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Decision

Matter of: Lockheed Martin Corporation; Northrop Grumman Systems Corporation--Costs

File: B-410719.8; B-410719.9

Date: December 12, 2016

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DIGEST

1. Protesters' requests for recommendation for reimbursement of costs of filing and pursuing their protests are granted, where the agency delayed taking corrective action until after submission of the agency reports, a hearing, and an alternative dispute resolution conference, and the protests were clearly meritorious on the record submitted by the agency.

2. Reimbursement of costs is not recommended for protest grounds that are readily severable from the successful challenges.

DECISION

Lockheed Martin Corporation (Lockheed), of Bethesda, Maryland, and Northrop Grumman Systems Corporation (Northrop), of Linthicum Heights, Maryland, request that our Office recommend that they be reimbursed the reasonable costs of filing and pursuing their protests challenging the award of a contract to Raytheon Company (Raytheon), of Tewksbury, Massachusetts, under request for proposals (RFP) No. FA8730-13-R-0001, issued by the Department of the Air Force as part of the Three-Dimensional Expeditionary Long-Range Radar (3DELRR) acquisition. We dismissed the protests after the Air Force advised our Office that it intended to take corrective action that would render both protests academic. Lockheed and

Northrop argue that their protests were clearly meritorious and that the agency's corrective action was unduly delayed.

We grant in part the requests that we recommend reimbursement of costs and deny the requests in part.

BACKGROUND

The Air Force's 3DELRR program is a multi-phase procurement to acquire a new long-range ground-based radar system to identify, track, and report aerial targets. The protests underlying this cost claim concerned the pre-engineering and manufacturing development stage of the procurement, in which the Air Force, in August 2012, awarded contracts to Lockheed, Northrop, and Raytheon for the development, review, and testing of prototype radar systems. On November 14, 2013, the Air Force issued the RFP for the next stage of the 3DELRR program. RFP § M at 2. The acquisition was structured as a modified best-value competition under Federal Acquisition Regulation part 15. Id. ¶ 1.1. Proposals were to be evaluated as acceptable or unacceptable on the technical and small business participation factors,¹ with an unacceptable rating on any factor or subfactor rendering the proposal ineligible for award. Id. ¶ 2.1. The RFP contemplated award of a single contract for the engineering and manufacturing and limited production of the chosen system to the offeror with acceptable ratings for the non-price factors and the lowest evaluated price. Id. ¶ 1.1.1.

All three proposals were evaluated as acceptable on all non-price factors and subfactors, and on October 6, 2014, the Air Force made award to Raytheon as the offeror with the lowest evaluated price. After the agency provided debriefings to Northrop and Lockheed, both firms filed timely protests with our Office, on October 21 and 22, respectively, challenging the award to Raytheon.² Both protesters alleged that the agency's price and technical evaluations were flawed.

As relevant here, Northrop alleged that the agency conducted misleading discussions with regard to the use of independent research and development

¹ In addition, offerors proposing to exceed a certain performance threshold--termed the firm track range requirement--could receive a decrement of up to \$155 million from their proposed prices depending on the amount by which the threshold was exceeded. Here, all three offerors received the full \$155 million decrement, which was subtracted from each offeror's total evaluated price.

² Northrop's protest and two supplemental protests were docketed as B-410719, B-410719.4, and B-410719.7. Lockheed's protest and three supplemental protests were docketed as B-410719.2, B-410719.3, B-410719.5, and B-410719.6. Our Office consolidated the protests on November 18, prior to the submission of the first agency report.

(IR&D) funds. Specifically, the Air Force had issued evaluation notices to both Northrop and Raytheon regarding their proposed use of IR&D funds to lower the direct charges to the contract. Northrop Comments & Second Supp. Protest, Dec. 8, 2014, exh. 1, Northrop Evaluation Notice NG-K-011, at 2; Agency Report (AR), Tab 86, Raytheon Evaluation Notice RAY-K-016, at 2. These evaluation notices described the agency's view that IR&D funds were unallowable as indirect charges and must instead be charged directly to the contract. *Id.* In response, Raytheon challenged the Air Force's interpretation, arguing that it was inconsistent with ATK Thiokol v. United States, 598 F.3d 1329 (Fed. Cir. 2010). AR, Tab 86a, Raytheon Response to Evaluation Notice RAY-K-016, at 3. The Air Force then reversed its position on the use of IR&D funds to permit indirect charges. See, e.g., AR, Tab 150, Final Source Selection Authority Decision Briefing, at 45 (allowing Raytheon to propose [DELETED] of IR&D funds in order to reduce direct costs to the contract). Although the Air Force did not directly communicate the change in its position to Raytheon, it allowed Raytheon to propose IR&D funds with no further objection. *Id.* Despite this change, the agency never informed Northrop that offerors could propose to use IR&D funds while not allocating them as direct charges to the contract. Northrop contended that the agency's failure to communicate its revised position constituted misleading discussions. Northrop Comments & Second Supp. Protest, Dec. 8, 2014, at 43-44.

In the case of Lockheed, it asserted that Raytheon's final design for its transmit/receive line replaceable unit (TR-LRU), which was identified as a critical technology element³ (CTE), contained an untested design change such that the final TR-LRU design could not be assessed at technology readiness level⁴ (TRL) 6. Lockheed Second Supplemental Protest at 13. The RFP provided that all CTEs

³ The Air Force defined a critical technology element as follows:

A technology element is 'critical' if the system being acquired depends on this technology element to meet operational requirements (within acceptable cost and schedule limits) and if the technology element or its application is either new or novel or in an area that poses major technological risk during detailed design or demonstration.

AR, Tab 117fm, TRA Report, at 12 (quoting Department of Defense, Technology Readiness Assessment (TRA) Deskbook (July 2009)).

⁴ TRLs are standard industry ratings scaled from 1 (low) to 9 (high) used to assess the maturity of a technology for a particular use. AR, Tab 117ar, TRA Overview, at 7. A technology rated at TRL 6 would be a "[r]epresentative model or prototype system, which is well beyond that of TRL 5, [and which] is tested in a relevant environment. Represents a major step up in a technology's demonstrated readiness. Examples include testing a prototype in a high-fidelity laboratory environment or in a simulated operational environment." *Id.* at 9 (emphasis omitted).

that were modified after the preliminary design review must be substantiated at a minimum of TRL 6.⁵ AR, Tab 6t, RFP § M ¶¶ 2.4.1, 2.4.1.3. The RFP also provided that a proposal that did not clearly meet the minimum requirements of the solicitation would be found technically unacceptable. Id. ¶ 2.2. Although Raytheon modified its TR-LRU design between its tested and final proposals, the Air Force did not obtain test data to substantiate performance at TRL 6. Nevertheless, the Air Force concluded that Raytheon's final design was technically acceptable. Lockheed argued that the Air Force erred in its evaluation because, under the terms of the RFP, it did not have an adequate basis for this conclusion.

The Air Force filed its initial agency report on November 25. After the parties filed supplemental briefings, our Office scheduled a hearing. GAO Hearing Confirmation Notice, Jan. 2, 2015. We asked the agency to provide witnesses who could respond to several protest issues, including, but not limited to, the agency's evaluation of the offerors' achievement of TRL 6 and the agency's communications to offerors relating to the use of IR&D funds. Id. at 2-3. The hearing took place on January 6; the parties filed their post-hearing comments 4 days later. Northrop Post-Hearing Comments, Jan. 10, 2015; Raytheon Post-Hearing Comments, Jan. 10, 2015; Air Force Post Hearing Comments, Jan. 10, 2015.

On January 15, the GAO attorney assigned to the protests held alternative dispute resolution (ADR) in the form of outcome prediction and indicated that the protest would likely be sustained on two grounds: Northrop's allegation that the Air Force conducted misleading discussions in respect of the allowability of future IR&D costs, and Lockheed's challenge to the agency's evaluation of Raytheon TR-LRU at TRL 6.⁶ The GAO attorney indicated that her recommendation would likely be that

⁵ "The Government will evaluate the Offeror's proposed design solution and determine if the subfactor has been met based on [. . .] [s]ubstantiation of at least a Technology Readiness Level 6 (TRL 6) for all Critical Technology Elements (CTEs) of the design solution that have changed since the Pre-EMD Preliminary Design Review (PDR). One CTE must be a Gallium Nitride (GaN) High Power Amplifier (HPA)-based Transmit/Receive (T/R) module." AR, Tab 6t, § M, ¶¶ 2.4.1, 2.4.1.3.

⁶ Pursuant to GAO's Bid Protest Regulations and our established practice, the GAO attorney handling a protest may conduct "outcome prediction" ADR by advising the parties of the attorney's views as to the likely outcome of the protest. See Pond Sec. Grp. Italia JV--Costs, B-400149.2, Mar. 19, 2009, 2009 CPD ¶ 61 at 3 n.1.

A GAO attorney will engage in this form of ADR only if there is a high degree of confidence regarding the outcome. Although the outcome prediction reflects the view of the GAO attorney and, generally, that of a supervisor as well, it is not a decision of our Office, and it does not bind our Office should issuance of a written decision remain appropriate. See T Square Logistics Servs. Corp., Inc.--Costs, B-297790.6, June 7, 2007, 2007 CPD ¶ 108 n.1.

the Air Force reevaluate the technological readiness level of Raytheon's CTE (reopening technical discussions with all three offerors if necessary), reopen cost/price discussions with all three contractors to explain its current view of the allowability of IR&D costs, and permit submission of final proposal revisions.

On January 16, the Air Force requested that we dismiss the protest on the basis that the following proposed corrective action would render the protest academic:

The Air Force intends to reopen discussions concerning the technical evaluation of Raytheon's Technology Readiness Level in accordance with Section M, Paragraph 2.4.1.3 of the RFP. In addition, the Air Force intends to reopen discussions with all offerors to clarify the allowability of Independent Research and Development (IR&D) as it relates to the cost/price evaluation. The Air Force reserves the right to take any other corrective action it deems appropriate.

Notice of Corrective Action, Jan. 16, 2015, at 1.

On January 21, we dismissed the protests. Northrop Grumman Sys. Corp.; Lockheed Martin Corp., B-410719 et al., Jan. 21, 2015 (unpublished decision). These requests for a recommendation of reimbursement of protest costs followed.

On January 23, Raytheon filed a bid protest at the United States Court of Federal Claims (COFC) challenging the Air Force's decision to take corrective action.⁷ Raytheon Co. v. United States, 121 Fed. Cl. 135, 138 (2015), aff'd 809 F.3d 590 (Fed. Cir. 2015). Raytheon argued that the Air Force's decision to take corrective action with respect to both the misleading discussions issue and the TRL 6 issue was arbitrary, capricious, and unreasonable. Id. at 150. The COFC denied Raytheon's protest, holding that the Air Force had a reasonable basis for each aspect of its proposed corrective action. Id. at 163, 165. In this respect, the COFC concluded that "the Air Force did not comply with the solicitation when it" failed to confirm that Raytheon had substantiated the TR-LRU at TRL 6. Id. at 161-162. The COFC also concluded that the Air Force had misled Northrop by failing to communicate the agency's revised position on the allowability of IR&D funds. Id. at 165.

Raytheon then appealed to the United States Court of Appeals for the Federal Circuit, which affirmed the COFC's decision, finding that "the Air Force's unequal communications regarding IR&D accounting, one of the GAO attorney's grounds, provide a rational basis for the [Air Force's] reopening" the competition through corrective action. Raytheon Co. v. United States, 809 F.3d 590, 596 (Fed. Cir.

⁷ Both Northrop and Lockheed intervened in Raytheon's suits against the United States in both the COFC and subsequent appellate litigation.

2015). On this basis, the Federal Circuit explicitly declined to address the TRL issue. Id. at 599 (“[W]e do not see[] any reason that this technology-reassessment issue should be decided once we have concluded that the Air Force properly reopened the bidding process because of the unequal-information violation.”).

DISCUSSION

The protesters request that we recommend that they be reimbursed for the costs associated with the protests. The Air Force argues that, if we do recommend reimbursement, we should limit our recommendation to those costs related to the two narrow protest grounds that formed the basis of the agency’s corrective action, i.e., misleading discussions and the agency’s TRL 6 evaluation. The Air Force also attempts to further limit the scope of reimbursable costs by asking that we deny Lockheed’s request for reimbursement for the TRL 6 protest ground because the issue was not addressed in the Federal Circuit’s opinion. We find no merit in either argument; however, we do not recommend reimbursement for costs related to protest grounds that were not clearly meritorious and are readily severable.

Recommendation for Reimbursement of Costs

Although the Air Force does not challenge the threshold question of whether these protesters’ requests for reimbursement of protest costs should be granted--in effect conceding that some reimbursement is appropriate--we discuss recommendations for reimbursement of costs generally in order to provide an appropriate foundation for our recommendation.

When a procuring agency takes corrective action in response to a protest, our Office may recommend reimbursement of protest costs where, based on the record, we determine that the agency unduly delayed taking corrective action in the face of a clearly meritorious protest, thereby causing the protester to expend unnecessary time and resources to make further use of the protest process in order to obtain relief. Bid Protest Regulations, 4 C.F.R. § 21.8(e); AAR Aircraft Servs.--Costs, B-291670.6, May 12, 2003, 2003 CPD ¶ 100 at 6. A protest is clearly meritorious where a reasonable agency inquiry into the protester’s allegations would reveal facts showing the absence of a defensible legal position. First Fed. Corp.--Costs, B-293373.2, Apr. 21, 2004, 2004 CPD ¶ 94 at 2.

As discussed above with regard to Northrop’s protest, the Air Force’s discussions were unequal and misleading. Specifically, the record shows that the Air Force reversed its position as to the allowability of IR&D after informing Northrop and Raytheon that the use of such funds was not permitted. After conceding the merit of Raytheon’s legal argument, the Air Force failed to inform Northrop of its revised position, which prejudiced Northrop by preventing Northrop from proposing IR&D funds in order to reduce its direct charges to the contract. See AR, Tab 150, Source Selection Authority Final Decision Briefing, at 58 (table showing equal

technical ratings for all offerors, and substantial cost/price differences between Northrop and the other offerors).

As to Lockheed's claim that the agency failed to reevaluate Raytheon's CTE at TRL 6 after a design change, we note first that in reviewing protests concerning an agency's evaluation of proposals, we do not independently review proposals; rather, we review the record to ensure that an agency's evaluation is reasonable and consistent with the terms of the solicitation, as well as applicable statutes and regulations. Intelligent Decisions, Inc., et al., B-409686 et al., July 15, 2014, 2014 CPD ¶ 213 at 15-16. While we will not substitute our judgment for that of the agency, we will sustain a protest where the agency's conclusions are inconsistent with the solicitation's evaluation criteria, inadequately documented, or not reasonably based. Id. Here, the agency did not obtain test data with regard to Raytheon's changed design, despite requirements for test data to substantiate a TRL 6 rating. RFP § M, ¶ 2.4.1.3. Thus, the record clearly shows that the agency erred in concluding that Raytheon's proposal satisfied the solicitation's requirements.

Regarding the other prong of our analysis--the question of the promptness of the agency's corrective action under the circumstances--we review the record to determine whether the agency took appropriate and timely steps to investigate and resolve the impropriety. See Chant Eng'g Co., Inc.--Costs, B-274871.2, Aug. 25, 1997, 97-2 CPD ¶ 58 at 4; Carl Zeiss, Inc.--Costs, B-247207.2, Oct. 23, 1992, 92-2 CPD ¶ 274 at 4.

The record here shows that a prompt and reasonable agency inquiry would have disclosed the absence of a defensible legal position to the protesters' allegations. Instead, the agency proposed corrective action only after the submission of the agency reports, circulation of a pre-hearing notice (which highlighted the discussions and TRL 6 evaluation as areas of risk for the agency), completion of a hearing, submission of post-hearing briefings, and an ADR conference.

We find that the bases for our conclusions as to the merits of the protests--and for the agency's own corrective action--were available in the agency report, and the issues were clearly meritorious on the record provided. The hearing testimony provided additional background and detail. Under these circumstances, we do not consider the corrective action to have been prompt. Wisconsin Physicians Serv. Ins. Corp.--Costs, B-401068.12, Mar. 22, 2013, 2013 CPD ¶ 81 at 4 (awarding protest costs where the agency took corrective action after a hearing and an ADR outcome prediction conference); Professional Landscape Mgmt. Servs., Inc.--Costs, B-287728.2, Nov. 2, 2001, 2001 CPD ¶ 180 at 5 (awarding costs where the agency took corrective action after a hearing, but before the receipt of post-hearing briefs).

In sum, we find that Lockheed's and Northrop's protests were clearly meritorious, and the Air Force's corrective action was unduly delayed.

Severability

The Air Force, relying on our decision in Sodexo Mgmt., Inc.--Costs, B-289605.3, Aug. 6, 2003, 2003 CPD ¶ 136 at 29, requests that we sever the costs relating to the two narrow bases for its corrective action from the costs relating to all other protest grounds. Air Force Resp. to Protesters' Req. for Costs, Nov. 3, 2015, at 2.

As a general rule, we recommend that a successful protester be reimbursed its incurred costs with respect to all issues pursued, and not merely those upon which it prevails. This is because limiting recovery of protest costs to only those issues on which the protester prevailed would be inconsistent with the broad remedial congressional purpose behind the cost reimbursement provisions of the bid protest provisions of the Competition in Contracting Act of 1984 (CICA). 31 U.S.C. § 3554(c)(1)(A). Consistent with this view, for purposes of determining entitlement to protest costs, we generally consider all issues concerning the evaluation of proposals to be intertwined--and thus not severable--and therefore generally will recommend reimbursement of the costs associated with both successful and unsuccessful evaluation challenges. See Coulson Aviation (USA) Inc.; 10 Tanker Air Carrier, LLC--Costs, B-406920.6, B-406920.7, Aug. 22, 2013, 2013 CPD ¶ 197 at 4; The Salvation Army Cmty. Corr. Program--Costs, B-298866.3, Aug. 29, 2007, 2007 CPD ¶ 165 at 7; Blue Rock Structures, Inc.--Costs, B-293134.2, Oct. 26, 2005, 2005 CPD ¶ 190 at 3. In determining whether protest issues are so clearly severable as to constitute essentially separate protests, we consider, among other things, the extent to which the issues are interrelated or intertwined--*i.e.*, the extent to which successful and unsuccessful arguments share a common core set of facts, are based on related legal theories, or are otherwise not readily severable. Basic Commerce & Indus., Inc.--Costs, *supra*, at 4.

In their requests for costs, Lockheed and Northrop have asked our Office to recommend that the Air Force reimburse the costs associated with all of the protest issues they pursued. While the Air Force in effect concedes (with a limitation described below) that both protesters should be reimbursed their costs of pursuing the TRL 6 and misleading discussions issues identified by the GAO attorney as clearly meritorious during the ADR conference, the Air Force also asserts that the remaining issues are severable, implicitly arguing that the remaining issues were neither clearly meritorious nor related to the meritorious protest grounds. Agency Resp. to Protesters' Requests for Costs, Nov. 3, 2015, at 3. We find the protesters' approach overly broad and the agency's approach too narrow.

Here, Northrop's challenges to the agency's price evaluation were related to the misleading discussions issue. In this respect, the considerable price differential between Northrop's and Raytheon's evaluated prices led Northrop to question the realism of Raytheon's price, and the documents in the agency report revealed the misleading discussions. Thus, the record shows that all of Northrop's price challenges were based on the same set of core facts. Similarly, Lockheed's

challenges to the agency's technical evaluation revealed the TRL 6 issue. Under the circumstances, we find that Northrop's challenges to the agency's price evaluation and Lockheed's challenges to the agency's technical evaluation were each based on common, core facts such that award of costs is appropriate here. T Square Logistics Servs. Corp., Inc.--Costs, *supra* at 9 (protest costs for issues not addressed by the GAO attorney during outcome prediction ADR need not be severed from costs for other protest grounds, where the issues are interconnected and based on common factual underpinnings). *See also Coulson Aviation--Costs*, *supra* at 3-4; Burns & Roe Servs. Corp.--Costs, B-310828.2, Apr. 28, 2008, 2008 CPD ¶ 81 at 3. On this basis, and as discussed below, we recommend that the agency reimburse Northrop for the costs of pursuing its challenges to the agency's cost evaluation, and we recommend that the agency reimburse Lockheed for the costs of pursuing its challenges to the agency's technical evaluation.

However, we find that the protesters' other protest grounds, such as Northrop's challenge to the Air Force's technical evaluation and Lockheed's challenge to the Air Force's cost/price evaluation, are properly severable from the objections discussed above. Our case law shows that when we recommend severing protest costs, we usually do so if the protest grounds that are meritorious and not meritorious are based on materially different protest grounds, *See, e.g., KAES Enters., LLC--Protest & Costs*, B-402050.4, Feb. 12, 2010, 2010 CPD ¶ 49 at 4-5 (awarding costs related to flawed price evaluation and denying costs related to technical evaluation challenge); Basic Commerce & Indus., Inc.--Costs, *supra* at 4 (awarding costs related to flawed cost realism evaluation and denying costs related to protest of non-cost evaluation). Here, we find that the remainder of Northrop's and Lockheed's protests were not clearly intertwined with the clearly meritorious issues. Under these circumstances, we agree with the agency that reimbursement of protest costs should be limited to those costs incurred in connection with Northrop's price protest grounds and Lockheed's technical protest grounds.

Severability of the TRL 6 Issue on the Basis of the Federal Circuit Opinion

Next, the Air Force asks that we deny Lockheed's request because the court of appeals found Northrop's misleading discussions issue provided an adequate basis to support the Air Force's decision to take corrective action and therefore did not review the COFC's decision with regard to Lockheed's TRL 6 issue. Air Force Resp. to Protesters' Req. for Costs, Nov. 3, 2015, at 1, 4. In this respect, the agency argues that because the court of appeals did not address whether the TRL 6 issue formed an independent basis for the agency's corrective action, this protest ground was not clearly meritorious. *Id.* We do not agree.

We have denied protest costs where the basis for the agency's corrective action was independent from the protester's grounds of protest. *See, e.g., Takota Corp.--Costs*, B-299600.2, Sept. 18, 2007, 2007 CPD ¶ 171 at 3 (denying request for costs where there was no nexus between protest bases and agency's corrective action).

That is not the case here. First, the crux of the court of appeals' opinion, i.e., that an agency merely requires a single reasonable basis in order to justify taking corrective action does not logically support the conclusion that the TRL 6 issue was not clearly meritorious. Yet the Air Force has not explained how its corrective action would have provided a sufficient basis to dismiss Lockheed's protest had the Air Force merely proposed corrective action with respect to the IR&D issue. The Air Force considered its proposed corrective action with regard to the TRL 6 issue sufficiently responsive to Lockheed's challenges as to render the protest academic. Notice of Corrective Action, Jan. 16, 2015, at 1. Furthermore, not only did the Air Force choose to take corrective action on the basis of flaws it recognized in its procurement, but it later defended its decision at the COFC and the court of appeals. At this point, therefore, the record does not support the conclusion that addressing the TRL 6 issue was irrelevant to the resolution of the bid protest.

RECOMMENDATION

We recommend that Lockheed be reimbursed the reasonable costs of filing and pursuing its protest challenging the agency's technical evaluation and the cost of pursuing this request, including reasonable attorneys' fees. 4 C.F.R. § 21.8(d)(1). We also recommend that Northrop be reimbursed the reasonable costs of filing and pursuing its protest challenging the agency's price evaluation (including the issue of misleading discussions with respect to the allowability of IR&D) and the cost of pursuing this request, including reasonable attorneys' fees. Id. The protesters should file their claims for costs, detailing and certifying the time expended and costs incurred, directly with the agency within 60 days of receipt of this recommendation. 4 C.F.R. § 21.8(f)(1).

The requests for recommendation for reimbursement of protest costs are granted in part and denied in part.

Susan A. Poling
General Counsel