cir. 1997) (citing **R.B. Wright Constr. Co. v. United States**, 919 F.2d 1569, 1572-73 (Fed. Cir. 1990)).

Attachment 3 to the solicitation may be read as requiring that the 62,000 DPLH be provided by 31 employees. AR at 119. That is because attachment 3 indicated the number of employees (in parenthesis)

for each labor category, as follows: "Project Manager," "Senior Policy Analyst," "Policy Analyst (3)," "Document Reviewer," "Senior Technical Analyst," "Technical Analyst (7)," "Senior Training Specialist," "Training Specialist," "Training Assistant," and "Clerical Support (14)." Adding the number of employees specified for each category registers a total of 31 employees.

However, nothing in the solicitation prohibited the use of part-time employees, as plaintiff's argument suggests. Absent any express prohibition of part-time labor, attachment 3 is best construed as delineating a minimum, not exact, number of employees. This reading gives meaning to all provisions of the contract, and accommodates both possible readings of the contract.

Moreover, other portions of the solicitation merely required offerors to bid 62,000 DPLH and did not set out a specific number of full-time employees. For example, section B of the solicitation requires only that offerors bid in terms of DPLH by labor category. It does not specify the number of employees. Nor does it state that the work must be performed by full-time employees. AR at 2-5. In addition, attachment 3 to the solicitation calls for bidding in terms of hours, not in terms of number of employees. AR at 119 n.2 ("Offerors are to propose the required yearly DPLH by labor category as listed above.").

Reading the solicitation as a whole, the court concludes that it unambiguously required bidding in DPLH, not in number of employees. In addition, the solicitation did not prohibit the use of part-time employees. Even if the provision discussed created an ambiguity, such ambiguity, if any, was patent, thus allocating the duty of inquiry to plaintiff. See Community Heating, 987 F.2d at 1579 (Fed. Cir. 1993). Plaintiff made no inquiry as to this provision. However, the court finds no ambiguity, thus finding that the solicitation required the provision of 62,000 DPLH per year only, and allowed bidders to determine how to allocate the required hours among at least the minimum number of employees set out in each labor category.

Past Performance

Plaintiff also contends that DOE unlawfully evaluated its past performance. By statute, agencies must rate offerors' past performance. See 41 U.S.C. § 405(j). There are three categories of past performance information. The first category is agency "past performance evaluations," generated after contract performance is complete. See FAR § 42.1502(a).⁽¹¹⁾ The second category is agency "interim evaluations," for contracts not fully performed. See id. These evaluations are voluntary. However, if "interim evaluations" are prepared, they must be shared with other agencies. See FAR § 42.1503(c). The third category is "ad hoc past performance information," obtained by "afford[ing] offerors the opportunity to identify Federal, state, and local government, and private contracts performed by the offerors that were similar in nature to the contract being evaluated," thereby allowing the agency to verify offerors' past performance on those contracts. FAR § 15.608(a)(2)(ii).

Plaintiff concedes the lack of "past performance evaluations" -- the first category. Plaintiff claims, however, that DOE ignored several "interim evaluations:" three from DOE's Oakland Office and one from DOE's Albuquerque Office. AR at 2217-79. However, it appears that the proffered "interim evaluations" were not presented to DOE as part of plaintiff's bid. Nor did these evaluations comply with DOE's guidelines. For example, they were not on DOE's required form, which contains a specific rating

scale. AR at 2198. In sum, the evaluations plaintiff proffers are not "interim evaluations" under the FAR. AR at 2187. Accordingly, it is evident that DOE did not violate the FAR requirement to share "interim evaluations," because none existed.

As for ad hoc past performance evaluations, DOE sent requests for such reports to all three of plaintiff's references. AR at 2008-11. None returned the questionnaire and the category was given a neutral rating as the solicitation mandated: "[I]f an offeror's client is unwilling to provide the Government requested information in support of the Government's past performance evaluation, that experience will be given a neutral rating." AR at 89-90; see also FAR § 15.608(a)(2)(iii).⁽¹²⁾

Moreover, even if DOE wrongfully failed to take into account plaintiff's past performance, plaintiff was not prejudiced thereby, because plaintiff's "interim evaluations" evidenced less than favorable performance, containing [*****]. AR at 2265, 2268, and 2275.⁽¹³⁾ Therefore even if these negative evaluations had been presented, it is unlikely that plaintiff would have achieved a rating of "10" (the numerical rating scale was 0, 2, 5, 8, and 10, AR at 176).

By contrast, DynMeridian's past performance questionnaires gave it the [*****], except for a questionnaire that included [*****]. Despite these overall [*****] ratings ([*****]), DynMeridian received a score of only [****] for past performance, AR at 166-71, the [*****] given plaintiff. We must assume that even with little or no criticism, plaintiff too would have earned no more than an "8."

Finally, even if plaintiff had received a perfect score of "10" for past performance, it would not have been selected for award. That is because a perfect score in this category would have given plaintiff only 50 extra points, thus raising its total technical score to 761.6 only, and thus 27% lower than DynMeridian's technical score. Again, this difference is particularly significant in light of the solicitation's emphasis on technical factors over price, AR at 108, and, in any event, outweighs plaintiff's 26% cost advantage.

Meaningful Discussions

Plaintiff alleges that DOE failed to conduct the "meaningful discussions" required in negotiated procurements. "Meaningful discussions" must "[a]dvice the offeror of deficiencies in its proposal so that the offeror is given an opportunity to satisfy the Government's requirements." FAR § 15.610(c)(3). Case law provides that discussions are meaningful if they "generally lead offerors into the areas of their proposals requiring amplification or correction, which means that discussions should be as specific as practical considerations permit." SRS Techs., B-254425.2, Sept. 14, 1995, 94-2 CPD ¶ 125, at 6; see generally Navales Enters., B-276122, May 13, 1997, 97-1 CPD ¶ 203. The contracting officer has broad discretion in conducting discussions. See FAR § 15.610(b) ("[t]he content and extent of the discussions is a matter of the contracting officer's judgment, based on the particular facts of each acquisition"); Burroughs Corp. v. United States, 617 F.2d 590, 598 (Ct. Cl. 1980) (same).

Plaintiff's claim that the discussions failed to address the senior technical analyst's lack of nuclear weapons design, development, or testing experience is baffling since the record shows that DOE addressed the matter no less than three times. DOE addressed the issue (1) in plaintiff's initial evaluation, AR at 182 ("Proposed Sr. Technical Analyst's technical experience is limited No demonstrated expertise in weapons design, development, or testing."); (2) in plaintiff's debriefing, AR at 203 ("No expertise in weapons design."); and (3) in the discussion questions, AR at 228-29 ("Please explain how the ADC team adequately covers all of these four technical areas [including nuclear weapons design, development, and testing]. In addition, demonstrate that your proposed senior technical analyst has the expertise in at least two of the four areas.").

Plaintiff's second claim, that it was not informed that its technical approach appeared to be oriented toward large project management, as opposed to day-to-day support, is equally unmerited. One of the questions asked for a discussion of "how your team would provide daily support and respond to short-term deadlines." DOE felt that plaintiff's answer to this question demonstrated an inability to respond to short term deadlines. Specifically, DOE noted that plaintiff's answer "showed a number of procedural steps needed before [plaintiff] would begin work on a 'quick response' item." See Def. Br. at 28; see also AR at 1843 (showing the number of steps required to respond to emergencies). The technical evaluation also communicated this deficiency: "[ADC] [a]ppeared to be oriented to a large project management approach as opposed to an integrated day-to-day support." AR at 241. Plaintiff claims that the discussions failed to reveal that this was a concern. On the contrary, the discussion question did precisely that. The technical evaluation's criticism of plaintiff's "large project management approach" indicated plaintiff's prior failure to address the discussion question, not an independent weakness in plaintiff's proposal.

In addition, contrary to plaintiff's contentions, DOE was not required to inform plaintiff that DOE never received plaintiff's ad hoc performance evaluations. FAR § 15.610(c)(2) requires only that discussions advise "the offeror of deficiencies in its proposal." (emphasis added). Because plaintiff received a neutral rating in this category, there was no deficiency, and thus no discussions were required. AR at 89-90. Nor was this a mistake requiring discussion. See FAR § 15.610(c)(4) (discussions shall "[r]esolve any suspected mistakes"). Rather, this eventuality was explicitly contemplated by the solicitation. AR at 89-90 (offerors lacking past performance information receive a neutral rating).

Finally, DOE's discussion questions regarding CRIT, CNWDI, and restricted data were not misleading. DOE was concerned that plaintiff's proposal confused these concepts. The debriefing, AR at 203, and the discussion questions, AR at 229-30, both raised this concern. Nevertheless, plaintiff's discussion answers demonstrated continuing confusion of these concepts, thereby confirming DOE's concerns. DOE was not required to explain to plaintiff that plaintiff fundamentally misunderstood concepts used in the Office of Declassification, but only to give plaintiff a reasonable opportunity to correct its errors. The mere fact that the plaintiff's response failed to satisfy the evaluators does not mean that the discussions were inadequate. See generally **Reflections Training Sys., Inc.**, B-261224, Aug. 30, 1995, 95-2 CPD ¶ 95.

CNWDI Reference

Finally, plaintiff's claim that defendant failed to assess plaintiff's revised proposal when it did not notice that plaintiff had deleted reference to CNWDI rests on an incorrect factual premise -- plaintiff did not delete reference to CNWDI in its BAFO. AR at 1828. Indeed, this answer demonstrated plaintiff's continued confusion regarding CNWDI's role, or lack thereof, in DOE's Office of Declassification.

Conclusion

Plaintiff's motion for summary judgment is denied and defendant's cross-motion for summary judgment is granted. The Clerk of the Court shall enter judgment for defendant. [\(14\)](#)

DIANE GILBERT WEINSTEIN

Judge, U.S. Court of Federal Claims

1. This opinion was originally filed on March 18, 1999, subject to a protective order. The parties were directed to designate protected material in the opinion that should be redacted. The opinion now issued for publication redacts all the material designated by asterisks within brackets ([**]).
2. A supplemental administrative record was filed on August 5, 1998, and the motions for summary judgment shortly thereafter. The parties subsequently filed redacted copies of these motions.
3. DynCorp EENSP, Inc. d/b/a DynMeridian (DynMeridian), the incumbent and successful bidder, moved to intervene in this action. The court denied DynMeridian's motion and permitted DynMeridian's participation in this action as amicus curiae. See **Advanced Data Concepts, Inc. v. United States**, No. 98-495C (Fed. Cl. June 18, 1998).
4. Plaintiff's complaint raises ten claims for relief, each of which is addressed herein, albeit rearranged into different categories: (1) the Department of Energy (DOE) failed to rate plaintiff's proposal on the "availability of personnel" and "key personnel" subcriteria in accordance with the weighting announced in the solicitation; (2) DOE double-counted a weakness in plaintiff's proposal by rating both key and non-key personnel as "classification professionals;" (3) DOE failed to contemporaneously evaluate the effect of DynMeridian's offer of uncompensated overtime; (4) DOE failed to contemporaneously assess the strengths and weaknesses of DynMeridian's proposal; (5) DOE improperly conducted an ad hoc evaluation of plaintiff's past performance; (6) DOE failed to assess plaintiff's past performance under the statutory and regulatory framework for collecting such information; (7) DOE failed to afford plaintiff meaningful discussions; (8) DOE failed to properly assess plaintiff's proposal when it did not notice that plaintiff had eliminated references to critical weapon design information; (9) DOE failed to contemporaneously document the technical evaluation, the source selection decision, and the procurement transaction; and (10) DOE breached its implied-in-fact contract to fairly evaluate plaintiff's proposal.
5. The court has overlooked plaintiff's use of an extremely fine typeface (Garmond) and single spacing,

apparently intended to sidestep the court's page limitation of 40 pages. See Rule 83.1(b) of the Rules of the United States Court of Court of Federal Claims (RCFC).

6. The FAR is codified at title 48 of the Code of Federal Regulations. Section references are to the provisions of title 48 effective when the solicitation was issued on April 1, 1997.

7. Plaintiff's initial proposal was for \$9,495,000. DynMeridian's was for \$17,183,793. AR at 196.

8. 28 U.S.C. § 1491(b)(1) provides:

Both the Unites [sic] States Court of Federal Claims and the district courts of the United States shall have jurisdiction to render judgment on an action by an interested party objecting to a solicitation by a Federal agency for bids or proposals for a proposed contract or to a proposed award or the award of a contract or any alleged violation of statute or regulation in connection with a procurement or a proposed procurement. Both the United States Court of Federal Claims and the district courts of the United States shall have jurisdiction to entertain such an action without regard to whether suit is instituted before or after the contract is awarded.

9. "Uncompensated overtime" refers to work in excess of 40 hours per week performed by employees exempt from the Fair Labor Standards Act, 29 U.S.C. §§ 201-209, and the Service Contract Act, 41 U.S.C. §§ 351-358. High levels of uncompensated overtime can reduce the quality of the services rendered. See 10 U.S.C. § 2331 (b)(6) (requiring the Secretary of Defense to "provide guidance to contracting officers to ensure that any use of uncompensated overtime will not degrade the level of technical expertise required to perform the contract").

10. GAO precedent is not binding on this court although it may, in appropriate cases, be persuasive. See Honeywell, 870 F.2d at 647-48.

11. Such evaluations are required for all contracts exceeding \$1,000,000, effective July 1, 1995, and all contracts exceeding \$100,000, effective January 1, 1998.

12. Neither the FAR nor the solicitation specified the numerical value of a "neutral" rating. DOE applied a rating of "good," equivalent to a numerical score of 8 out of 10.

13. Plaintiff's performance under the categories of "quality of products/services," "timeliness of services," and "ability to meet task requirements with little or no interruptions in service," was rated as [*****].

14. The court has considered plaintiff's claim that DOE breached its implied duty to fairly consider plaintiff's bid. This theory of relief requires proof that the government's actions were arbitrary and capricious. See E.W. Bliss Co. v. United States, 77 F.3d 445, 447 (Fed. Cir. 1996). In light of the court's finding that DOE's procurement decisions were reasonable, and absent any independent evidence of arbitrary or capricious decision making, this claim must also fail. Nothing in the record supports an independent claim for bad faith, particularly in light of the onerous burden for plaintiffs to prove governmental bad faith. See Torncello, 681 F.2d at 771.


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Sec. 254c. Multiyear contracts

- (a) Authority

An executive agency may enter into a multiyear contract for the acquisition of property or services if -

- (1) funds are available and obligated for such contract, for the full period of the contract or for the first fiscal year in which the contract is in effect, and for the estimated costs associated with any necessary termination of such contract; and
- (2) the executive agency determines that -
 - (A) the need for the property or services is reasonably firm and continuing over the period of the contract; and
 - (B) a multiyear contract will serve the best interests of the United States by encouraging full and open competition or promoting economy in administration, performance, and operation of the agency's programs.

- (b) Termination clause

A multiyear contract entered into under the authority of this section shall include a clause that provides that the contract shall be terminated if funds are not made available for the continuation of such contract in any fiscal year covered by the contract. Amounts available for paying termination costs shall remain available for such purpose until the costs associated

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with termination of the contract are paid.

- (c) Cancellation ceiling notice

Before any contract described in subsection (a) of this section that contains a clause setting forth a cancellation ceiling in excess of \$10,000,000 may be awarded, the executive agency shall give written notification of the proposed contract and of the proposed cancellation ceiling for that contract to the Congress, and such contract may not then be awarded until the end of a period of 30 days beginning on the date of such notification.

- (d) Multiyear contract defined

For the purposes of this section, a multiyear contract is a contract for the purchase of property or services for more than one, but not more than five, program years. Such a contract may provide that performance under the contract during the second and subsequent years of the contract is contingent upon the appropriation of funds and (if it does so provide) may provide for a cancellation payment to be made to the contractor if such appropriations are not made.

- (e) Rule of construction

Nothing in this section is intended to modify or affect any other provision of law that authorizes multiyear contracts.