Comptroller General
of the United States

Washington, D.C. 20548

Decision

REDACTED DECISION

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Matter of: Raytheon Company

File: B-261959.3

Date: January 23, 1996

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Ralph O. White, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that, given agency's establishment of an evaluation Steering Committee composed of representatives from NATO member nations, agency was required to secure waiver of statutory requirement that contracts be awarded only by the head of the agency or his delegate--not foreign citizens--is denied where there is no basis in the record to conclude that participation by foreign members of the Steering Committee in the evaluation process resulted in an abdication of source selection authority to the Steering Committee.

2. Where, in response to an agency question attempting to clarify a proposal's offer of technical data rights, offeror proposes a material revision to its proposal, and agency accepts and proceeds to evaluate the proposal on the basis of the response, agency has engaged in discussions such that it must hold discussions with the other competitive range offeror and allow both offerors to submit best and final offers.

DECISION

Raytheon Electronic Systems Division, through its parent, Raytheon Company, protests the award of a contract to Hughes Missile Systems Company under request for proposals (RFP) No. N00024-95-R-5400, issued by the Naval Sea Systems Command, Department of the Navy. The RFP was issued to procure engineering and manufacturing development of the Evolved Seasparrow Missile. Raytheon

argues that the Navy's selection of Hughes for award of this contract was unreasonable and results from an improper deviation from applicable procurement laws and regulations.

We sustain the protest.

BACKGROUND

This procurement--seeking design, development, fabrication (of test articles) and testing of a modified warhead, new rocket motor, and new tail control section for the existing Seasparrow missile system--was conducted pursuant to a Memorandum of Understanding (MOU) among members of the North Atlantic Treaty Organization (NATO). The MOU, for the Cooperative Support of the Seasparrow Surface Missile System, provides for the establishment of a steering committee comprised of a representative of each of the 13 nations participating in the MOU. An addendum to the MOU assigns the contracting responsibility for the missile upgrade to the Department of the Navy within the U.S. Department of Defense (DOD) (and provides that the procurement be conducted in accordance with U.S. contracting laws, regulations and procedures), but requires unanimous approval by the Steering Committee of any source selection advisory council (SSAC) recommendation for award prior to a final selection decision by the source selection authority (SSA).

Pursuant to the authority in 10 U.S.C. § 2304(c)(1) (1994), the Navy limited the competition here to Raytheon and Hughes, the only two qualified Seasparrow missile producers, and issued the RFP on December 16, 1994. As mentioned above, the procurement seeks a modified guidance section and fuze,[1] along with a new rocket motor and new tail control system, resulting in a faster and more maneuverable missile. These increases in speed, maneuverability, and warhead/fuze effectiveness are required to meet both U.S. and international threat scenarios. Despite the international cooperative nature of this endeavor, however, the U.S. threat scenario included in the RFP is more challenging--i.e., more difficult to counter--is classified and is not releasable to the non-U.S. participants in the program. As a result, these requirements were included in a classified attachment to the RFP marked "NOFORN," barring dissemination of the information to foreign nationals. Section L of the RFP advised offerors that any information covered by

[1]The onboard fuze detects the missile's proximity to the target and computes the optimum point to detonate the warhead. The Seasparrow generally destroys targets by guiding to within warhead lethal radius of the target and detonating.

the NOFORN restriction should be clearly labeled and segregated in a separate proposal annex.[2]

Section M of the RFP advised the two offerors that proposals would be evaluated under each of seven technical/management evaluation factors, listed below in descending order of importance: (1) performance/design; (2) schedule, planning and control; (3) work share; (4) organization/resources; (5) test and evaluation; (6) support engineering; and (7) production readiness. Section M also advised that offers must be evaluated as technically acceptable under each of the above factors to be eligible for award. In addition, section M explained that the agency was seeking the greatest value for the government and reserved the right to pay a premium of up to 25 percent to obtain the services of an offeror whose proposal received a higher technical score than the lowest cost technically acceptable proposal. The RFP also warned that the agency intended to award a contract without discussions.

After receipt of initial proposals from both Raytheon and Hughes on March 7, 1995, the source selection evaluation board (SSEB) and the cost evaluation panel (CEP) evaluated the proposals and prepared reports to the SSAC. The SSEB's report provided the following adjectival ratings under each of the evaluation factors:

	Hughes	Raytheon
Performance/Design	[DELETED]	[DELETED]
Schedule, Planning and Control	[DELETED]	[DELETED]
Work Share	[DELETED]	[DELETED]
Organization/Resources	[DELETED]	[DELETED]
Test and Evaluation	[DELETED]	[DELETED]
Support Engineering	[DELETED]	[DELETED]
Production Readiness	[DELETED]	[DELETED]

[2]To assure that offerors understood that there would be foreign participation in the source selection process, the agency drafted a question on this subject which was included as part of 69 offeror questions answered prior to the submission of proposals.

With respect to costs, the CEP's report to the SSAC made the following adjustments to each offeror's proposed costs:

	Proposed Costs	Evaluated Costs
Hughes	[DELETED]	$175,219,629
Raytheon	[DELETED]	[DELETED]

The CEP's report also identifies additional risk associated with Raytheon's proposed costs. Specifically, since [DELETED].

Upon receipt of these reports, the SSAC began a review of the SSEB and CEP findings, including assigning numerical scores to the predetermined weighting factors in order to calculate a weighted technical/management score for each offeror. As part of this review, the SSAC upgraded the adjectival ratings assigned to Hughes by the SSEB in four of the seven evaluation factors. In each case where the SSAC upgraded the adjectival rating assigned to the Hughes proposal by the SSEB, the SSAC made written findings explaining the basis for its decisions. The SSAC made no changes to the ratings assigned the Raytheon proposal by the SSEB. At the conclusion of the review, the evaluation results were as follows (with the changed ratings shown in bold):

	Hughes	Raytheon
Performance/Design	Acceptable	Good
Schedule, Planning and Control	**Good**	Acceptable
Work Share	**Outstanding**	Acceptable
Organization/Resources	Acceptable	Acceptable
Test and Evaluation	**Good**	Acceptable
Support Engineering	**Good**	Acceptable
Production Readiness	Acceptable	Acceptable

Using these adjectival ratings and the weights assigned each of the evaluation factors, the SSAC calculated a weighted score of [DELETED] for Hughes's proposal and [DELETED] for Raytheon's proposal. After comparing the strengths and weaknesses associated with the two technical proposals, and considering the relative difference in evaluated costs and cost risk, the SSAC recommended award to Hughes despite the higher evaluated costs in its proposal.[3]

The SSA for this procurement states that he attended several days of the deliberations of the SSAC and concluded that award should be made to Hughes. The SSA explains that he advised civilian leadership of the Navy of his decision in late May 1995. On a date after June 16 but before June 19, the SSA--who also served as chairman of the Steering Committee formed pursuant to the MOU--received the unanimous vote of the Steering Committee to accept the SSAC recommendation, which included his vote as chairman. The SSA explains that on June 19, he formally determined that award should be made to Hughes, based on the recommendation of the SSAC and the Steering Committee vote. On that date, the contracting officer awarded the contract to Hughes and this protest followed.

PROTESTER'S CONTENTIONS

Raytheon's protest raises two broad challenges to this procurement: (1) that the structure of the source selection process foreclosed any independent selection decision by the SSA; and (2) that the evaluation was unreasonable. In the first broad area, Raytheon contends that by permitting representatives of foreign governments to serve on the SSAC, the Navy improperly relinquished control over the selection decision for reasons discussed more fully below. In the second broad area, Raytheon claims that the Navy improperly held discussions only with Hughes and not with Raytheon; that the technical evaluation of both proposals was unreasonable; that the Navy improperly awarded on the basis of initial proposals when discussions were required; and that the Navy's evaluation of Hughes's proposed costs was unreasonable.

[3]The SSAC also concluded that award without discussions was appropriate, and elected not to use the discussion questions drafted by the SSEB for each of the technical/management weaknesses identified.

STRUCTURE OF THE SOURCE SELECTION PROCESS

In its challenge to the structure of the source selection process--portions of which were the subject of a partial dismissal decision issued early in these proceedings[4]--Raytheon essentially argues that the Navy wrongly abdicated the authority to make the selection decision to the foreign members of the Steering Committee (many of whom also served on the SSAC) without obtaining a statutory waiver that Raytheon claims was required. Based on our review of the applicable statutory provisions, we conclude that, under these circumstances, the Navy's selection process was proper.

This procurement was conducted under the authority set forth at 22 U.S.C. § 2767 (1994), which permits the President to enter into cooperative projects with NATO, or with NATO member countries. A companion provision within the Department of Defense procurement statutes, 10 U.S.C. § 2350b (1994), authorizes the Secretary of Defense to support such cooperative projects through the use of contracting or other activities. Under this authority, the Secretary may waive the application of most laws and regulations related to the formation of contracts, see 10 U.S.C. § 2350b(c)(1)(A),[5] but such a waiver must be signed by either the Secretary of Defense, the Deputy Secretary of Defense, or the Acquisition Executive designated for the Office of the Secretary of Defense. See 10 U.S.C. § 2350b(c)(3).

Against this backdrop of near unlimited authority to waive applicable procurement statutes (coupled with greatly curtailed delegation authority), Raytheon contends that the inclusion of the NATO Steering Committee members on the SSAC violates

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[4]Raytheon has asked that we reconsider our earlier decision dismissing the first ground of its initial protest, B-261959, Aug. 16, 1995, unpub., while the Navy has argued that Raytheon has failed to provide any basis for reconsidering our earlier decision. Since Raytheon's supplemental protest filings have changed the formulation of this challenge significantly since its initial protest, and since in our view its current challenge is timely and raises an issue that may appropriately be considered by our forum, we will consider the issue on its merits.

[5]Section 2350b(c)(1)(A) permits the Secretary to waive:

> "the application of any provision of law, other than a provision of the Arms Export Control Act or section 2304 of this title, that specifically--(A) prescribe procedures to be followed in the formation of contracts. . . ."

the requirements applicable to the evaluation of contracts set forth in 10 U.S.C. § 2305(b)(4)(B), which provides, in relevant part, that:

> "the head of the agency shall award a contract with reasonable promptness to the responsible source whose proposal is most advantageous to the United States, considering only cost or price and the other factors included in the solicitation."

While Raytheon recognizes that the above-quoted authority to evaluate contracts may be delegated to any agency official pursuant to 10 U.S.C. § 2311,[6] Raytheon argues that this authority could not be delegated to the foreign representatives of the Steering Committee who were empaneled on the SSAC without use of the waiver authority in 10 U.S.C. § 2350b(c)(3). Similarly, Raytheon argues that the Steering Committee members' presence on the SSAC, together with the requirement that the Steering Committee unanimously approve the selection decision, was a de facto divestiture of the SSA's selection authority in favor of the Steering Committee. According to Raytheon, our Office should conclude that the structure of the selection process here was improper without a decision by the Secretary of Defense (or one of his two delegees) to waive the application of section 2305, and that the contract awarded to Hughes is void ab initio.

Our Office will not usually consider a protester's challenge to the composition of an evaluation panel because we regard this as a matter within the discretion of the agency which we will not review without a showing of possible abuse of that discretion in light of a conflict of interest or actual bias on the part of evaluators. Univ. Research Corp., B-253725.4, Oct. 26, 1993, 93-2 CPD ¶ 259; Herndon Science and Software, Inc., B-245505, Jan. 9, 1992, 92-1 CPD ¶ 46; National Council of Teachers of English, B-230669, July 5, 1988, 88-2 CPD ¶ 6. We consider the protester's contentions in this case, however, to the extent Raytheon claims that by placing the foreign members of the Steering Committee on the SSAC the Navy violated statutory requirements.

We conclude that there is no requirement for the statutory waiver contemplated by 10 U.S.C. § 2350b. First, as noted above, 10 U.S.C. § 2305(b)(4)(B) refers to contract award being made by the "head of the agency"; 10 U.S.C. § 2311 permits the agency head--here, the Secretary of Defense--to delegate procurement responsibilities and functions to any agency official. We see no basis to interpret

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[6]10 U.S.C. § 2311, entitled "Assignment and delegation of procurement functions and responsibilities," provides in pertinent part as follows: "(a) In general.--Except to the extent expressly prohibited by another provision of law, the head of an agency may delegate, subject to his direction, to any other officer or official of that agency, any power under this chapter."

these provisions to preclude an agency's use of outside assistance to formulate a selection decision.

To the extent that Raytheon contends that the Navy's reliance on the SSAC resulted in an abdication of source selection authority, we find this argument without merit. The Navy structured this shared-expense, NATO cooperative procurement so that the NATO members, who after all will be acquiring the missile system, agreed with the selection. While, in this sense, the Steering Committee could effectively veto a selection, it had no authority to impose selection of a contractor on the SSA. Under the framework of this cooperative endeavor, if the Steering Committee disagreed with the SSA, there would have been a stalemate, and presumably, the project would not have gone forward. While this framework clearly invests the Steering Committee with a significant role, we do not agree that it transfers from the SSA to the Steering Committee authority to select a contractor. Thus, we do not agree that this framework triggered the requirement for a waiver from the applicable statutes.[7]

Since we conclude that no waiver was required to structure the selection process as the Navy did here and deny this ground of Raytheon's protest, we need not consider Raytheon's contention that the award decision without a waiver was void ab initio. Similarly, we deny Raytheon's related claim that the mere presence of foreign representatives on the SSAC--and their corresponding inability to review portions of

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[7]We note that Raytheon's assertions that the SSA would have been hamstrung had he selected an offeror different from that recommended by the Steering Committee in this case raises a theoretical concern only. The SSA here explains that he participated in several days of the SSAC review, and that as the SSAC developed its consensus on each of the evaluation factors, he reached his own conclusions about the relative strengths and weaknesses of the competing proposals. The SSA explains that he agreed with the ultimate decision that the Hughes proposal offered the greatest value to the government.

Additionally, we note that Raytheon's assertions imply that the foreign representatives on the Steering Committee comprised the totality of the SSAC, other than its U.S. chairman. However, the record shows that the SSAC included significant participation by U.S. government personnel. For example, while several of the NATO country representatives on the Steering Committee opted not to participate on the SSAC, the SSAC included both a U.S. Chairman, two U.S. representatives, and two U.S. technical advisors. (The two technical advisors were not named members of the SSAC but were serving as advisors to the SSAC members.) In addition, the SSAC met throughout its deliberations with the Chairman of the SSEB, and the SSA--both officials with the U.S. Navy. Thus, of the 12 signatories on the SSAC report, 3 were U.S. representatives, and 4 other U.S. representatives participated in the deliberations.

the technical proposals marked NOFORN--rendered the evaluation here unreasonable. The SSEB performed a detailed review of the proposals, including those portions of the proposal which could not be revealed to representatives of foreign governments. The SSAC accepted the SSEB's assessments in this regard, and, as discussed above, the SSAC had significant participation by U.S. citizens who were eligible to review the NOFORN portions of the proposals if needed. Thus, we see nothing unreasonable about the evaluation here based on the presence of non-U.S. citizens on the SSAC.

DISCUSSIONS

Raytheon contends that the Navy improperly held discussions only with Hughes, and wrongly permitted Hughes to revise its proposal, while not giving Raytheon a similar opportunity. Raytheon argues that once the Navy held discussions with Hughes, it was required to do so with Raytheon, and it was required to permit both offerors to submit best and final offers (BAFO). The Navy does not deny that if discussions are held, they must be held with all offerors or that upon the conclusion of discussions, all offerors must be permitted to submit BAFOs; rather, the Navy argues that no discussions occurred here, and that what transpired between the Navy and Hughes was merely clarification of Hughes's proposal.

At issue here is Hughes's proposed conveyance of data rights to the government for certain elements of the Seasparrow missile. Specifically, Hughes's proposal [DELETED].[8]

GPLR permit the government to use technical data to conduct follow-on competitive procurements, but limit use of the data for other commercial purposes. Defense Federal Acquisition Regulation Supplement (DFARS) § 227.401(14).[9] GPLR may only be claimed by an offeror for a limited time; offerors are required to identify the time period for which they claim GPLR, and after expiration of the claimed time the

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[8]This quotation was taken from the narrative text of Hughes's proposal. The Navy's question to Hughes quotes from a tabular display of the proposed data rights set forth on the same page. We see no substantive difference between the two statements.

[9]The DFARS provisions applicable to technical data rights have been revised. The new provisions are effective as of their date of publication for inclusion in solicitations issued after September 29, 1995. See 60 Fed. Reg. 33,464-33,507 (June 28, 1995) (to be codified at 48 C.F.R Parts 211, 227, and 252). The citations in this decision are those applicable to this procurement--i.e., the ones in place prior to June 28, 1995.

government is entitled to unlimited rights to the data. DFARS §§ 227.402-72(a)(2); 252.227-7013(b)(2).

In reviewing Hughes's proposal, the Navy explains that its evaluators wanted confirmation that the above-quoted Hughes statement was intended to mean that, [DELETED]. This led to the following written question to Hughes:

> [DELETED]

Hughes responded:

> [DELETED]

The Navy concluded that Hughes's response meant that the proposal was offering [DELETED]. In its recommendation to the SSA that award be made to Hughes, the SSAC included Hughes's offer [DELETED] proposal over Raytheon's. According to Raytheon, regardless of whether the Navy intended to seek clarification or to conduct discussions, Hughes took the opportunity to revise its proposal, and this exchange constituted discussions. Thus, Raytheon claims that it, too, should be given an opportunity to revise its proposal.

Federal Acquisition Regulation (FAR) § 15.610(a) permits contracting agencies to make award on the basis of initial proposals without discussions, where the solicitation, as here, announces this possibility. Where discussions are held with one offeror, however, the agency is required to conduct discussions with all other offerors whose proposals are in the competitive range, which is composed of those proposals that, as submitted, either are acceptable or are susceptible of being made acceptable through negotiations. FAR § 15.610(b); HFS, Inc., B-248204.2, Sept. 18, 1992, 92-2 CPD ¶ 188; Microlog Corp., B-237486, Feb. 26, 1990, 90-1 CPD ¶ 227; Kinetic Concepts, Inc., B-232118, Oct. 26, 1988, 88-2 CPD ¶ 428. Discussions are material communications related to an offeror's proposal and distinguishable from clarifications, which are merely inquiries for the purpose of eliminating minor uncertainties or irregularities in a proposal. Microlog Corp., supra.

The difference between clarifications and discussions is described in FAR § 15.601:

> "'Clarification' . . . means communication with an offeror for the sole purpose of eliminating minor irregularities, informalities, or apparent clerical mistakes in the proposal . . . . Unlike discussion . . ., clarification does not give the offeror an opportunity to revise or modify its proposal, except to the extent that correction of apparent clerical mistakes results in a revision."

> "'Discussion' . . . means any oral or written communication between the Government and an offeror (other than communications conducted for the purpose of minor clarification) whether or not initiated by the Government, that (a) involves information essential for determining the acceptability of a proposal, or (b) provides the offeror an opportunity to revise or modify its proposal."

See also New Hampshire-Vermont Health Serv., 57 Comp. Gen. 347 (1978), 78-1 CPD ¶ 202 (if the communications provide an offeror with an opportunity to make a substantive change in its proposal, the communications are discussions, not clarifications); The Human Resources Co., B-187153, Nov. 30, 1976, 76-2 CPD ¶ 459 (same). If discussions are conducted, the agency must request BAFOs from those offerors whose proposals are still in the competitive range, even where the discussions do not directly affect the offerors' relative standing. FAR § 15.611(a); HFS, Inc., supra; Microlog Corp., supra; Kinetic Concepts, Inc., supra.

It is the actions of the parties that determine whether discussions have been held, and not merely the characterization of the communications by the agency. ABT Assocs., B-196365, May 27, 1980, 80-1 CPD ¶ 362; The Human Resources Co., supra. The acid test of whether discussions have been held is whether it can be said that an offeror was provided the opportunity to revise or modify its proposal. 51 Comp. Gen. 479 (1972); New Hampshire-Vermont Health Serv., supra; The Human Resources Co., supra.

The key issue here is whether Hughes's response changed its proposal in a meaningful way. We conclude that it did, and thus that the exchange constituted discussions, not clarifications.

The Navy explains that the Seasparrow missile program has existed since 1968, and that during that time improvements to the missile have been modest. With this procurement, the Navy (and NATO) seek engineering and manufacturing design changes to significantly enhance the capabilities of this missile system. After the design changes procured here are incorporated into the Seasparrow missile, the Navy (and NATO) seek to competitively purchase production quantities of these missiles for years to come. In this environment, the willingness of the offerors to provide relatively unfettered access to as much of the technical data as possible will have a significant impact on the government's ability to conduct future competitions for the enhanced missile. [DELETED].

[DELETED]

[DELETED] other conclusion about the meaning of Hughes's response is not supported by the language of the response.[10]

Since Hughes's response to the Navy's question about [DELETED] effect of revising the company's proposal, this exchange met the requirements of the test set forth at FAR § 15.601 for determining whether discussions were held. 4th Dimension Software, Inc.; Computer Assocs. Int'l, Inc., B-251936; B-251936.2, May 13, 1993, 93-1 CPD ¶ 420. Accordingly, we sustain the protest.[11]

RECOMMENDATION

We recommend that the Navy conduct discussions with both offerors, request best and final offers, and proceed with the source selection process. In view of our recommendation, we need not consider Raytheon's numerous challenges to the evaluation, since most of these matters can be resolved, if necessary, during discussions.

If, after the selection process has concluded, Raytheon's offer is determined to be more advantageous than the offer submitted by Hughes, the Navy should terminate Hughes's contract and award to Raytheon. We also find that the protester is entitled to recover the reasonable cost of filing and pursuing this protest, including attorney's fees. 4 C.F.R. § 21.6(d)(1) (1995). The protester should submit its certified claim for protest costs directly to the agency within 60 days of receipt of this decision. 4 C.F.R. § 21.6(f)(1).

The protest is sustained.

Comptroller General
of the United States

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[10]In fact, we find unreasonable the Navy's conclusion that Hughes's response means [DELETED]. Under these circumstances, the Navy's conclusion that Hughes's proposal [DELETED].

[11]Prejudice is a prerequisite to sustaining a protest, and generally, we have presumed prejudice when an agency holds discussions with fewer than all of the competitive range offerors. National Medical Staffing, Inc., B-259402; B-259402.2, Mar. 24, 1995, 95-1 CPD ¶163. Here, in fact, Raytheon has asserted that, if given the opportunity to address evaluator concerns during discussions, it would have submitted a revised proposal. There is no basis to assume that this would not have occurred, with the result that the outcome of the competition could have been affected. See id.; Telos Field Eng'g, B-253492.2, Nov. 16, 1993, 93-2 CPD ¶ 275.