**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Hughes Space and Communications Co.; Lockheed Missiles & Space Co., Inc.

File: B-266225.6; B-266225.7; B-266225.8; B-266225.9; B-266225.10

Date: April 15, 1996

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DIGEST

1. Protest contention that an agency's decision to accept a proposal including an offer to share 50 percent of any cost overrun improperly changed the solicited contract type and violated discussions is denied where the record shows that (1) the accepted proposal did not change the cost-plus-award-fee contract type, but instead only offered to share in any cost overrun in excess of the offeror's proposed costs, analogous to a cap on costs; and (2) the discussions between the agency and offerors clearly emphasized the importance of submitting realistic cost proposals, but did not prohibit offerors from offering to cap their costs or offer to share in cost overruns.

2. Protest complaint that selection document shows that agency failed to properly evaluate awardee's cost overrun sharing approach under an evaluation provision requiring that points be deducted from the offeror's mission suitability scores for unrealistic proposed costs is denied where the record shows that: (1) the evaluation panel properly applied the evaluation provision; (2) the evaluation panel presented the results to the selection official; (3) the selection official directed the evaluation panel to prepare additional analysis showing the relative standing of the offerors

both with and without the application of the evaluation penalty; (4) the selection official's handwritten contemporaneous notes show that he considered the relative standing of the offerors both with and without the mission suitability penalty even though the selection document references only the relative standing of the offerors without application of the penalty; and (5) the selection official affirms his selection decision with application of the penalty.

3. Allegation that awardee gained an improper competitive advantage over other offerors as a result of a meeting between the head of the agency and a senior representative of the awardee while the procurement was ongoing, and as a result of a letter issued to all offerors after the meeting reiterating the agency's commitment to cost realism in this procurement, is denied where the record shows that the meeting was routine and unrelated to the instant procurement, where the agency head refused to discuss the particular procurement when the awardee's representative attempted to raise the subject, and where there is no evidence to support the protester's claim that the letter to all offerors reiterating the agency's commitment to cost realism was somehow "encoded" or "encrypted" with information useful only to the awardee.

4. Protester whose proposal was excluded from the competitive range lacks the direct economic interest necessary to raise challenges related only to the final selection decision, as opposed to issues which, if resolved in its favor, would restore the protester's proposal to the competitive range.

DECISION

Hughes Space and Communications Co. and Lockheed Missiles & Space Co., Inc. protest the award of a contract to TRW Inc. for the design, fabrication, integration, testing, delivery, launch support and flight operations support for two Earth Observing Satellites (referred to as EOS Common Spacecraft). The contract was awarded by the National Aeronautics and Space Administration (NASA) pursuant to request for proposals (RFP) No. 5-12492/305. Both protesters challenge NASA's evaluation and acceptance of TRW's proposed cost sharing arrangement, and both argue that TRW received an unfair competitive advantage from a meeting with the NASA Administrator.

We deny the protests.

BACKGROUND

Prior to initiating this procurement, NASA awarded five study contracts related to the development of EOS Common Spacecraft. These satellites are intended for use in NASA's Mission to Planet Earth, an initiative to develop a global data base on the environment. On September 1, NASA issued the RFP here to four of the five

companies that participated in the study effort.[1] These companies were Hughes, Lockheed, TRW, and Martin Marietta Corporation. As amended, the RFP anticipates award of a CPAF contract for two satellites, with options for two more.

The RFP, as initially issued, contained four evaluation factors: (1) mission suitability; (2) cost/price; (3) relevant experience and past performance; and (4) other considerations. The first two factors--mission suitability and cost/price--were of equal importance, and each was more important than the two remaining factors--relevant experience and past performance, and other considerations. Mission suitability was the only numerically scored factor, and was worth a maximum of 1,000 points; the other evaluation factors were assigned adjectival ratings.

On November 7, 1994, the four offerors submitted initial proposals in response to the solicitation. The initial evaluation--and a subsequent evaluation performed after submission of revised proposals--resulted in a recommendation to exclude [DELETED] from the competitive range because of their relatively low technical scores. On both occasions, however, the source selection official (SSO) overrode the recommendation and decided that all four offerors should have another opportunity to submit revised proposals.

The first two rounds of proposal submissions led the SSO to conclude that all four offerors were proposing unrealistically low costs for this effort. By letter dated May 11, 1995, NASA's Director of Flight Projects notified each offeror that

> "[a]ll proposals submitted in response to this solicitation failed to demonstrate realistic cost and resource estimates. It appears that offerors have sacrificed cost realism for perceived advantages in the cost evaluation. As a result, we are taking precedent setting measures to further reinforce this agency's commitment to cost containment." (Emphasis added.)

The "precedent setting measures" mentioned in NASA's letter were set forth in amendment 0005 to the RFP, which included a new evaluation provision. Specifically, the amendment included a new paragraph, M.2.2, which advised offerors that NASA would use the difference between an offeror's proposed and most probable costs as an indication of the offeror's understanding of the effort, and would deduct up to 400 of the 1,000 available points under the mission suitability evaluation factor for proposing unrealistic costs. The 400-point deduction

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[1]Two of the five companies awarded contracts to study the development of a common EOS spacecraft merged. Thus, there were only four remaining companies to participate in this effort.

was allocated as follows: 240 points for the basic contract, and 80 points for each of the two contract options.

NASA's unique approach to blending cost realism and technical merit provided for no adjustment to an offeror's mission suitability score if the difference between proposed and most probable costs were 15 percent or less. At the other end of the scale, if the difference between proposed and most probable costs were greater than 55 percent, the full 400 points would be deducted from the mission suitability score. For proposals with differences between 15 and 55 percent, paragraph M.2.2 set forth a sliding scale. The full formula is shown below:

Percentage of Difference Between Proposed and Most Probable Costs	Adjustment Applicable to Basic Contract	Adjustment Applicable to Each Option
0 to 15 percent	No adjustment	No adjustment
16 to 25 percent	3 point deduction for every percentage point over 15 percent	0.5 point deduction for every percentage point over 15 percent
26 to 35 percent	30 point deduction plus 5 additional points for every percentage point over 25 percent	5 point deduction plus 1.5 additional points for every percentage point over 25 percent
36 to 45 percent	80 point deduction plus 7 additional points for every percentage point over 35 percent	20 point deduction plus 2.5 additional points for every percentage point over 35 percent
46 to 55 percent	150 point deduction plus 9 additional points for every percentage point over 45 percent	45 point deduction plus 3.5 additional points for every percentage point over 45 percent
Greater than 55 percent	240 point deduction	80 point deduction

Concurrent with the release of amendment 0005, NASA initiated discussions and plant visits with all four offerors. At the end of discussions, and before submission of best and final offers (BAFO), the Source Evaluation Board (SEB) made a third competitive range determination on July 10. As part of this determination, NASA concluded that Lockheed's proposal did not have a reasonable chance of being selected for award. By letter dated July 12, NASA advised Lockheed of its

proposal's elimination from the competitive range based predominantly on concerns about its cost realism. Specifically, the SEB subtracted more than 300 points from Lockheed's mission suitability score by applying the cost realism formula set forth in amendment 0005. This deduction lowered Lockheed's mission suitability adjectival rating from very good to fair, and moved Lockheed's relative standing under the mission suitability factor from third place, among the four offerors, to last place by a wide margin.

Although NASA offered Lockheed a debriefing at the time of the competitive range decision, Lockheed declined the offer until the agency completed its selection process. By letter dated July 15, Lockheed also advised NASA that it intended to dissolve an existing "Chinese wall" that had been established between Lockheed and Martin employees after the two companies had merged and learned that both entities were participating in this competition.[2]

The remaining three offerors were then provided with what NASA terms "model contracts," and were instructed to revise the text of the model contracts to include any unique contract clauses. Both TRW and Hughes incorporated unique contract terms designed to address NASA's concerns about cost realism.[3] TRW proposed to absorb 50 percent of all costs exceeding its proposed costs (TRW Model Contract at § H.21), and proposed a [DELETED] rebate to NASA if the appropriated funding for

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[2]Although Lockheed and Martin Marietta submitted separate initial proposals on November 7, 1994, in response to the RFP, the companies later merged. By letter dated June 26, 1995, the two companies announced plans to consolidate as a result of their recent merger. In order to protect the integrity of the ongoing procurement, the parties executed an agreement to bar the transfusion of substantive details of either company's proposal. It was this bar that was dissolved by the July 15 letter to the agency. Therein, the newly formed entity of Lockheed Martin Astro Space advised NASA that:

> "we intend to utilize talent from [Lockheed] to assist us in the preparation of our amended proposal. Specifically, [Lockheed] personnel will provide technical expertise, information with respect to details of [Lockheed] facilities, manufacturing capabilities, and other resources available at [Lockheed]."

To avoid confusion, our decision will refer to the Lockheed and Martin proposals by their corporate names at the time proposals were initially submitted.

[3]The cost measures discussed herein are the major cost measures at issue in this protest. Each offeror included other cost savings measures not directly relevant to this discussion.

the contract materialized at projected levels. (TRW Model Contract at § H.23.) Hughes proposed to cap its costs at [DELETED] percent of its proposed costs, and to absorb 100 percent of all costs above that amount.[4] (Hughes Model Contract at §§ B.6, H.14 and H.19; see also Hughes Cost/Price Executive Summary, Aug. 15, 1995 at 1.) Martin ultimately did not propose any cost containment measure or cap, although it had suggested it would do so during discussions.

After NASA completed its review of contract clauses, it requested and received BAFOs from the three remaining offerors. The SEB first reviewed each offeror's proposed BAFO costs, including the two options, to determine the most probable cost to the government. As part of this review, the SEB calculated each offeror's most probable cost both with and without the cost containment measures described above. The table below sets forth the result of the cost review:

Costs
(in millions of dollars)

	Hughes	**Martin**	**TRW**
Proposed Costs Plus Fees	[DELETED]	[DELETED]	[DEL.]
Probable Costs (without cost containment)	$911.8	$814.7	$805.1
Probable Costs (with cost containment)	$911.8	n/a	$722.6

SEB Final Report at 197.

In evaluating technical proposals, NASA assigned both point scores and adjectival ratings to the mission suitability factor, and assigned adjectival ratings to the factors of relevant experience and past performance and other considerations. In preparing the report for the SSO, the SEB also calculated the point deductions from each

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[4]The impact of Hughes' cost savings measure must be extrapolated from the terms of its model contract. In its clause H.19, Hughes states that it will absorb 100 percent of all costs in excess of the negotiated contract price. The clause defines the term "negotiated contract price" as the sum of the estimated cost, maximum available award fee, and maximum positive performance incentive. These amounts for the basic contract effort are set out in Hughes' clause B.6; these amounts for the two option periods are set out in Hughes' clause H.14. Due to mathematical errors by the agency, the numbers in Hughes proposal do not match precisely those in the agency evaluation materials; however, our review shows that NASA's errors did not affect its selection decision.

offeror's mission suitability score required by amendment 0005. The result of this evaluation is set forth below:

	Hughes	Martin	TRW
Mission Suitability			
BAFO Rating	Excellent	Fair	Very Good
BAFO Points	951	[DELETED]	[DELETED]
Adjustment Amt.	0[5]	0	-57
Adjusted Rating	Excellent	Fair	Very Good
Adjusted Points	951	[DELETED]	[DELETED]
Relevant Experience and Past Perform.	Good	Fair	Very Good
Other Considerations	Very Good	Good	Very Good

SEB Final Report at 198.

While the table above--showing a deduction of 57 points from TRW's mission suitability score because of the difference between TRW's proposed and most probable costs--summarizes the evaluation results as presented to the SSO by the SEB, the SSO requested additional analysis. Among other things, the SSO requested a table showing the results of applying TRW's 50-percent cost containment measure before calculating the cost realism penalty. Under this scenario, the mission suitability adjustment was reduced from 57 points to 1 point, and TRW's final mission suitability score was calculated as [DELETED], rather than [DELETED]. Presentation to SSO, Sept. 11, 1995 at 66-67, 70, as amended by Memorandum for the Record, Sept. 20, 1995.

Citing this second scenario, the SSO selected TRW for award on September 14 after concluding that "the recognized technical superiority of [Hughes'] proposal could not justify its substantially higher probable cost to the [g]overnment." Source Selection Statement at 8. The SSO continued, "[t]he proportionate difference

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[5]No adjustment was made to Hughes' mission suitability score because the difference between its proposed and most probable costs was too small to trigger the operation of the point deduction formula.

between TRW's probable cost and that of [Hughes] is almost twice as large as the difference between TRW's [m]ission [s]uitability [s]core and that of [Hughes]." Id. These protests followed.

HUGHES' PROTESTS

The gravamen of the 10 separate protests filed by Hughes and Lockheed is NASA's decision to accept TRW's proposal to share 50 percent of any cost overruns with the agency. Because of Lockheed's more limited ability to challenge the award decision--given Lockheed's exclusion from the competitive range some 2 months before--and because many of Lockheed's challenges are resolved by our consideration of the protests filed by Hughes, we will first consider Hughes' contentions. In addition to its challenges to the cost sharing arrangement, discussed in detail below, Hughes argues that: (1) NASA improperly permitted TRW to propose a clause that violates regulatory restrictions applicable to independent research and development costs; (2) TRW gained an unfair advantage over other offerors through a meeting with the NASA administrator while the procurement was ongoing; and (3) the SSO performed an arbitrary and irrational cost/technical tradeoff in selecting TRW for award.

TRW's Offer to Share Cost Overruns

Hughes argues that NASA could not accept TRW's offer to share in any cost overrun without violating the terms of the RFP, and without contradicting the direction given Hughes during discussions. Thus, Hughes claims that NASA was required to amend the solicitation before it could accept TRW's proposal. In addition, Hughes argues that NASA improperly applied paragraph M.2.2 of the solicitation, as added by amendment 0005, because the agency failed to deduct points from TRW's mission suitability score.

Hughes' first two claims--that NASA could not accept TRW's proposal for sharing cost overruns without violating the RFP and without contradicting the directions given during discussions--are based on the premise that TRW's proposal changed the contract type called for in the solicitation. We do not agree with Hughes' premise.

The RFP here called for the award of a CPAF contract. A CPAF contract is a cost reimbursement contract that includes a fee consisting of a base amount and an award amount. Federal Acquisition Regulation (FAR) §§ 16.305, 16.404-2. Like any cost reimbursement contract, the contractor is reimbursed for all actual costs incurred that are reasonable, allowable, and properly allocable to the contract. FAR § 31.201-2; Vitro Corp., B-247734.3, Sept. 24, 1992, 92-2 CPD ¶ 202.

As explained above, TRW sought to convince NASA that it was sufficiently committed to the realism of its proposed costs to absorb 50 percent of any costs

incurred in excess of its proposed costs. In contrast, Hughes showed its commitment to its proposed costs by capping its cost proposal at [DELETED] percent of its total proposed costs. As a starting point, there is no dispute that from the first dollar of cost incurred, until TRW crosses the threshold of its total proposed costs, this contract will remain a cost-plus-award-fee (CPAF) instrument. The dispute begins on the other side of the threshold.

Despite Hughes' arguments to the contrary, TRW's offer to share costs above the threshold of its proposed costs operates much like a cap. Although there is ultimately no ceiling on the arrangement, from the time TRW's costs pass the level proposed, the share arrangement will "cap" NASA's reimbursement of TRW at fifty cents on the dollar. Hughes' cap, on the other hand is absolute. Hughes gets no further reimbursement above the level of its cost cap.[6]

In our view, while both proposals alter the allocation of risk between the government and the contractor after a certain point, TRW's proposal does not alter the entire contract in such a way that a CPAF contract has been changed to a purely cost-sharing contract.[7] In addition, despite Hughes' claims that TRW's

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[6]Hughes argues that the lack of a ceiling in the TRW proposal makes Hughes' cap materially different from, and better for the government than, the arrangement offered by TRW. We disagree. NASA determined TRW's most probable costs to be $805.1 million. Since TRW's most probable costs are nearly $200 million above its proposed costs (and since TRW's most probable costs are more than $100 million less than Hughes' most probable costs), there is little evidence to suggest that NASA will need the assistance of a ceiling to help manage cost overruns here. In essence, with the proposed sharing arrangement, TRW must exceed its proposed costs by approximately $400 million before the costs to NASA will exceed the costs established by Hughes' cap. See SEB Final Report at 197. Should this scenario materialize, NASA will have ample time to take whatever steps (including termination) it deems necessary to check the growth in costs. Finally, we note that Hughes has not challenged the specific adjustments made to TRW's proposed costs (as opposed to its challenges to the decision to accept certain TRW cost containment measures). In the absence of such a challenge, or any evidence to the contrary, we see no basis to question NASA's specific adjustments to TRW's proposed costs.

[7]We also do not agree that the situation here is akin to that discussed in our decision in Union Carbide Corp., 55 Comp. Gen. 802 (1976), 76-1 CPD ¶ 134. In that case we sustained a protest where in awarding a fixed-price requirements contract, NASA accepted a proposal including a direct reimbursement of the offeror's interest expense incurred in building new plant facilities. There, we concluded that NASA
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approach violated the terms of the solicitation, while its own approach did not, we fail to see any meaningful difference between the two cost containment measures in terms of contract type. Both proposals accept the RFP's CPAF contracting approach until a cost overrun occurs, and both offer to remedy any cost overruns by forgoing reimbursement for all, or a portion of, the overrun costs. While we do not agree that the approach taken here by TRW altered the solicited contract type, if it did, Hughes' proposal did so as well.[8]

To the extent that we view TRW's cost overrun sharing approach as analogous to a cap, we know of no requirement that a cap be established at a total fixed amount such as the Hughes cap here. Our Office has reviewed caps on overhead rates that are established as a percentage, see MAR, Inc., B-255309.4; B-255309.5, June 8, 1994, 94-2 CPD ¶ 19; Technical Resources, Inc., B-253506, Sept. 16, 1993, 93-2 CPD ¶ 176, caps on general and administrative expenses, also established as a percentage, see Vitro Corp., supra, and caps on precise cost components which include some costs but exclude others. Halifax Technical Servs., Inc., B-246236.6 et al., Jan. 24, 1994, 94-1 CPD ¶ 30. While we will sustain a protest where the record shows that the agency does not understand the operation of a proposed cap, or has failed to adequately assure that the proposed cap will effectively shield the government from

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[7](...continued)
had changed the ground rules and was required to amend the solicitation and permit other offerors to compete equally. Here, both offerors continued to propose CPAF contracts, and both adopted limitations on the reimbursement to them of cost overruns. Thus, we conclude that the approaches of both TRW and Hughes are more analogous to a below-cost offer than they are a change in the fundamental ground rules of the procurement.

[8]Throughout the course of this protest, Hughes has argued extensively that TRW's cost overrun sharing arrangement changes the solicited contract type here, while Hughes' cost cap does not. As stated above, we conclude that TRW's strategy vice the strategy chosen by Hughes has no discernibly different effect on the ultimate type of contract awarded. We note further, that if Hughes is correct in its contention that TRW's cost overrun sharing arrangement converts the contract type, then by the same logic, Hughes' cap converts the CPAF contract here to a fixed price contract. See Vitro Corp., supra at 7-8 ("a cap, by definition, converts at least some portion of a cost-type contract to a fixed-price contract"). Since it similarly offered a variation on the contract type, Hughes cannot credibly claim to have been misled by NASA. We also reject Hughes' claim that its approach is different because it would not become effective until Hughes exceeded its most probable costs. To carry Hughes' reasoning one step further, the fact that the two approaches become effective at different points does not change the fact that both alter the solicited contract: the difference is simply one of degree.

cost growth, see Advanced Technology Sys., Inc., 64 Comp. Gen. 344 (1985), 85-1 CPD ¶ 315, we generally view cost caps and ceilings as powerful and effective tools in the government's arsenal against cost overruns. See generally Technical Resources, Inc., supra. In none of these cases, however, did our Office conclude that the challenged cap changed the solicited contract type, even where the agency was soliciting a CPAF contract, as NASA is here. See id.

Hughes claims that TRW's approach to sharing cost overruns was contrary to the guidance given offerors by NASA during discussions. It is a fundamental precept of negotiated procurement that discussions, when conducted, must be meaningful and must not prejudicially mislead offerors.[9] SRS Technologies, B-254425.2, Sept. 14, 1994, 94-2 CPD ¶ 125; Ranor, Inc., B-255904, Apr. 14, 1994, 94-1 CPD ¶ 258. Specifically, an agency may not inadvertently mislead an offeror--through the framing of a discussion question or a response to a question--into responding in a manner that does not address the agency's concerns; misinform the offeror concerning a problem with its proposal; or misinform the offeror about the government's requirements. Id.; Price Waterhouse, B-254492.2, Feb. 16, 1994, 94-1 CPD ¶ 168; DTH Management Group, B-252879.2; B-252879.3, Oct. 15, 1993, 93-2 CPD ¶ 227.

The record here shows no basis for concluding that Hughes was misled. In letters, in written and oral discussions, and ultimately, in an aggressive and innovative evaluation clause added by amendment (further highlighting its unusual nature), NASA went to extraordinary lengths to communicate to offerors the importance of cost realism and cost containment for this project. While each offeror adopted unique methods to address these concerns, the record shows two similar types of responses to NASA's admonitions: (1) all four offerors proposed to perform portions of the effort at no cost to the government; and (2) three of the four proposed to mitigate cost growth by agreeing to absorb a portion of any cost overruns, even though one of these did not ultimately include its overrun clause in its BAFO.[10] This general observation alone--as well Hughes' own cap on costs--

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[9]While we recognize that NASA has adopted unique and limited discussions provisions, see generally FAR § 15.613(a); 48 C.F.R. § 18-15.613-71; Ogden Logistics Servs., B-257731.2; B-257731.3, Dec. 12, 1994, 95-1 CPD ¶ 3, there has been no suggestion that the requirement for fundamental fairness does not apply to NASA.

[10]The offeror that ultimately did not include a cost containment provision in its BAFO was Martin Marietta, and Lockheed claims that Martin refrained from doing so because it concluded that an offer to share cost overruns would require an amendment to the solicitation. Lockheed Comments on the Agency Report, Dec. 15, 1995 at 51. We find this assertion unpersuasive given the exchange during oral

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suggests that the discussions did not lead offerors to conclude that they could not propose caps on overrun sharing arrangements to shield the agency from the effects of cost growth during performance.

We also conclude that the specifics of the discussions between Hughes and NASA do not support Hughes' claims. For example, in the exchange Hughes identifies as the clearest example of misleading discussions, Hughes Initial Protest, Sept. 25, 1995 at 14, Hughes inquired during oral discussions whether it could propose a fixed-price contract or some other contract type--or could submit an alternate proposal incorporating a different contract type--in order to more convincingly address the agency's concerns about cost realism and cost containment. In response, the NASA representatives advised Hughes that the agency considered a cost reimbursement contract the most prudent method of contracting for the equipment and services here given the expected 17-year life of the program. NASA also advised Hughes that it would not accept an alternate proposal containing a different contract type given the agency's conclusion that acceptance of such a proposal would first require amending the solicitation. Transcript of Oral Discussions with Hughes at 381-382, 385, 504-506.

We note that even in the portion of the exchange most favorable to Hughes, NASA did not rule out the use of caps designed to address cost overruns. Instead, NASA explained that it had

> "explored numerous possibilities, even some hybrids that NASA had never done before, because we were given the mission in the task to be bold in trying to work this issue out. And after exploring many alternatives of various different types--everything; we went so far as to suggest fixed price all the way up to cost plus incentive fee, and then again hybrids where we looked at cost reimbursement to the first spacecraft, converting to the fixed price for the follow-up, and we had various scenarios."

In our view, NASA's answer relates to the choice of overall contract type and does not mean that an offeror could not offer to cap its costs at certain levels or offer to share in cost overruns. In addition, Hughes' own proposal does not support its claimed interpretation of this exchange.

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[10](...continued)
discussions, and in the letter from NASA afterwards, in which NASA appears to be seeking a more firm commitment on cost sharing from Martin Marietta than was included in the proposal on the table. Transcript of Oral Discussions Between NASA and Martin Marietta, June 5, 1995 at 148-150; NASA Letter to Martin Marietta, June 7, 1995.

Finally, we turn to Hughes' claim that NASA failed to properly evaluate TRW's proposal under paragraph M.2.2 of the solicitation, because the provision stated that unrealistic proposed costs would result in a deduction from an offeror's mission suitability score. In this regard, we agree with Hughes' conclusion that section M of the RFP contemplated two distinct evaluation actions: (1) a determination of the offeror's most probable cost, pursuant to the provisions of paragraph M.3; and (2) an adjustment to the offeror's mission suitability score based on the difference between the offeror's proposed and most probable cost, pursuant to the formula discussed above and included in paragraph M.2.2.

While we conclude above that the agency could properly accept TRW's proposed sharing arrangement for cost overruns--i.e., we disagree that the arrangement itself violated the solicitation or the content of discussions--we do not think that the inclusion of either a cap or a sharing arrangement permitted the agency to bypass the mission suitability deduction. In our view, the only fair reading of paragraph M.2.2, together with the extraordinary emphasis NASA placed on cost realism here, is that offerors needed to ensure that their proposed costs were adjudged realistic by NASA's evaluators, or risk a significant reduction in their mission suitability score. The theory behind NASA's evaluation provision--that a large gap between an offeror's proposed and most probable costs is indicative of a weakness in the offeror's understanding of the requirements for the effort--applies regardless of whether the agency is actually required to reimburse the costs. Thus, we see no basis in paragraph M.2.2 for failing to apply this deduction because an offeror--like TRW and like Hughes--proposed to shield the agency from the requirement to reimburse the contractor from all, or part, of any cost overrun.

We part company with Hughes, however, in its argument that NASA did not apply paragraph M.2.2 in this case. As explained above, as reflected in the record, and as Hughes itself claims, it appears that the SEB never considered the possibility of failing to make the mission suitability deduction described above, until its extensive briefing of the SSO. Thus, from the initial SEB report, to the time of the competitive range decision excluding Lockheed from further consideration, to the final SEB report, the SEB made the adjustments Hughes claims are required. The record shows that when the SEB reported these figures to the SSO, the SSO requested several additional calculations applicable to the award decision. These additional calculations, memorialized in a document dated September 20, 1995, show TRW's costs and mission suitability score in nearly every possible permutation--with and without the cost sharing arrangement, with and without the point deduction from the mission suitability score, and with and without consideration of the proposed rebate arrangements.

In preparing the Source Selection Statement, the SSO based his tradeoff upon the supplemental analysis that recognized the impact of TRW's cost-sharing arrangement before calculating the mission suitability deduction. Thus, the

selection statement is based on a 1-point deduction from TRW's mission suitability score rather than the 57-point deduction reflected in the Final SEB Report. Hughes contends that since the SSO based the selection decision on the supplemental analysis that considers the impact of TRW's cost overrun sharing arrangement and fails to deduct points from TRW's mission suitability score, the award decision is improper and should be overturned. We disagree.

Despite our agreement with Hughes about the proper application of paragraph M.2.2, we will not overturn the selection decision here by focusing only on the recitation in the selection statement while ignoring the significant evidence in the record showing that the SSO considered then--and has considered since--precisely the evaluation scenario Hughes claims should have been considered. First, the record shows that despite some confusion about how to apply this never-before used provision, NASA carefully considered the impact on the evaluation both with and without the deduction at issue. In addition, the Final SEB Report and the SEB's briefing for the SSO, are based on the analysis Hughes claims should have been used. Thus the SSO was presented with this analysis. Finally, the SSO has provided a sworn statement in response to this protest affirming his selection of Hughes under either scenario. Under these circumstances, we will not overturn the selection decision because the Source Selection Memorandum calculates the mission suitability score after recognizing the impact of TRW's cost overrun sharing approach. JSA Healthcare Corp., B-242313; B-242313.2, Apr. 19, 1991, 91-1 CPD ¶ 388.

TRW's Clause H.17

In addition to the central challenges raised against NASA's acceptance of TRW's proposed sharing of cost overruns, Hughes argues that NASA improperly gave evaluative credit to TRW's clause H.17 wherein TRW agreed to complete several enumerated tasks "through Engineering Model Environmental Test Demonstration at no additional direct cost to this contract." According to Hughes, this effort will be improperly charged to independent research and development (IR&D) rather than as direct costs of the instant contract, thus giving TRW an unfair advantage because TRW will be able to propose lower costs. For the reasons set forth below, our review of the record shows that there is nothing improper in NASA's acceptance of TRW's clause H.17, and even if there were, the amounts involved here are de minimis--Hughes cannot reasonably claim that they had any meaningful impact on the award decision.

The IR&D projects described in TRW's clause H.17 had been underway for [DELETED] years by the time TRW submitted its initial proposal in November 1994. TRW explains that the total investment at that time in this advance (and independent) effort was [DELETED], of which more than [DELETED] was directly applicable to the EOS program. In explaining that TRW's proposed costs for the

EOS contract were reduced by [DELETED] as a result of the previous effort, TRW states that there is only an additional [DELETED] of effort remaining in this regard at the time of contract award. TRW's Consolidated Comments, Feb. 22, 1996 at 130.

Hughes correctly points out that the initial version of TRW's H.17 clause did, in fact, reference completing the above-described portion of the effort as part of TRW's ongoing IR&D efforts. However, after discussions, TRW amended its clause to omit any reference to IR&D, and the clause, as incorporated in TRW's contract, states only that TRW will complete the identified effort "at no additional direct cost" to the government. Since the clause clearly states that the costs will not be charged directly to this contract, and does not set forth some improper method of recouping these costs, we fail to see how NASA acted improperly in accepting the revised clause at face value. In addition, we note that TRW has submitted a sworn statement explaining that the costs at issue here are being charged to profit.

Finally, rather than analyze every challenge Hughes raises to NASA's acceptance of this clause, we reject any claim that Hughes has been prejudiced by NASA's acceptance of the clause given the relatively insignificant amount of costs at issue here. As set forth above, TRW has calculated that only [DELETED] of effort remains associated with the tasks identified in the challenged clause. Since, in general terms, TRW's costs will have to exceed its proposed costs by approximately $400 million before surpassing Hughes' most probable costs, even if we accept Hughes' claim that NASA's consideration of the clause was improper--and we do not--we see no basis to conclude that a [DELETED] addition to TRW's costs--less than half of one percent of this amount--would change the selection decision here.

Meeting with NASA's Administrator

Hughes protests that a meeting between NASA's Administrator and a senior TRW official resulted in an unfair competitive advantage for TRW in this procurement. Although Hughes expressly states that it is not alleging a violation of the procurement integrity provisions of the Office of Federal Procurement Policy Act, 41 U.S.C. § 423 (1994), it claims that the meeting was a violation of NASA's internal "blackout" policy, and that a letter sent to all offerors after the meeting was "encrypted" or "encoded" with information only TRW could use.

The controversy about this meeting, and about the letter that followed the meeting (which was sent from the contracting officer to all offerors on June 26, 1995), arose from NASA's response to a Hughes document request during the course of this protest. This letter, which in part announced plant visits to each offeror's facility, also included the following comments about the agency's view of cost realism:

> "The SEB's evaluation of cost realism is based on the difference between the offeror's proposed cost and the "most probable cost" as

> developed by the SEB (Reference Amendment 5, Section M.2.2. COST REALISM ADJUSTMENT). The probable cost reflects the SEB's evaluation of the cost and resources necessary to perform the work based on each offeror's unique approach. The most realistic bid does not mean the highest bid. Rather it is a credible bid where the proposed resources and cost clearly demonstrate the offerors understanding of the requirements. The Source Selection Official will make a selection based upon the combination of proposal features under all evaluation factors which provide the greatest overall benefit to NASA."

After initially describing this letter as one prepared in response to a telephone call, NASA corrected the record to advise our Office, and the parties to this protest, that the letter was prepared following a meeting between NASA's Administrator and a senior TRW representative.

In sworn statements provided by the Administrator, and by the Associate Administrator for Legislative Affairs, both officials explain that the meeting took place on June 21, and was part of a routine visit to discuss the congressional outlook for NASA and its programs. Both officials state that during the course of the meeting TRW's representative raised the subject of the ongoing EOS procurement, and both state that the Administrator responded that he would not discuss the pending procurement. Both also state that there was no further discussion of the procurement, although the Administrator states that he reemphasized that NASA was serious about cost realism in its procurements. Declaration of Daniel S. Goldin, Jan. 29, 1996; Declaration of Jeff Lawrence, Feb. 6, 1996.

In the supplemental agency report responding to this issue, NASA explains that the June 26 letter was prepared by the contracting officer at the request of a NASA procurement analyst, who was acting at the request of the Associate Administrator for Procurement, who apparently forwarded the request from the Administrator's Office. The contracting officer states, however, that no one from the Administrator's Office instructed him about what to include in the letter, other than to reiterate the oft-repeated commitment to cost realism. Thus, the contracting officer explains that the letter could not have provided information useful only to TRW, since the contracting officer had no knowledge of the meeting.

Hughes claims that the meeting between the Administrator and the TRW representative violated a provision set forth in NASA's SEB Handbook which provides that after release of an RFP, the SEB Chairperson

> "shall impose a communication blackout, in writing, by directing all personnel associated with the procurement to refrain from

> communicating with prospective offerors, formally or informally, regarding any aspects of the procurement. All inquiries regarding the procurement shall be referred to the contracting officer."

NASA FAR Supplement, § 18-70.303, Appendix I, subparagraph 401(2)(i).

While our Office generally will not review an alleged violation of an internal agency policy, see Indian Resources Int'l, Inc., B-256671, July 18, 1994, 94-2 CPD ¶ 29 (failure to follow proposed agency rule and internal policy memorandum); Krystal Gas Mktg. Co., B-243868, May 10, 1991, 91-1 CPD ¶ 458 (failure to follow agency policy directive); Eagle Timber, Inc., B-239386, Aug. 28, 1990, 90-2 CPD ¶ 162 (failure to follow Forest Service Timber Sale Preparation Handbook), we fail to see how this meeting would have violated NASA's policy in any event. As stated above, the meeting at issue was not about the procurement, and when the subject of the procurement was raised, the Administrator refused to discuss the matter.

With respect to the larger issue of whether TRW was able to gain a competitive advantage over other offerors by virtue of this meeting, there is no evidence in the record to support such a conclusion. First, despite Hughes' attempts to characterize the meeting as unfair or inappropriate, there is nothing inherently improper about an agency head meeting routinely with representatives of industry, even if such meetings occur during an ongoing procurement in which the industry is participating. Universal Automation Labs, Inc. v. Department of Transp., GSBCA No. 12370-P, 94-1 BCA ¶ 26,323; 1993 BPD ¶ 211 (July 7, 1993).

Second, Hughes has failed to present any evidence of impropriety to support its allegation and its corresponding request that TRW be eliminated from the competition. Protests raising such allegations must present "hard facts" to support such a claim. NKF Eng'g Inc. v. U.S., 805 F.2d 372 (Fed. Cir. 1986). In this regard, there has been no showing that there is any "encoded" or "encrypted" information in the letter, and no showing of how such information could have been included in the letter. No one associated with the Administrator's meeting assisted the contracting officer with the alleged encryption--a matter that would have presumably required inside information and subtlety--and the contracting officer denies that any encryption exists. In addition, the letter repeats the same message that has been consistently reiterated by NASA throughout the course of the procurement--that NASA wants cost proposals that are realistic and credible. Further, we note that a letter providing similar information to all offerors is precisely the kind of corrective action that would have been appropriate if the meeting had, in fact, resulted in TRW's gaining information not available to other offerors. KPMG Peat Marwick, 73 Comp. Gen. 15 (1993), 93-2 CPD ¶ 272, aff'd, Agency for Int'l Dev.; Development Alternatives, Inc.--Recon., B-251902.4; B-251902.5, Mar. 17, 1994, 94-1 CPD ¶ 201.

Finally, we note that the basis of TRW's advantage over other offerors here--i.e., its proposed cost overrun sharing approach--was offered to NASA approximately 2 weeks prior to the meeting. Thus Hughes cannot claim that TRW gained its advantage as a result of any information learned in the meeting, or learned in the follow-up letter. Accordingly, we deny this basis of protest.

Cost/Technical Tradeoff and TRW's Funding Rebate

As a final matter, Hughes argues that the cost/technical tradeoff made by the SSO in his selection decision was irrational. For the most part, the discussion above addresses the component parts of this allegation; however, one remaining specific challenge to the selection decision has not been addressed. Hughes claims that NASA acted improperly in giving evaluative credit to TRW for the rebate arrangement contained in TRW's proposal. Specifically, TRW proposed to forgo up to [DELETED] in reimbursable costs if the level of congressional funding for the program continued at projected levels. TRW Model Contract Clause H.23. According to Hughes, NASA improperly relied on the clause despite statements in the Source Selection Memorandum that it did not rely on the clause.[11]

The record shows that NASA generally regarded TRW's rebate clause as too speculative to consider as part of the agency's determination of TRW's most probable costs. In fact, as Hughes points out, "when NASA announced the contract award to TRW, the total price was given as $668.5 million. Since TRW's BAFO price was [DELETED], giving the 'funding refund' its fullest [DELETED] effect, it is plain that NASA declined to credit the rebate in making the contract award." Hughes' Second Supplemental Protest, Nov. 21, 1995 at 17. However, the Source Selection Memorandum prepared in support of the award to TRW is less clear on the subject, as set forth below:

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[11]For the record, we note that Hughes also contends that TRW's rebate clause violates the Antideficiency Act, 31 U.S.C. § 1341 (1994), because the offer will require NASA to spend additional monies in the event funding for the program does not meet currently projected profiles. Hughes' argument is not supported by the facts. The rebate clause anticipates that TRW will forgo a portion of its reimbursable costs after a fiscal year in which the EOS contract/program is funded according to the profile set forth in the RFP. There is nothing in the record to suggest that NASA will be penalized if the funding profile is not met; instead, NASA will only benefit. In addition, since this incrementally funded contract contains the standard Limitation of Costs Clause, RFP ¶ I.1, there is no Antideficiency Act concern because the government is only obligated to the contractor for the funds allocated to the contract. Honeywell, Inc., B-192988, July 11, 1979, 79-2 CPD ¶ 23.

> "we disregarded TRW's offer to rebate a portion of the Government's payment if NASA were able to provide funding in accordance with the profile identified in the RFP. Because some funding is already available for this procurement, NASA would, obviously, be able to earn some portion of the offered rebate. Beyond what appropriations are currently available, however, it is uncertain, at best, how well NASA could comply and how much of the rebate NASA could earn. Although considering the rebate would only further reduce TRW's probable cost, we concluded that using this factor was too speculative and dropped it from further consideration."

Source Selection Memorandum, Sept. 14, 1995 at 8. In selecting TRW, however, the statement includes a conclusion that "[t]he proportionate difference between TRW's probable cost and that of [Hughes] is almost twice as large as the difference between TRW's Mission Suitability Score and that of [Hughes]." Id.

In its protest challenges, Hughes repeatedly argued that the conclusion above--i.e., that the difference between the probable costs is almost twice as large as the difference between mission suitability scores--could only be true if the comparison was made using the full amount of the promised rebate. Our review of Hughes' pleadings, and the evaluation materials, led us to conclude that Hughes appeared to be correct in its assertion. Finally, in a supplemental explanation, the SSO stated:

> "In light of the recent legal challenges to my source selection decision . . . [i]t became apparent to me that the Source Selection Memorandum may be unclear with regard to assumptions taken when I stated that the proportionate difference between TRW's and Hughes' probable costs was almost twice the proportionate difference between their respective Mission Suitability scores. This statement . . . takes into account the maximum potential cost difference between Hughes and TRW assuming all cost containment measures have maximum effect.
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> . . . . .
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> "The proportionate difference between the Hughes and TRW most probable costs referenced in the Source Selection Memorandum includes the full value of the rebate TRW offered if NASA is able to adhere to our projected profile. As the Source Selection Memorandum recognizes, NASA will get credit in proportion to the degree to which we adhere to the funding profile. While NASA's ability to adhere to the funding profile is too uncertain to provide a basis for according TRW full credit for the proposed rebate, this rebate, nevertheless, represents real economic value. The statement in question was

> intended to reflect the rebate's maximum economic value for purposes of overall comparison."

Declaration of William F. Townsend, November 7, 1995 at 5. This explanation led to Hughes' supplemental argument that the selection decision was irrational and should be overturned.

Hughes' argument here, in part, rests upon the assumption that the quoted statement setting forth the comparison in relative proposed costs and mission suitability scores, is the entirety of the rationale for NASA's selection decision. This assumption is the underpinning for further contentions that our Office should reject the selection decision here as conclusory and unjustified. We do not accept this assumption.

The Source Selection Memorandum here, as well as the extensive record of evaluation materials, shows that NASA carefully considered the relative merits and costs of these two proposals. In this regard, the comparison statement is but one part of the selection statement, and but one--even smaller--part of the overall analysis of the tradeoff between the two offers. In our view, the inconsistency between the statement that the rebate was not considered, and the subsequent recognition that it was considered in order to make the claimed mathematical conclusion near the end of the document, does not make the entire selection decision irrational.

In order to better understand the conflict within the Source Selection Memorandum, we have reviewed the SSO's handwritten contemporaneous notes outlining his selection decision (again produced in response to Hughes' document request). These notes clearly show his consideration of the proposed costs both with and without the offered rebate. Thus, Hughes cannot claim that the agency failed to analyze the rebate, or that it made irrational assumptions or conclusions about how the rebate would apply.[12] Instead, Hughes asks that we, in essence, elevate form over substance, and conclude that the Source Selection Statement contains a contradiction, and hence is irrational. As stated above, we will not overturn a selection decision supported by an evaluation record that shows that NASA did, in fact, consider the issues the protester alleges it failed to consider. JSA Healthcare Corp., supra.

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[12]In addition, we see nothing unreasonable in NASA's evaluation of TRW's rebate clause. As NASA points out, since it has already received a significant portion of the funding applicable to the basic contract effort, there is no doubt that at least the amount applicable to the initial effort will be realized.

As a final matter, we also reject Hughes' contention that the cost/technical tradeoff should be overturned on the basis that it is conclusory. While a selection official's judgment must be documented in sufficient detail to show it is not arbitrary, KMS Fusion, Inc., B-242529, May 8, 1991, 91-1 CPD ¶ 447, we have held that a selection official's failure to specifically discuss the cost/technical tradeoff in the selection decision document does not affect the validity of the decision if the record shows that the agency reasonably determined that a higher technically scored proposal is not worth the additional cost associated with that proposal. University of Dayton Research Institute, B-260709, July 10, 1995, 95-2 CPD ¶ 17.

Here, the document itself discusses the results of the evaluation and makes a reasonable cost/technical tradeoff in greater detail than in the selection document reviewed in the University of Dayton case. In addition, as mentioned above, the SSO's extensive, contemporaneous handwritten notes provide a significant level of detail explaining the tradeoff decision. The selection document itself, together with the SSO's notes and the extensive evaluation record here, lead us to conclude that the cost/technical tradeoff decision was sufficiently documented. Id.

LOCKHEED'S PROTEST

As explained above, Lockheed was excluded from the competitive range by letter dated July 12, and first learned of the award to TRW on September 21, when NASA provided Lockheed with the September 14, 1995, Source Selection Memorandum. In this document, Lockheed learned that TRW's BAFO proposed to share with the government 50 percen of any cost overruns, which, in NASA's view, mitigated the impact of any perceived lack of cost realism in TRW's proposal. In response, Lockheed has filed an initial and four supplemental protests with our Office. Because of Lockheed's exclusion from the competitive range, its ability to challenge many facets of the award decision was foreclosed for reasons discussed in greater detail below. In large measure, the discussion of issues raised by Hughes covers issues that Lockheed would have raised as well, had it been eligible to do so.

Lockheed's first two protest filings ostensibly set forth five separate bases for protest, which we concluded, in essence, raised two arguments: (1) that its proposal was unfairly excluded from the competitive range due to concerns about its cost realism given that NASA later permitted TRW to circumvent similar concerns about its proposal by offering a cost-sharing arrangement in its BAFO, which, if Lockheed had known was permissible, it might have offered; and (2) that award to TRW was improper for a number of reasons--i.e., NASA relaxed the requirements of the solicitation; waived the requirements for cost realism; abandoned the cost/price evaluation factor; and lacked authority to award a cost-sharing contract without complying with procedures for obtaining a deviation from

the requirements of the FAR.[13] Lockheed's remaining three filings argue that: (1) it was unreasonable to exclude Lockheed from the competitive range for concerns about cost realism when NASA had a very low confidence level in its cost estimates; (2) the meeting between NASA's Administrator and a senior TRW official was an improper ex parte communication about the procurement; and (3) a recent exchange between the NASA Administrator and the agency's congressional oversight committee show that NASA's acceptance of TRW's cost overrun sharing arrangement was improper and could not have been foreseen by other offerors.

In response, both NASA and TRW argue that Lockheed's protest is untimely, that Lockheed is not an interested party to challenge award to TRW, and that its challenge based on the exchange between the Administrator and the congressional oversight committee raises a matter of contract administration over which our Office has no jurisdiction.

Procedural Issues in Lockheed's Protest[14]

Lockheed received a detailed explanation of the decision to exclude its proposal from further consideration in the agency's July 12 letter. The letter explained that NASA had ongoing concerns about the cost realism of Lockheed's proposal, and that the agency had applied the formula set forth in amendment 0005 to significantly reduce Lockheed's mission suitability score. As a result of its receipt of this detailed information, Lockheed was required to file any challenge to the agency's stated reasons for excluding its proposal from the competitive range within 10 working days of its receipt of the July 12 letter. 4 C.F.R. § 21.2(a)(2) (1995); GBF Medical Group/Safety Prod. Mktg., Inc.--Recon., B-250923.2, Nov. 24, 1992, 92-2 CPD ¶ 378. Lockheed failed to do so.

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[13]With respect to our conclusion that Lockheed's second basis of protest is essentially a challenge to the agency's selection of TRW, we note that Lockheed, in fact, attempts to argue that each of these contentions shows that its proposal was unfairly excluded from the competitive range. Despite Lockheed's attempts, however, its challenges to the award to TRW generally cannot be retrofitted to reach back to the competitive range determination. Thus, we conclude that Lockheed's first two filings raise only two challenges: one to the fairness of its exclusion from the competition; and one to award to TRW. For the reasons stated below, until Lockheed establishes that the competitive range decision was improper, it cannot mount a challenge to the award to TRW.

[14]Much of the procedural analysis set out below was included in a partial dismissal decision issued by our Office, see Lockheed Missiles & Space Co., Inc., B-266225.2; B-266225.3, Nov. 27, 1995, unpub., but is included here in the interest of providing a more complete decision.

Lockheed's decision not to protest at the time of its exclusion from the competitive range does not preclude it from filing a protest on an issue that it did not know of--and in fact, could not have known of--at the time of the agency's exclusion decision. See US Sprint Communications Co. Ltd. Partnership, B-243767, Aug. 27, 1991, 91-2 CPD ¶ 201 (offeror whose proposal was excluded from competitive range permitted to challenge assumption that it had no chance of receiving award where agency first learned upon receipt of BAFOs that offerors used different assumptions regarding foreign exchange rates, raising questions about whether the protester's proposal was properly excluded on the basis that it was more expensive than other proposals). Specifically, Lockheed's complaint that it was treated unfairly because it was not given the same opportunity as TRW to offer its own cost-sharing proposal--especially given NASA's heightened concerns about cost realism in this procurement--raises an issue that did not exist until TRW submitted its BAFO, and of which Lockheed was unaware until it received the memorandum explaining the basis for the agency's selection of TRW. This basis of protest raises an issue that is timely filed even though raised after the time when Lockheed generally could challenge its exclusion from the competition.

NASA and TRW assert that even assuming that Lockheed can raise a timely protest, it is not an interested party to do so because there are other intervening offerors who would precede the protester in eligibility for award. Thus, both the agency and the awardee argue that Lockheed lacks the direct economic interest necessary to maintain a protest.

Under our Bid Protest Regulations, a protester must be an actual or prospective supplier whose direct economic interest would be affected by the award of a contract, or the failure to award a contract. 4 C.F.R. § 21.0(a). Determining whether a party is interested involves consideration of a variety of factors, including the nature of the issues raised, the benefit of relief sought by the protester, and the party's status in relation to the procurement. Black Hills Refuse Serv., 67 Comp. Gen. 261 (1988), 88-1 CPD ¶ 151.

Given the posture of this procurement and Lockheed's position vis-a-vis the other offerors, each of Lockheed's protest grounds must be viewed with an eye towards whether resolution of the issue in Lockheed's favor would restore its proposal to the competitive range. In our view, since Lockheed's first argument contends that its proposal was unfairly excluded from the competitive range, Lockheed is an interested party to raise this issue.

On the other hand, our view of Lockheed's second basis of protest--that award to TRW was improper--is that it raises a question that is inappropriate for resolution at this juncture regardless of the outcome of Lockheed's challenge to the competitive range decision. If Lockheed prevails in its challenge to the competitive range decision, its arguments about award to TRW are premature; if Lockheed fails in its

challenge, it is not an interested party to challenge the selection of TRW. Our reasoning for this conclusion is set forth below.

If Lockheed were successful in challenging the competitive range decision here, the normal remedy would be to require the agency to restore the proposal to the competitive range; hold discussions with all remaining competitive range offerors, if necessary; and request new BAFOs from the offerors. Information Ventures, Inc., B-232094, Nov. 4, 1988, 88-2 CPD ¶ 443. Thus, any challenge to the award to TRW would be premature until the agency made a new selection decision. If Lockheed failed to convince our Office that its proposal should be restored to the competitive range, only another competitive range offeror would be an interested party to challenge the award to TRW. See Dick Young Prods. Ltd., B-246837, Apr. 1, 1992, 92-1 CPD ¶ 336. As a result, we conclude that Lockheed may pursue the issue of whether it was unfairly excluded from the competitive range because of concerns about the cost realism of its proposal when it might have addressed this issue using the same kind of approach TRW used, if Lockheed had known such an approach was permissible.

The Merits of Lockheed's Protests

With respect to Lockheed's contention that it could not have known that an approach like that adopted by TRW was acceptable here, we note that our discussion of the issues raised by Hughes has already concluded that TRW's approach did not alter the contract type called for in the RFP, and did not otherwise violate the terms of the solicitation. All that is left for Lockheed in this regard is its claim that it was misled by discussions. For the reasons set forth below, we conclude it was not misled.

In its recitation of oral discussions with NASA, Lockheed sets forth numerous instances where the agency reiterates its requirement that offerors must submit realistic cost proposals, and must assure that Lockheed's representatives take every possible action to convince the agency evaluators that proposed costs are realistic. Similarly, Lockheed points to numerous instances where it was advised that cost overruns will not be tolerated on this contract. In the exchange we view as most favorable to Lockheed's position, NASA evaluators advised that Lockheed had only two options: bid costs realistically; and if you think costs will be lower than we do, convince us otherwise. Transcript of Oral Discussions Between Lockheed and NASA at 210.

In our view, the discussions Lockheed points to are less persuasive than those cited by Hughes. There is no dispute here that the agency used every opportunity to communicate to offerors that realistic cost proposals were desired, and that cost overruns probably would result in termination of the EOS program. These admonitions do not translate, however, to a requirement that offerors refrain from

offering innovative methods to shield the agency from cost overruns should they occur. They did not dissuade TRW. They did not dissuade Hughes. And it does not appear that they were the operative reason behind Martin's decision to back away from its proposal to include such a provision in its proposal. See footnote 10, supra.

With respect to Lockheed's contention that it was unreasonable to exclude its proposal from the competitive range when the agency had little confidence in its own cost estimates, we find Lockheed's arguments similarly unpersuasive. Lockheed bases its claim on a statement in the initial SEB Report wherein the report states that:

> "the SEB has serious doubts about either the offerors' or the Government's ability to predict costs over the 15-year contract for multiple spacecraft builds. All offerors are consolidating and generally down-sizing to lower expenses in the face of a shrinking business base. (Lockheed and Martin Marietta's merger, already announced and in progress, is a good example.)
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> ". . .due to the high level of indirect rate uncertainty over the relatively long period of this multiple spacecraft build, the SEB expressed a low degree of confidence in both proposed costs and probable cost estimates. The Board assigned no more than a 15 percent confidence factor to probable cost figures . . . ."

SEB Initial Report, Feb. 24, 1995 at 208.

Our review of the record shows that a great deal happened between the initial SEB Report in February and Lockheed's exclusion from the competitive range in July. For example, offerors were repeatedly advised that NASA perceived that all of the proposals contained unrealistic costs; NASA revised its solicitation to assure that offerors understood that unrealistic costs would result in lowered mission suitability scores; NASA held oral and written discussions with offerors to better understand each offeror's technical approach and proposed costs; NASA held plant visits; and offerors prepared revised cost proposals and were given an opportunity to explain and defend those proposals. Notably, neither the final SEB report, nor any of the other evaluation materials prepared closer to the time of Lockheed's exclusion from the competitive range, reflect a continuation of this earlier concern. For these reasons, we see no basis to conclude that the statement in the initial SEB report invalidates the agency's evaluation of Lockheed's most probable costs.

Finally, Lockheed points to an exchange of letters between NASA and the Chairman of the Committee on Science of the House of Representatives wherein the Office of the Administrator answers a question from the Chairman regarding the impact of TRW's cost overrun sharing arrangement on NASA's management of cost growth. Specifically, NASA explains its in-house policy of triggering a termination review "when the [g]overnment's current estimate of resources needed to complete a major contract exceeds by 15 [percent] the [g]overnment's initial cost estimate of the same work" and states that TRW's cost overrun sharing arrangement will not affect the termination review trigger. The letter also promises that the agency will "undertake a new type of review--a Contractor's Commitment Review--which will be held should TRW reach a point where it is sharing any substantial amount of contract overrun." Letter from the Associate Administrator for Legislative Affairs to Chairman, Committee on Science, March 15, 1996. According to Lockheed, this exchange shows that Lockheed could not have known that NASA would accept a proposal such as that submitted by TRW.

The exchange between NASA and its oversight committee in Congress throws no light on the question of what Lockheed knew or could have known last year. Instead, the letters describe the most basic kind of contract administration issue, and whether adjustments need to be made to effectively manage the contract awarded here. This is an issue we will not review.[15] 4 C.F.R. § 21.3(m)(1). We also

[15]Hughes, too, filed a supplemental protest on April 4, 1996, challenging the exchange of letters cited here. In essence, Hughes argues that this exchange contains an admission that the contract type awarded is different from the contract solicited. Specifically, Hughes argues that the need to institute a new kind of termination review shows that the agency has awarded a contract different from the contract Hughes was led to believe would be awarded. In our view, the agency's consideration of the special issues presented by accepting TRW's BAFO proposal is commendable and analogous to the kind of consideration an agency should always invoke when awarding a contract that may result in less than full compensation for the contractor's efforts--i.e., a below-cost bid or offer. See Vitro Corp., supra; Robocom Sys., Inc., B-244974, Dec. 4, 1991, 91-2 CPD ¶ 513. Rather than an inconsistency, this kind of review is entirely consistent with the agency's long-announced efforts at cost containment on this project. Accordingly, we see nothing in this exchange of letters to support a conclusion that TRW's cost overrun sharing arrangement altered the solicited contract type.

need not revisit Lockheed's challenge to the meeting between the Administrator and the TRW representative; this issue was discussed with respect to Hughes' protest.

The protests are denied.

Comptroller General
of the United States