National Aeronautics and
Space Administration

**Office of Inspector General**
Washington, DC 20546-0001

July 11, 2006

TO: Associate Administrator, Aeronautics Research Mission Directorate
Associate Administrator, Exploration Systems Mission Directorate
Associate Administrator, Science Mission Directorate
Associate Administrator, Space Operations Mission Directorate
Assistant Administrator for Procurement
Chief Education Officer

FROM: Assistant Inspector General for Auditing

SUBJECT: Final Memorandum on Improvements Needed in NASA's Evaluation and Selection Processes under NASA Research Announcements (Assignment No. S-06-003)

In June 2005, an offeror under NASA Research Announcement (NRA) NNH04ZYS004N, "Measurements, Modeling, and Analysis in Support of AURA and Other NASA Satellite Observations and Earth's Atmosphere," submitted complaints to both the NASA Office of Inspector General (OIG) and the NASA Ombudsman regarding NASA's conduct of the NRA. Specifically, the complainant alleged significant regulatory violations and procedural flaws, including conflicts of interest and breaches of confidentiality, in NASA's conduct of the NRA. The complainant also challenged NASA's evaluation of his proposal submitted in response to the NRA. Further, the complainant asserted that he was wrongfully threatened with a lawsuit via e-mail by a NASA Program Manager involved in the conduct of the NRA and that the Agency never adequately responded to his concerns regarding the lawsuit threat.

In response to the complaint, the NASA Ombudsman initiated a review of NASA's conduct of the NRA. Due to the serious nature of the allegations, and to ensure that the Ombudsman's review was conducted appropriately and in a timely manner, the OIG decided to conduct an independent review of NASA's Ombudsman process in relation to the complainant's allegations.

We found many of the complainant's allegations of procedural flaws in NASA's conduct of the NRA to be substantiated, as discussed in detail below. We did not pursue the matter of the lawsuit threat because NASA's Office of General Counsel responded to the complainant in a July 5, 2005, e-mail stating that "neither NASA nor any NASA official intends to pursue litigation against you in relation to matters arising out of your inquiry about the evaluation and selection of proposals under NRA NNH04ZYS004N."

Regarding the allegations of regulatory violations and procedural flaws in NASA's conduct of the NRA, the Ombudsman sent a letter to the complainant on November 2, 2005, that provided the results of his office's review and addressed several initiatives NASA planned for improving the NRA process. The planned initiatives addressed in the letter include establishing a consistent policy regarding the release of information to research investigators, reinforcing confidentiality protocols, and improving procedures for identifying potential conflicts of interest among mail reviewers. We believe that the planned initiatives are prudent measures, and we encourage the Agency to implement them.

However, our independent review also identified deficiencies that were not addressed in the Ombudsman's letter and a need for additional improvements to NASA's NRA process. Specifically, this memorandum addresses

- documentation deficiencies relating to NASA's evaluation and selection process under the NRA;
- conflict of interest concerns regarding NASA's "dual use" of proposing investigators as mail reviewers/panel members; and
- deficiencies regarding clauses and provisions, pertaining to the availability of an Ombudsman review process and protest process, that are required by the FAR and NSF, but were missing from the NRA and were not addressed in the Guidebook.

We were unable to determine whether the specific deficiencies identified, with regard to this particular NRA procurement, had any material impact on the evaluation and disposition of the complainant's proposal. We did not conduct a technical review to examine the relative merits of the proposals considered by the panel. However, there were clearly significant process failures. The Ombudsman's review conducted in response to the complainant's allegations, which included an independent technical assessment from a research scientist external to the Agency, was useful in that it identified material NRA procedural flaws that can be corrected in future NRAs. It also provided some limited assurance that the end result of the NRA evaluation process was appropriate. However, the Ombudsman review process is by no means a substitute for a properly functioning NRA process. Moreover, the deficiencies identified in this memorandum, which go beyond those identified in the Ombudsman review, may have an impact on the Agency's conclusions regarding whether any specific relief to the complainant is warranted.

Our May 26, 2006, draft of this memorandum included six recommendations to correct the identified deficiencies. In its June 15, 2006, response to the draft memorandum, NASA concurred with five of the recommendations; partially concurred with one; and provided completed and planned corrective actions (see Enclosure 3). NASA's corrective actions are responsive to our recommendations. Recommendation 6 is closed based on the corrective action completed; however, recommendations 1, 2, 3, 4 and 5 will remain open for reporting purposes pending verification of NASA's completion of the planned corrective actions.

## *I. Applicable Criteria*

Guidance on the use of NRA is provided in Federal Acquisition Regulation (FAR), Part 35, "Research and Development Contracting," and the corresponding NASA FAR Supplement (NFS) Part 1835, "Research and Development Contracting." Also, the *NASA Guidebook for Proposers Responding to a NASA Research Announcement (NRA)*, January 2005, hereafter referred to as the "Guidebook," provided additional guidance on the NRA proposal, review, and selection process. In addition, the former Office of Earth Science Enterprise (now part of NASA's Science Mission Directorate), which issued the NRA in question, established Office Work Instructions (OWIs)[1] that provide additional procedural guidance regarding the use of NRAs and the related peer review evaluation process.

## *II. Documentation Deficiencies Relating to NASA's Evaluation and Selection Process under NRA NNH04ZYS004N*

In our review of the evaluation and selection process for NRA NNH04ZYSOO4N, we found several documentation deficiencies. Specifically, we found that the required selection statement was not produced and other important evaluation documentation was incomplete or did not accurately capture all pertinent facts and results of the evaluation process. We also found that the mail evaluation forms and panel consensus form relied on for the selections were unsigned, undated, and with one exception did not indicate the reviewers' institutional affiliations.

**NFS-Required Selection Statement Not Produced.** NFS 1835.016-71(d)(6) states:

> The basis for selection of a proposal shall be documented in a selection statement applying the evaluation factors in the NRA. The selection statement represents the conclusions of the selecting official and must be self-contained. It shall not incorporate by reference the evaluations of the reviewers.

Despite that it is required by the NFS, a selection statement was not produced for the NRA in question. The cognizant NASA Program Manager stated that no selection statement was prepared because the OWIs do not require one. We found that, as the Program Manager stated, the OWIs do not require a selection statement but, rather, require the selecting official to review and approve the selection recommendation and sign the selection acceptance and rejection letters. By reviewing the recommendation and selection documentation and interviewing Program staff, we verified that NASA followed the OWI process. However, NFS is higher level guidance than OWI; thus, the inconsistency between NFS and OWI requirements does not absolve the Program of the NFS requirement to produce a self-contained selection statement.

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[1] OWI 7040-Y012B, "Conduct Peer Review," effective date November 13, 2000; and OWI 8310-Y005D, "Solicit and Select Science, Applications, Education, and Technology Investigations," effective date December 28, 2000.

Without a written selection statement, there is no self-contained record of the evaluation process, making it necessary to obtain and integrate information from a variety of NRA documents to ascertain the rationale of a selection decision. For example, in conducting our review, we had to locate and assess various relevant documentation, including the Steering Committee's Power Point presentation, the mail/panel reviews, and the selection acceptance and rejection letters. Such a circuitous path to determining the rationale of a selection decision indicates a lack of transparency, which reduces assurances regarding the propriety of the evaluation and selection process.

**Record of NASA's Evaluation Process Incomplete.** While neither the FAR nor NFS provides specific guidance, the OWI requires that the NRA lead reviewer summarize the mail review results and produce a set of "findings" with all supporting evaluation materials. However, the fact that one mail review was entirely excluded and another was only partly considered was not disclosed anywhere in the evaluation documentation.

The Ombudsman's letter noted that two mail reviews were not fully considered in the overall panel consensus, but it was only through in-depth review of documentation and interviews with the program personnel involved in the evaluations that we were able to corroborate that statement and identify the reasons why the two mail reviews were not fully considered. Specifically, we verified that the NASA evaluation panel excluded Review #5 because the complainant's proposal named that reviewer as a research collaborator and the NASA evaluation panel determined that this represented a conflict of interest. Review #4 was only partially considered because the NASA evaluation panel determined that it lacked sufficient detail to support the "excellent" ratings given by the reviewer and because the review findings were not consistent with those of the other three reviewers.

Appendix C, Section C.3, of the Guidebook, states that "As a general rule, and as based on its deliberations, a peer panel is authorized to wholly or partially accept or reject any . . . mail reviews." (See the Table below for a breakout of reviewers and consideration of their ratings.)

**Table. Breakout of Mail Review Ratings**

| Mail Review | Overall Rating | Fully Considered | Partly Considered | Not Considered due to COI[a] |
|---|---|---|---|---|
| Review 1 | Good | X | | |
| Review 2 | Good | X | | |
| Review 3 | Fair | X | | |
| Review 4 | Excellent | | X | |
| Review 5 | Excellent | | | X |

[a]Conflict of Interest

As part of its review, the Ombudsman's office obtained an independent analysis of both the complainant's proposal and the individual mail reviews (with the exception of Review #5). According to the Ombudsman's letter, the independent reviewer was a "highly qualified and respected member of the atmospheric sciences community" employed by another Federal agency. A representative from the Ombudsman's office told us that the independent reviewer was not made aware of the disposition of Review #4 but reached the same conclusion as the NASA evaluation panel—i.e., that Review #4 was inconsistent with the evaluations of the other three mail reviews and the "excellent" score was not substantiated by supporting detail. We were also told that the independent reviewer's assessment of the complainant's proposal was that it was "rather ordinary." To further examine NASA's rationale for not giving Review #4 full consideration in the panel consensus, we assessed a mail review submitted by that same reviewer but for an "airborne" proposal (a separate category of proposals under the NRA); it was the only other mail review from that particular reviewer. We found the reviewer's mail review for the airborne proposal was similar regarding the lack of detail provided; however, in the case of the airborne proposal, the scores from the reviewer in question were more consistent with those of the other five reviewers and, therefore, the review was given full consideration in the airborne panel consensus.

The Agency's rationale of having relied on the consistency of reviews to discount Review #4 is undermined, in retrospect, by an analysis of the conflict of interest with regard to Review #1 (discussed in Section III below). That is, if Review #1 were excluded, there would be no consensus of reviews; thus, the rationale of discounting Review #4 on the basis of consistency is questionable. Although the Agency's rationale for its treatment of Review #4 is questionable, it is in accordance with the discretionary (and heavily subjective) guidance, noted earlier, in Appendix C, Section C.3, of the Guidebook, which authorizes a peer panel to wholly or partially accept or reject any mail reviews. We find that the Agency's action with regard to the treatment of Review #5 was appropriate under the circumstances (that is, that it was not considered because of an acknowledged conflict of interest). However, because the NRA proposal evaluation documentation does not address the fact that two of five evaluations were not completely considered, it does not provide a complete and accurate statement of record regarding how the evaluation was conducted and the basis for arriving at the final overall disposition.

**Evaluation Forms Not Signed or Dated and Names of Reviewers' Institutions Omitted.** We found a lack of documentable accountability in NASA's use of the individual mail evaluation forms and the panel consensus form for the NRA in question.

The individual mail evaluation forms did not include reviewer signatures or dates and, with one exception, did not indicate the reviewers' institutional affiliations. The panel consensus form contained a signature line for the primary and secondary reviewers, but the signature lines were left blank and only the name of the primary reviewer was indicated on the form. Also, the panel consensus form did not indicate the primary reviewer's institutional affiliations.

We found that there is no specific requirement in the applicable FAR, NFS, or OWI regulations and guidance that mail reviewers sign, date, or indicate their institutional affiliations on the mail evaluation forms. Moreover, NFS 1835.016-71(d)(9) states that "The selecting official may provide to the contracting officer copies of the reviewers' evaluations. Reviewers' names and institutions may be omitted."

The Guidebook states that "preserving the anonymity of the participants in the review process promotes more candid comments than if this practice were not used." However, we believe the resultant lack of documentable accountability is problematic. Furthermore, the NFS language that permits this information to be withheld from the contracting officer—the NASA official ultimately responsible for ensuring the integrity of the process and signing the resultant awards—is imprudent and results in reduced assurance of integrity in the Agency's evaluation/selection process.

**Recommendations, Management's Response, and Evaluation of Management's Response**

**Recommendation 1.** NASA's Office of Procurement, in conjunction with the affected NASA Mission Directorates and Programs, should review all OWIs, Guidebook, and similar NRA peer review guidance used by the Mission Directorates and Programs to ensure that such guidance is appropriate and consistent with applicable higher level Federal and Agency regulations and policies. This guidance should be revised as necessary to address and correct the documentation and evaluation/selection process deficiencies identified herein.

**Management's Response.** NASA's Office of Procurement concurred with the recommendation. NASA's response stated that the Office of Procurement, in conjunction with the affected NASA Mission Directorates and programs will conduct a review that will particularly focus on NFS Part 1835 to ensure that all guidance addresses the documentation and evaluation/selection process deficiencies identified in the draft of this memorandum. NASA's response stated that the review is ongoing and is expected to be completed by December 31, 2006.

**Evaluation of Management's Response.** NASA's corrective action is responsive to the recommendation. However, the recommendation will remain open for reporting purposes pending completion of the Agency's review and verification that the documentation and evaluation/selection process deficiencies identified in this report have been corrected.

**Recommendation 2.** NASA's Office of Procurement, in conjunction with all affected Mission Directorates and Programs, should ensure that all Mission Directorate and Program personnel involved in the NRA peer review process receive training regarding their responsibilities in properly conducting and documenting the evaluation and selection process. This training should specifically address revised processes, procedures, and requirements resulting from the Agency's corrective action in response to Recommendation 1 above.

**Management's Response.** NASA's Office of Procurement concurred with the recommendation. NASA's response stated that, as a result of the review being undertaken in response to Recommendation 1, the Agency will document procedures and guidance more clearly and will train all program personnel who participate in the NRA peer review process. NASA's response stated that initial training will be completed by March 31, 2007.

**Evaluation of Management's Response.** NASA's planned corrective action is responsive to the recommendation. However, the recommendation will remain open for reporting purposes pending completion of the Agency's training of all Mission Directorate and Program personnel involved in the NRA peer review process.

**Recommendation 3.** The NASA Office of Procurement should revise the applicable section(s) of the NFS and other applicable guidance to specifically require that all NRA evaluation forms include the name of the reviewer and the reviewer's institution, and that the forms be signed and dated by the reviewers.

**Management's Response.** NASA's Office of Procurement partially concurred with our recommendation. NASA's response stated that no changes to the NFS are necessary because the NASA Solicitation and Proposal Integrated Review and Evaluation System (NSPIRES) Peer Review Module currently being implemented for NRAs will incorporate electronic signatures and dates for all submitted evaluations.

**Evaluation of Management's Response.** Although NASA management partially concurred with the recommendation, the Agency's completed and planned corrective actions are responsive to the intent of the recommendation. An official from the NASA Office of Procurement stated that the NSPIRES Peer Review Module will be fully implemented in July 2006. The official also stated that the system, when fully implemented, will incorporate electronic signatures and dates, as well as the names of the reviewer's institution, for all submitted evaluations. The recommendation will remain open for reporting purposes pending verification of NASA's implementation of the NSPIRES Peer Review Module, and confirmation that the system identifies electronic signatures, dates, and the names of the reviewer's institution for all evaluations submitted.

## *III. Conflict of Interest Concerns in NASA's Peer Review Process*

We identified concerns relating to NASA's management of conflict of interest issues in its handling of the NRA in question as well as the peer review process in general. Specifically, we found that there was no signed nondisclosure/conflict of interest agreement on file for one of the non-Government mail reviewers for the NRA in question. In addition, we found that NASA's "dual use" of proposing investigators as reviewers (and, in some instances, as panel members) puts the integrity of NASA's peer review process at undue risk.

**Required Nondisclosure/Conflict of Interest Agreement Not Obtained for One Non-Government Reviewer.** The Guidebook, Appendix C, Section C.1, states, "[A]ll reviewers not employed by the U.S. Government must submit a signed Nondisclosure Agreement before they are allowed to review any proposals (see Section E.2 in Appendix E in this Guidebook)." Section E.2 in Appendix E states:

> As discussed in Section C.1 of this Guidebook, every person (other than a Civil Servant) who is asked to serve as reviewer of proposals submitted to NASA must sign a statement concerning the nondisclosure of the proposal materials to which they may have access either as an individual reviewer or as a member of a review panel that will consider the proposal, as well as their obligation to disclose any conflicts of interest that they may have with either the proposing personnel or organizations. Once signed, these agreements are kept on permanent file by NASA, and no proposal materials are sent to a reviewer without confirming that his/her agreement is on file.

However, we found that there was no signed nondisclosure/conflict of interest agreement on file for one of the non-civil servant mail reviewers (for Review #4). The reviewer did not submit a competing proposal under the NRA. Nevertheless, the failure to ensure that agreements are obtained from all non-Government reviewers, as required, results in increased risk of conflicts of interest, improper disclosures, and other potential improprieties that are harmful to the integrity of the Agency's NRA process.

**NASA's "Dual Use" of Proposing Investigators as Reviewers/Panel Members.** The Guidebook establishes procedures designed to identify and prevent possible conflicts of interest in the proposal review process. Specifically, Guidebook, Appendix C, Section C.4, "Conflict of Interest and Confidentiality," states:

> Occasionally, NASA must ask personnel to participate on a panel that will consider one or more proposals for which a reviewer does have acknowledged conflict of interest. In cases like this, the reviewer is excused from the panel during all deliberations of those proposals, and in some cases may also be excused from the deliberations of any other proposals that are judged to be in direct programmatic competition with the conflicted proposals.

For NRA NNH04ZYS004, a non-NASA university research scientist who had also submitted a proposal under the same category of the NRA as the complainant served as the designated primary reviewer/panel member in relation to the complainant's proposal. According to the Ombudsman's letter, NASA determined that assigning the individual as a reviewer was "necessary to ensure that the reviews were staffed by individuals with the necessary expertise to fully evaluate proposals from the relevant areas of research being solicited." The Ombudsman's letter notes that the NRA covered a wide breadth of scientific topics and that a significant number of the scientists involved in the areas of atmospheric science covered by this NRA had also submitted proposals. The letter further states that the number of scientists submitting proposals coupled with the need for a significant number of scientists to review the proposal may have exacerbated the need for "dual use" of potential investigators as evaluators serving in the mail review and panel review processes. Nonetheless, dual use clearly results in a direct conflict of

interest; and, contrary to Guidebook guidelines, this individual was not excused from panel deliberations. In fact, we were told that, in his role as the designated primary reviewer/panel member, the individual actually led the panel deliberations. In addition, we found that, while this individual did not participate in the panel deliberations of his own proposal, his proposal was selected for funding under the NRA, which gives further rise to the appearance of impropriety.

We were unable to determine from our review of evaluation documentation relating to the NRA and our interviews with NASA program officials whether the participation of the primary reviewer, or the participation of the reviewer without a signed conflict of interest agreement, negatively impacted the evaluation results of the complainant's proposal. However, the use of proposing investigators as reviewers (and in some instances as panel members) puts the integrity of NASA's peer review process at undue risk. In fact, we have received multiple complaints over the past few years alleging improprieties relating to conflicts of interest attributable to NASA's dual use of investigators/reviewers in the Agency's peer review process.

For NRA NNH04ZYS004N, NASA used its SYS_EYFUS automated system to manage research solicitation activity, plan for the receipt of research proposals, track the receipt and peer review of these proposals, and manage the funded research. The Customer Support Manager for the NASA Research and Education Support Services (NRESS) contractor informed us that NASA is migrating to a new automated system called NSPIRES. She stated that, compared to SYS_EYFUS, NSPIRES has better capabilities for identifying qualified reviewers and flagging potential conflicts of interest between proposing investigators and reviewers.

Although NSPIRES may help in this regard, we propose that additional proactive measures could be taken to eliminate or minimize the dual use of proposing investigators/reviewers in an effort to ensure the integrity of the Agency's peer review process. For example, measures could include coordinating with other Federal Agencies such as the National Science Foundation and the National Oceanic and Atmospheric Administration to seek ways to expand the pool of qualified reviewers for scientific research areas of mutual interest. Additional measures could include

- revising NASA's peer review guidance to incorporate a clearer definition of conflict of interest issues and policies (to include, for example, specific conflict of interest scenarios commonly encountered in NASA's peer review process),
- requiring higher-level approval of the use of proposing investigators to serve as reviewers (dual use) in a NASA peer review, and
- establishing improved management controls for verifying that nondisclosure/conflict of interest agreements are obtained for all non-Government reviewers.

On January 3, 2006, the Associate Administrator for NASA's Science Mission Directorate (SMD) issued to all SMD staff a memorandum implementing revised directorate peer review policy. The memorandum states, in part, that "The issues of

conflict of interest and confidentiality are of critical importance to ensure the fairness and credibility of the peer review process" (see Enclosure 1 for a copy of the memorandum). The revised SMD policy defines "conflict of interest" as it relates to peer review panel members, establishes a waiver process requiring approval from the Assistant Associate Administrator for Science when it is necessary to use reviewers who have a conflict of interest, and requires that a written log be kept during peer review panel meetings to document the handling of potential conflicts of interest. We commend the SMD for taking the initiative to improve its peer review process and we encourage NASA to implement similar policy on an Agency-wide basis.

**Recommendation, Management's Response, and Evaluation of Management's Response**

**Recommendation 4.** The NASA Office of Procurement, in conjunction with all affected Mission Directorates and Programs, should revise or establish NASA peer review guidance to ensure that adequate management controls are in place to mitigate the potential for conflicts of interest, including minimizing or eliminating the dual use of proposing investigators/reviewers.

**Management's Response.** NASA's Office of Procurement concurred with the recommendation. NASA's response stated that it issued written direction to the contractor that supports the peer review process prohibiting the contractor from distributing NRA proposal documents without a signed non-disclosure agreement in hand. NASA also stated that as part of the ongoing policy/guidance review discussed in response to Recommendation 1, the Office of Procurement is working with all Mission Directorates and Programs to establish Agency-wide controls to mitigate potential conflicts of interests for all peer review activities. NASA stated that a written Agency-wide policy for defining and mitigating conflicts of interest for peer reviews will be instituted by September 30, 2006.

**Evaluation of Management's Response.** NASA's completed and planned corrective actions are responsive to the recommendation. NASA officials provided a copy of the direction that was issued to the NRESS contractor prohibiting the contractor from distributing NRA proposal documents without a signed non-disclosure agreement in hand. The recommendation will remain open for reporting purposes pending NASA's formal issuance of an Agency-wide policy for defining and mitigating conflicts of interest for peer reviews, including minimizing or eliminating the dual use of proposing investigators/reviewers.

## *IV. NRA Missing Required Clauses and Provisions Relating to Availability of Ombudsman Review Process and Protest Process*

The complainant alleged that NASA failed to note, in the NRA and the Guidebook, the availability of an Ombudsman review process. Our review substantiated his allegation on this matter. We also found that other required solicitation clauses and provisions were absent from the NRA and not addressed in the Guidebook (see Enclosure 2 for the full text of clauses and provisions).

NFS 1815.7003 requires that NASA's "Ombudsman" clause (NFS clause 1852.215-84) be included in "all solicitations (including draft solicitations) and contracts." The purpose of this clause is to notify offerors and awardees of the availability of a designated NASA Ombudsman to hear and facilitate the resolution of concerns during the pre-award and post-award phases of an acquisition. However, the clause was absent from the NRA and the availability of an Ombudsman review process is not addressed in the Guidebook.

Furthermore, we found that a required clause and required provisions pertaining to the availability of a protest mechanism for offerors were also absent from the NRA and not addressed in the Guidebook. Specifically, FAR 33.106(a) requires that provision 52.233-2, "Service of Protest," be included in "solicitations for contracts expected to exceed the simplified acquisition threshold" ($100,000).[2] Also, FAR 33.106(b) requires that clause 52.233-3, "Protest After Award," be included in "all solicitations and contracts." In addition, NFS 1833.106-70 requires that provision 1852.233-70, "Protests to NASA," be included in "all solicitations." The purpose of the clause and provisions is to notify offerors of the availability of a protest mechanism through either the Agency or the Government Accountability Office.

The Ombudsman and protest mechanisms are designed to ensure the integrity of the procurement process by providing aggrieved offerors (or other interested parties) a venue for receiving a fair and objective hearing of their concerns. However, because the required Ombudsman and protest clauses and provisions were absent from the NRA and not addressed in the Guidebook, offerors (including the complainant) were not made aware of the availability of these important mechanisms. It was much later, and only through subsequent discussions with NASA personnel, that the complainant learned of the Ombudsman review process.

### Recommendations, Management's Response, and Evaluation of Management's Response

**Recommendations 5.** The NASA Office of Procurement, in conjunction with all affected Mission Directorates and Programs, should ensure that the required Ombudsman

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[2] This provision was applicable to the NRA in question because awards under that NRA were expected to exceed $100,000. The NRA stated that "The typical annual budget for a project is expected to be $100,000-$350,000."

and protest clauses and provisions are included in all future NRAs and that the availability of these processes are addressed in the Guidebook.

**Management's Response.** NASA's Office of Procurement concurred with the recommendation. NASA's response stated that the Guidebook and all future NRAs will address the availability of the Ombudsman review process, and when the NRA is expected to result in a contract, will also include appropriate protest clauses. NASA's response stated that the language will be included in NRAs issued after September 30, 2006.

**Evaluation of Management's Response.** In response to our subsequent clarification questions, an official from NASA's Office of Procurement confirmed that the Guidebook will be revised to address both the availability of the protest process for contracts and an appeals process for grants and cooperative agreements. The official also confirmed that all future NRAs will address the availability of the Ombudsman review process and that the Ombudsman clause will be included in all future NRAs as well as in the Guidebook. The official further stated that the expanded language will inform all potential proposers of their rights and of the procedures to follow when inquiring about the terms, conditions, and administration of any NRA that the Agency issues, whether the particular solicitation results in a contract, grant, or cooperative agreement.

NASA's planned corrective action is responsive to the recommendation. However, the recommendation will remain open for reporting purposes pending completion of the planned corrective action.

**Recommendations 6.** In light of the additional deficiencies identified in this memorandum, which go beyond those identified in the Ombudsman review, the Assistant Administrator for Procurement, in coordination with the Assistant Associate Administrator for Science, should reconsider whether any specific relief to the complainant is warranted.

**Management's Response.** NASA's Office of Procurement concurred with the recommendation. NASA's response states that the Office of the Assistant Administrator for Procurement, in coordination with the Associate Administrator for Science, reconsidered whether any specific relief to the complainant was warranted, in light of the additional deficiencies identified in the OIG draft memorandum. NASA determined that none of the newly identified procedural deficiencies cited in the OIG memorandum had an impact on the scientifically based evaluation. As a result of its joint reconsideration, the Assistant Administrator for Procurement and the Associate Administrator for Science concluded that no specific relief to the complainant is warranted.

**Evaluation of Management's Response.** NASA's completed actions are responsive to the recommendation. The recommendation is closed.

We appreciate the courtesies extended to our staff. Questions should be directed to Mr. Joseph Kroener, Director of Procurement Audits, at (202) 358-2558.

Evelyn R. Klemstine

3 Enclosures

cc:
Administrator
Chief Acquisition Officer
General Counsel
Ombudsman
Director, Management Systems Division

National Aeronautics and
Space Administration
**Headquarters**
Washington, DC 20546-0001

SMD

January 3, 2006

TO: Science Mission Directorate

FROM: Associate Administrator for Science Mission Directorate

SUBJECT: SMD Policy on Conflicts-of-Interest for Peer Review Panels

The quality of NASA's science program rests on our policy of open, competitive solicitations and on the use of peer review to establish the merit of the proposals that we receive. The issues of conflict-of-interest and confidentiality are of critical importance to ensure the fairness and credibility of the peer review process.

All NASA personnel and all reviewers of NASA proposals must avoid not only actual but also any apparent conflicts-of-interest and must maintain confidentiality about all activities involved in the review process.

I am directing all SMD personnel to follow the enclosed Science Mission Directorate when establishing and managing peer review panels for all SMD solicitations including Announcement of Opportunity, Nasa Research Announcements, and Cooperative agreement Notices.

I am delegating to Paul Hertz, Assistant Associate Administrator for Science, the task of ensuring that these policies are followed for SMD's peer reviews. I am also delegating to him the authority to approve waiver requests, as specified in the Policy.

Any questions concerning this Policy should be directed to Dr. Hertz.

Mary L. Cleave

Enclosure

## SCIENCE MISSION DIRECTORATE POLICY: CONFLICTS-OF-INTEREST FOR PEER REVIEW PANELS

Approved by Mary L. Cleave
Associate Administrator for Science Mission Directorate
January 3, 2006

All peer review panels managed by the Science Mission Directorate will be conducted in compliance with the following policies regarding conflicts-of-interest for members of the peer review panel.

Section 1. Guiding Principles

(a) The issues of conflict-of-interest and confidentiality are of critical importance to ensure the fairness and credibility of the peer review process. All NASA personnel and all reviewers of NASA proposals are directed to avoid not only actual but also any apparent conflicts-of-interest and to maintain confidentiality about all activities involved in the review process.

(b) Review organizers shall make every effort to prevent peer reviewers from being exposed to a proposal with which a conflict-of-interest is known to exist.

(c) Generally, peer reviewers have potential non-statutory or "scientific ethics" conflicts–of-interest if they are associated with a proposing institution and/or are participating in a proposal under evaluation. Reviewers who are Federal employees or IPA's are also subject to statutory conflict-of-interest restrictions under criminal statute 18 USC §208.

(d) In accordance with the *Proposal Peer Review Non-Disclosure Agreement and Conflict of Interest Avoidance Statement*, which NASA Science Management policy (NPR 1080.1) requires non Federal employees to sign, peer reviewers shall be personally responsible for immediately identifying any conflicts-of-interest they may encounter when participating in the review process and for notifying the cognizant NASA Program Officer. In addition, reviewers shall be personally responsible for maintaining the confidentiality of each proposal that they handle or to which they may be exposed during the course of the review process.

(e) Regardless of whether the review process is by mail or by a convened panel, the presiding NASA Program Officer addresses and adjudicates conflicts-of-interest. Questions of interpretation or application of these policies should be brought to the designated Directorate official (i.e., the Assistant Associate Administrator for Science). The Office of General Counsel and the Office of Procurement will be consulted whenever necessary to assist in resolving issues.

(f) Additional guidance is provided in NPR 1080.1, *NASA Science Management*, Section 2.6, and the *Guidebook for Proposers Responding to a NASA Research Announcement*, Section C.4.

Section 2. Policy

(a) Subpanel-level Conflicts-of-interest

A subpanel is a group of reviewers that are collectively reviewing the same proposals in the same room (or on the same telecon) at the same time. A single solicitation may require multiple subpanels to review all submitted proposals. Some research programs use the term "panel" to refer to a subpanel as defined here.

(i) Principal Investigators, Co-Investigators, and any other team members that would actively perform an element of the proposed investigation, or benefit financially from the proposed investigation, are considered to have a subpanel-level conflict-of-interest. Merely providing expert advice to the investigation team does not necessarily create a conflict.

(ii) Individuals with subpanel-level conflicts-of-interest shall be prohibited from reviewing any proposal that is reviewed by the same subpanel as their proposal and any proposal that is in direct competition (e.g., similar objectives, similar methodologies) with their proposal.

(iii) Individuals shall not serve as reviewers on any subpanel that is considering a proposal with which they have a subpanel-level conflict–of-interest, unless a waiver is approved (see Section 3 below).

(b) Proposal-level Conflicts-of-interest

(i) The conflicts-of-interest identified in Section 2(a)(i) and Section 2(a)(ii) are also applicable to proposal-level conflicts-of-interest.

(ii) Individuals from the same institution as the proposing organization, as the Principal Investigator, or as any Co-Investigator have a proposal-level conflict-of-interest with that proposal. Individuals from separate and distinct campuses within the same institution are not normally considered as having a proposal-level conflict-of-interest (e.g., UCLA and UCSD are typically considered to be separate proposing institutions).

(iii) In addition, an individual has a proposal-level conflict-of-interest if any of the personnel identified in the proposal are closely related to the reviewer (e.g., household or family members, partners, or professional associates); or if the individual has a financial interest in a proposing organization (e.g., ownership of stock or securities, employment, or arrangements for prospective employment).

(iv) Individuals with proposal-level conflicts-of-interest shall not review any proposal with which they are conflicted and shall be excused from panel discussions of proposals for which a conflict exists, unless a waiver is approved (see Section 3 below).

(v) In some cases, the individual shall also be excused from the discussion of proposals other than those giving rise to the conflicts-of-interest if these proposals are in direct competition (similar objectives, similar methodologies, etc.) with those proposals giving rise to the conflict.

Section 3. Waivers

In rare cases, NASA may require the use of conflicted reviewers despite their having a potential or actual conflict-of-interest.

(a) Under such circumstances, the NASA Program Officer shall submit a waiver request containing, at a minimum, identification of the potential reviewer, identification of the conflicted proposal(s), nature of the conflict, justification for needing the participation of the conflicted reviewer, and the mitigations that will be used to ensure impartiality in the evaluation process.

(b) In such cases a waiver must be requested in writing and approved by the designated Directorate official (i.e., the Assistant Associate Administrator for Science). This waiver shall be concurred in by the Headquarters Office of General Counsel and the Office of Procurement. The Selecting Official shall be notified of all waivers.

Section 4. Documentation

(a) A written log must be kept of all actual and potential conflicts-of-interest that are raised during a subpanel review. The written log is a required work product of the subpanel. It will be maintained with other records of the subpanel meeting.

(b) The NASA Program Officer must ensure that an individual is assigned the responsibility for maintaining the log. Appropriate individuals include, but are not limited to, the NASA official leading the subpanel, the community-based chair or co-chair of the subpanel, or the subpanel's executive secretary.

(c) The written log must contain, at a minimum, all actual and potential conflicts-of-interest that are raised during the subpanel meeting, the disposition of the issue, and any mitigation that is undertaken.

## Required Clauses and Provisions Relating to Availability of Ombudsman Review Process and Protest Process

**52.233-2 Service of Protest.**

As prescribed in Federal Acquisition Regulation (FAR) 33.106, insert the following provision:

SERVICE OF PROTEST (AUG 1996)

(a) Protests, as defined in FAR 33.101, that are filed directly with an agency, and copies of any protests that are filed with the General Accounting Office (GAO), shall be served on the Contracting Officer (addressed as follows) by obtaining written and dated acknowledgment of receipt from _____. [*Contracting Officer designate the official or location where a protest may be served on the Contracting Officer.*]

(b) The copy of any protest shall be received in the office designated above within one day of filing a protest with the GAO.

(End of provision)

**52.233-3 Protest after Award.**

As prescribed in FAR 33.106(b), insert the following clause:

PROTEST AFTER AWARD (AUG 1996)

(a) Upon receipt of a notice of protest (as defined in FAR 33.101) or a determination that a protest is likely (see FAR 33.102(d)), the Contracting Officer may, by written order to the Contractor, direct the Contractor to stop performance of the work called for by this contract. The order shall be specifically identified as a stop-work order issued under this clause. Upon receipt of the order, the Contractor shall immediately comply with its terms and take all reasonable steps to minimize the incurrence of costs allocable to the work covered by the order during the period of work stop-page. Upon receipt of the final decision in the protest, the Contracting Officer shall either—

(1) Cancel the stop-work order; or

(2) Terminate the work covered by the order as provided in the Default, or the Termination for Convenience of the Government, clause of this contract.

(b) If a stop-work order issued under this clause is canceled either before or after a final decision in the protest, the Contractor shall resume work. The Contracting Officer shall make an equitable adjustment in the delivery schedule or contract price, or both, and the contract shall be modified, in writing, accordingly, if—

(1) The stop-work order results in an increase in the time required for, or in the Contractor's cost properly allocable to, the performance of any part of this contract; and

(2) The Contractor asserts its right to an adjustment within 30 days after the end of the period of work stoppage; *provided*, that if the Contracting Officer decides the facts justify the action, the Contracting Officer may receive and act upon a proposal at any time before final payment under this contract.

(c) If a stop-work order is not canceled and the work covered by the order is terminated for the convenience of the Government, the Contracting Officer shall allow reasonable costs resulting from the stop-work order in arriving at the termination settlement.

(d) If a stop-work order is not canceled and the work covered by the order is terminated for default, the Contracting Officer shall allow, by equitable adjustment or otherwise, reasonable costs resulting from the stop-work order.

(e) The Government's rights to terminate this contract at any time are not affected by action taken under this clause.

(f) If, as the result of the Contractor's intentional or negligent misstatement, misrepresentation, or miscertification, a protest related to this contract is sustained, and the Government pays costs, as provided in FAR 33.102(b)(2) or 33.104(h)(1), the Government may require the Contractor to reimburse the Government the amount of such costs. In addition to any other remedy available, and pursuant to the requirements of Subpart 32.6, the Government may collect this debt by offsetting the amount against any payment due the Contractor under any contract between the Contractor and the Government.

(End of clause)

**1852.233-70 Protests to NASA.**

As prescribed in 1833.106-70, insert the following provision:

PROTESTS TO NASA
(OCTOBER 2002)

Potential bidders or offerors may submit a protest under 48 CFR Part 33 (FAR Part 33) directly to the Contracting Officer. As an alternative to the Contracting Officer's consideration of a protest, a potential bidder or offeror may submit the protest to the Assistant Administrator for Procurement, who will serve as or designate the official responsible for conducting an independent review. Protests requesting an independent review shall be addressed to Assistant Administrator for Procurement, NASA Code H, Washington, DC 20546-0001.

(End of provision)

**1852.215-84 Ombudsman.**

As prescribed in 1815.7003, insert the following clause:

OMBUDSMAN
(OCTOBER 2003)

(a) An ombudsman has been appointed to hear and facilitate the resolution of concerns from offerors, potential offerors, and contractors during the preaward and postaward phases of this acquisition. When requested, the ombudsman will maintain strict

confidentiality as to the source of the concern. The existence of the ombudsman is not to diminish the authority of the contracting officer, the Source Evaluation Board, or the selection official. Further, the ombudsman does not participate in the evaluation of proposals, the source selection process, or the adjudication of formal contract disputes. Therefore, before consulting with an ombudsman, interested parties must first address their concerns, issues, disagreements, and/or recommendations to the contracting officer for resolution.

(b) If resolution cannot be made by the contracting officer, interested parties may contact the installation ombudsman, _____ [Insert name, address, telephone number, facsimile number, and e-mail address]. Concerns, issues, disagreements, and recommendations which cannot be resolved at the installation may be referred to the NASA ombudsman, the Director of the Contract Management Division, at 202-358-0445, facsimile 202-358-3083, e-mail james.a.balinskas@nasa.gov. Please do not contact the ombudsman to request copies of the solicitation, verify offer due date, or clarify technical requirements. Such inquiries shall be directed to the Contracting Officer or as specified elsewhere in this document.

(End of clause)

National Aeronautics and
Space Administration
**Headquarters**
Washington, DC 20546-0001

June 15, 2006

Reply to Attn of:

Deputy Chief Acquisition Officer/Assistant Administrator for Procurement

TO: W/Assistant Inspector General for Auditing

FROM: HK/Acting Director, Contract Management Division

SUBJECT: Agency Response to OIG Draft Memorandum on Improvements Needed in NASA's Evaluation and Selection Processes under NASA Research Announcements, Assignment No. S-06-003

Enclosed is the Agency response to the subject draft memorandum dated May 25, 2006.

Please feel free to call the undersigned at 202-358-4593 if you have any questions or require further coordination on this matter.

Lou Becker

Enclosure

SUBJECT: OIG's "Draft Memorandum on Improvements Needed in NASA's Evaluation and Selection Processes under NASA Research Announcements (Assignment No. S-06-003)"

**Recommendation 1:**

Directorates and Programs should review all OWI's, Guidebooks, and similar NRA peer review guidance used by the Mission Directorates and Programs to ensure that such guidance is appropriate and consistent with applicable higher level Federal and Agency regulations and policies. This guidance should be revised as necessary to address and correct the NASA's Office of Procurement, in conjunction with the affected NASA Mission documentation and evaluation/selection process deficiencies identified herein.

Response:
NASA's Office of Procurement, in conjunction with affected NASA Mission Directorates and Programs, will review all OWI's, Guidebooks, and similar NRA peer review guidance to ensure they are appropriate and consistent with applicable higher level Federal and Agency regulation and policies. In particular, this review will focus on NASA Federal Acquisition Regulation (FAR) Supplement (NFS) 1835 to ensure that all guidance addresses the documentation and evaluation/selection process deficiencies identified in OIG report S-06-003. The Office of Procurement has already begun this review as a result of the Ombudsman report which was issued late last year, and expects to complete it by December 31, 2006.

Request this recommendation be closed for reporting purposes.

**Recommendation 2:**

NASA's Office of Procurement, in conjunction with the affected NASA Mission Directorates and Programs, should ensure that all Mission Directorate and Program personnel involved in the NRA peer review process receive training regarding their responsibilities in properly conducting and documenting the evaluation and selection process. This training should specifically address revised processes, procedures, and requirements resulting from the Agency's corrective action in response to Recommendation 1 above.

**Recommendation 3:**

The NASA Office of Procurement should revise applicable sections of the NFS and other applicable guidance to specifically require that all NRA evaluation forms include the name of the reviewer and the reviewer's institution, and that the forms be signed and dated by reviewers.

Response:
Partially Concur. The NSPIRES Peer Review Module being implemented (Summer 2006) for NRAs incorporates electronic signatures and dating for all submitted evaluations. NASA will continue to document the names and assignments of all reviewers who contribute to the NRA evaluation process. However, only the final evaluation form constitutes the official record of the peer review's findings regarding the research proposals evaluated under the NRA process; this is the record of the peer review that is provided to the grant officer. This record represents the consensus findings of the reviewers and is not attributable to any one individual. No changes to the NFS are necessary.

Request that this recommendation be closed for reporting purposes.

**Recommendation 4:**

The NASA Office of Procurement, in conjunction with the affected NASA Mission Directorates and Programs should revise or establish NASA peer review guidance to ensure that adequate management controls are in place to mitigate the potential for conflicts of interest, including minimizing or eliminating the dual use of proposing investigators/reviewers.

Response:
Concur. As noted in the OIG report, certain of the affected Mission Directorates and Programs have already put in place a policy for defining and mitigating conflicts of interest in peer reviews. NASA has already issued written direction to contractors that support the peer review process prohibiting them from distributing NRA proposal documents without a signed non-disclosure agreement in hand. As part of the on-going policy/guidance review discussed in response to Recommendation 1, above, the Office of Procurement is working with all Mission Directorates and Programs to establish Agency-wide controls to mitigate potential conflicts of interests for all peer review activities.

A written Agency-wide policy for defining and mitigating conflicts of interest for peer reviews will be instituted by September 30, 2006.

**Recommendation 5:**

The NASA Office of Procurement, in conjunction with the affected NASA Mission Directorates and Programs, should ensure that the required Ombudsman and protest clauses and provisions are included in future NRA's and that the availability of these processes is addressed in the Guidebook.

Response:
Concur. The Guidebook and all future NRAs will address the availability of the Ombudsman review process, and when the NRA is expected to result in a contract, will also include appropriate protest clauses. The Office of Procurement will work with the Office of General Counsel to establish appropriate language for inclusion in future NRAs that recognizes the rights to protest procedures.

This language will be included in NRAs issued after September 30, 2006 and we request that this recommendation be closed for reporting purposes.

**Recommendation 6:**

In light of the additional deficiencies identified in the memorandum, which go beyond those identified in the Ombudsman review, the Assistant Administrator for Procurement, in coordination with the Assistant Associate Administrator for Science, should reconsider whether any specific relief to the complainant is warranted.

Response:
Concur. The Office of the Assistant Administrator for Procurement, in coordination with the Associate Administrator for Science, has reconsidered whether any specific relief to this complaint is warranted, in light of the additional deficiencies identified in the OIG memorandum. We have concluded that none of the newly identified procedural deficiencies cited in the OIG memorandum impact the scientifically based evaluation that concluded that the complainant's proposal should not be selected. NASA's evaluation of the scientific merit of the complainant's proposal was fully validated by the independent scientific review which was performed as part of the Ombudsman review. As a result of this joint reconsideration, the Assistant Administrator for Procurement and the Associate Administrator for Science concur that no specific relief to the complainant is warranted.

Request that this recommendation be closed for reporting purposes.