

Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

**Matter of:** Marconi Dynamics, Inc.

**File:** B-252318

**Date:** June 21, 1993

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John S. Pachter, Esq., and Michael K. Love, Esq., Smith, Pachter, McWhorter & D'Ambrosio, for Hughes Missile Systems Company, an interested party.  
Gregory H. Petkoff, Esq., and Clifford A. Carlisle, Esq., Department of the Air Force, for the agency.  
Ralph O. White, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

### DIGEST

Protest against the proposed award of a sole-source, follow-on contract for weapon system support is sustained where the agency relies on the authority of 10 U.S.C. § 2304(c)(1) (1988) to support its decision, but the agency's written justification and approval is not reasonably based because its claims--that the unavailability of proprietary data and of certain equipment and facilities (both government furnished and otherwise), combined with the short term of performance and low contract value mean that only the sole-source can provide the services--have been effectively refuted by the protester who has shown that the findings are not supported by fact.

### DECISION

Marconi Dynamics, Inc. protests the proposed award of a contract to Hughes Missile Systems Company under request for proposals (RFP) No. F42630-93-R-20771, issued by the Department of the Air Force for follow-on engineering services, called Weapon System Support (WSS), for the AGM-65D, AGM-65F, and AGM-65G Maverick Missiles. Marconi challenges the selection of Hughes for award of this sole-source contract on the grounds that the Air Force improperly determined that Hughes was the only responsible source capable of meeting the government's needs.

We sustain the protest.

#### BACKGROUND

This protest arises over what the Air Force describes as the final contract to be awarded for WSS for the IR Maverick Missile, during the last period of the missile's production. It was triggered when, on January 22, 1993, the Air Force published a notice in the Commerce Business Daily (CBD) announcing that it would procure these engineering services via a sole-source contract with Hughes, the company that produced most of the missiles.

The IR Maverick Missile is the last variation in a series of Maverick Missiles produced for the Air Force over the last 25 years.<sup>1</sup> Although the agency states it has no plans to procure additional Maverick Missiles past the end of calendar year 1994, it acknowledges that there could be additional foreign military sales of Maverick Missiles that are yet unplanned.

Marconi engaged Air Force personnel in a dialogue about its ability to compete for this and other Maverick Missile support requirements during much of 1992. In response, the Air Force informed Marconi by letter dated January 26, 1993, that Marconi would not be considered an approved source to perform support services for the IR Maverick.

After receipt of the January 26 letter, representatives of Marconi met with officials from Hill Air Force Base on February 3 to discuss Marconi's capabilities, and to request that the Air Force reconsider whether Marconi could perform the contract. Immediately after the meeting, the contracting officer issued a February 5 letter rescinding the January 26 letter that concluded that Marconi was not a qualified source. The contracting officer stated that Marconi would receive a new letter "detailing our reasons for a sole source procurement on the AGM-65 Weapons System Support requirement." In addition, the contracting officer stated that he would delay the issuance of the RFP until Marconi had an opportunity to review the letter.

Since the Air Force letter continued to state an intent to procure the engineering support services here via a sole-source contract, despite the decision to rescind its finding that Marconi was not a qualified source, Marconi filed a protest with our Office on February 11. As part of the

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<sup>1</sup>The designation "IR" refers to the infrared imaging system used by the Maverick Missile at issue here. Previous versions of the missile include the Television (TV) Maverick and the Millimeter Wave (MW) Maverick.

agency report on the protest, the Air Force provided legal arguments, a contracting officer's statement, and a justification and approval (J&A) document, dated March 19 (the day the agency report was due), supporting the decision to procure these services sole-source from Hughes.

#### The Findings in the J&A

The J&A concludes that a sole-source award to Hughes is justified under 10 U.S.C. § 2304(c)(1) (1988), which authorizes the use of other than competitive procedures when the supplies or services needed by the agency are available from only one responsible source, or from a limited number of responsible sources, and no other product will satisfy the agency's needs. In addition, the J&A cites Federal Acquisition Regulation (FAR) § 6.302-1, which provides additional guidance applicable to the decision to procure services on a sole-source basis. For example, the J&A states that the FAR authorizes limiting competition since the Air Force concluded that only Hughes has the necessary data rights (FAR § 6.302-1(b)(2)) and unique capabilities (FAR § 6.302-1(b)(1)) to perform the services, and since the Air Force concluded that award to a source other than Hughes would cost more than the agency expects to recover through competition (FAR § 6.302-1(a)(2)(ii)).

In reaching the decision that a sole-source award to Hughes is justified, the J&A makes findings on numerous issues that contribute to the ultimate conclusion. These issues, discussed in greater detail below, include: how long the services will be required in the future; whether there will be additional purchases of these services after 1994; the value of the services; the necessity of using proprietary technical data to perform the services; the cost of procuring such proprietary data from Hughes; the amount, availability, and cost of government furnished equipment needed; and the requirement to use special test equipment available only at Hughes.

Specifically, the J&A describes this contract as having an estimated value of \$4.3 million. This total is comprised of an estimated \$1.1 million fixed-price effort for systems engineering, interface control, and baseline maintenance support; and an estimated \$3.2 million time-and-materials effort for on-call tasking for aircraft integration, training, and problem resolution support. According to the J&A, there is no anticipated follow-on requirement for these services. Thus, the J&A balances the value of the contract

against the cost of numerous other barriers to competition. As a result of this balancing, the J&A concludes:

"With the short period of performance and lack of future contracts, there is no reasonable expectation that the government can recoup the costs of competing this effort. The estimated costs associated with competing WSS would include the purchase of data rights (\$4M), the duplication of minimum required GFE [government-furnished equipment] (\$3M-\$4M), creating new test labs and computer simulation equipment (\$5M), and the unmeasurable costs associated with the learning curve a new contractor would require.

"The net costs of competing WSS, especially compared to the dollar value of the entire effort, make a sole source acquisition reasonable from both a program cost and risk standpoint."

During the course of this protest, Marconi has challenged nearly every finding of the J&A document created to defend the Air Force sole-source decision, including the Air Force's representations to our Office regarding the value and term of this contract. Our review of the initial agency materials, the supplemental documents,<sup>2</sup> the protester's and interested party's filings, and the extremely limited Air Force response to those filings, leads us to conclude that the record before us does not support the decision to procure these services on a sole-source basis. The reasons for our conclusion are set forth below.

#### DISCUSSION

Because the overriding mandate of the Competition in Contracting Act of 1984 (CICA) is for "full and open competition" in government procurements obtained through the use of competitive procedures, 10 U.S.C. § 2304(a)(1)(A), this Office will closely scrutinize sole-source procurements conducted under the exception to that mandate authorized by

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<sup>2</sup>Since the J&A was provided as part of the agency report, Marconi requested additional documents from the Air Force under the terms of our Bid Protest Regulations. See 4 C.F.R. § 21.3(f) (1993) (protesters may request additional documents if the existence or relevance of such documents first becomes evident from the agency report).

10 U.S.C. § 2304(c)(1). Test Sys. Assocs., Inc., 71 Comp. Gen. 33 (1991), 91-2 CPD § 367, aff'd, B-244007.3, Mar. 17, 1992, 92-1 CPD § 287; Sperry Marine, Inc., B-245654, Jan. 27, 1992, 92-1 CPD § 111. As explained above, the Air Force also invoked FAR § 6.302-1, which permits limiting competition when supplies or services are available from only one source because of limited data rights (FAR § 6.302-1(b)(2)), unique capabilities (FAR § 6.302-1(b)(1)), or because award to another source would result in substantial costs not expected to be recovered through competition (FAR § 6.302-1(a)(2)(ii)).

When an agency uses noncompetitive procedures under 10 U.S.C. § 2304(c)(1), it must execute a written J&A with sufficient facts and rationale to support the use of the specific authority, see FAR §§ 6.302-1(c); 6.303; 6.304, and publish a notice in the CBD to permit potential competitors to challenge the agency's intent to procure without full and open competition. See 10 U.S.C. § 2304(f) (1988 and Supp. IV 1992). Our review of an agency's decision to conduct a sole-source procurement focuses on the adequacy of the rationale and conclusions set forth in the J&A. When the J&A sets forth reasonable justifications for the agency's actions, we will not object to the award. Turbo Mechanical, Inc., B-231807, Sept. 29, 1988, 88-2 CPD § 299.

Under each of the headings below--Availability of Data; Availability of Equipment and Facilities; and Term and Value of Contract--we review the agency claims and the protester's and interested party's arguments related to those claims.

#### Availability of Data

The Air Force J&A contends that the agency must procure these services on a sole-source basis from Hughes because several critical portions of the technical baseline for the Maverick program have restricted data rights. In this regard, the J&A states:

"There are approximately 500 Hughes-proprietary technical documents. As an example, the drawings and specifications for the Autofocus Assembly, the Rate of Acceleration Meter (ROAM) and the A7 Correlator Circuit Card Assembly are proprietary to Hughes. This data, which documents the functional characteristics of these components, is not releasable by the government to other potential sources."

The J&A states that the data will be necessary to perform the WSS contract, and the Air Force estimates that it will cost approximately \$4 million to purchase the data from Hughes.

In addition, the legal memorandum submitted with the agency report argues that Hughes has all formal and informal developmental materials from over 20 years, and that the Maverick weapons system "consists of over 5,500 drawings and 244 specifications and interface control drawings." The Air Force legal memorandum also states that there are more than 45,000 Maverick technical documents in Hughes's possession, and that Hughes personnel have unique knowledge to supplement the drawings and materials that are only available to Hughes.

Marconi's response to the Air Force on the subject of proprietary data takes three forms: (1) it argues that the agency exaggerates the amount of data required to perform the WSS contract; (2) it presents expert opinion to show that there is little or no need for a WSS contractor to have access to the remaining unavailable data to perform these services; and (3) it attempts to refute both the claim that the data is proprietary, and the claim that purchasing the rights to the data from Hughes would cost \$4 million.

#### Requirement for proprietary data is overstated

Marconi's contention that the Air Force exaggerates the amount of data required to perform these services begins with several reminders about the nature of the WSS services. First, Marconi points out that the Air Force cannot seriously suggest that access to every technical document produced over the life of the Maverick Missile program--i.e., some 45,000 documents--is necessary to perform the engineering services here. The IR Maverick is a recent configuration of this missile; documents related to the TV Maverick produced in 1968 and 1969 are unlikely to play any role in providing engineering support for the missiles here. Second, Marconi points out that it is not seeking to build the IR Maverick, but to provide engineering services. Finally, Marconi notes that the Air Force is not suggesting that the 45,000 documents are proprietary.

In response to Marconi's document request asking the Air Force to provide a list of the 500 Hughes-proprietary documents cited in the J&A, the Air Force admitted that it had no list, that the number was an estimate, and most importantly, that the three components identified as examples in the J&A--the Autofocus Assembly, the ROAM device, and the A7 Correlator Circuit Card Assembly--were the only components of the system for which the technical data remained proprietary to Hughes.<sup>1</sup> In a supplemental contracting

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<sup>1</sup>The Air Force's May 14 response--the last in a series of responses--to Marconi's March 24 supplemental document  
(continued...)

officer's statement addressing this issue, the Air Force points to additional data such as "sub vendor qualification reports, design and development data and parametric test results." The agency does not explain why this data is necessary to perform the WSS contract, and does not contend that there is some legal bar to making this information available to a competitor. Rather, the Air Force states that the data is "resident exclusively at the incumbent's facility."

In short, a review of the record shows that whatever data is proprietary is limited to the three components identified above, not the entire missile, and that the total amount of proprietary data for the three components is, at most, 500 documents, not 45,000.

WSS services can be performed with other available data

Marconi next argues that it can perform the engineering support services with information other than the proprietary drawings the J&A claims are unavailable. As a guideline for this discussion, Marconi points out that the initial claims regarding proprietary data in the J&A have been limited to the data associated with the three components of the missile discussed above. Marconi explains that even without the data related to those three components, it will be able to

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3 (...continued)  
request stated:

"A list of the 500 drawings does not exist. The figure of 500 drawings was an estimate. The following assemblies are proprietary to [Hughes]:

Correlator Circuit Card Assembly	Drawing 3731190-4
Rate of Acceleration Meter (ROAM)	Drawing 260044-2
Autofocus Circuit Card Assembly	Drawing 3829685-3

Indentured drawings for these assemblies comprise the bulk [of] what was estimated as 500 drawings. Rights to these drawings were relinquished by the government as part of the second-source licensing agreement." [Emphasis added.]

We agree with Marconi that the admission that the drawings for the three components named above comprised the bulk of the protected information related to this program appears inconsistent with the statement in the Air Force legal memorandum submitted with the agency report which claimed that Hughes "has restricted rights data in a variety of items, including, but not limited to" the three components named above.



provide these support services--which include requirements like engineering troubleshooting services--by using the technical orders for the IR Maverick, together with several other items of delivered data. Since these technical orders are procured by the government for use by support personnel for maintenance, the orders are not proprietary.

In response to Marconi's extensive explanation of its views regarding other sources of data available for use in performing this effort--including argument, sworn statements, and documentary submissions--the Air Force submitted a 3-page supplemental contracting officer statement addressing Marconi's comments. In this statement, the contracting officer disagrees with Marconi's contention that the technical orders contain sufficient detail to perform the WSS contract. According to the Air Force, the technical orders "do not contain all interfaces between the missile, launchers, aircraft," and are insufficient to perform maintenance of functional, allocated, and product baselines as specified in the statement of work. Hughes likewise opines that the technical orders are not sufficient to perform these services, and states that the technical orders were never intended for use in performing WSS.

Our review of Marconi's specific and detailed contentions, compared with the responses of the Air Force (and Hughes), leads us to conclude that the agency has failed to rebut Marconi's specific claims and failed to explain why the information cited by Marconi is insufficient to perform the services at issue here. The technical orders on this system are numerous and highly detailed. They include circuit diagrams, parts breakdowns, mechanical drawings, functional descriptions, troubleshooting charts, software descriptions, and other data intended to be sufficient for operational and field maintenance, troubleshooting and depot maintenance by government personnel.

In addition, Marconi states that it can supplement the technical orders with software source codes, documentation system design and production specifications, plus other data owned by the Air Force. One example of such other data is the Air Force Weapon System Evaluation Report. This report is prepared quarterly by the WSS contractor for the Air Force and documents all repair actions to the piece part level. Marconi points out that the report reveals patterns versus random failures, and component problems that may be associated with age or degrading reliability.

Marconi also points out that it would not be reviewing these materials for the first time, or approaching the task of supporting the IR Maverick with no relevant background, as it has assembled a team of former Hughes and Air Force employees who have extensive experience with the IR Maverick



system. Marconi sets forth significant portions of its explanation of how it would use nonproprietary information to perform the WSS contract in sworn statements from two such experienced employees. One of these individuals, Marconi's proposed project manager, was employed by Hughes for 24 years, 18 years of which were spent in positions of significant authority on the IR Maverick Missile program. The other individual, a former employee of Hill Air Force Base for 36 years, has extensive experience with the content of technical orders and other available nonproprietary documents that could be used to provide this support.

Marconi's explanation of its view of the role of the technical orders and other available documentation is not mere disagreement with the agency's statement of its needs. Rather, Marconi points out that this is a very mature weapon system with a stable design.<sup>4</sup> According to Marconi, changes to the missile at this point in its production are usually limited to parts substitution which would require a maintenance action on the Program Parts Selection List or possibly the depot technical orders.

In sum, we find that Marconi has made a substantial, detailed, and well-reasoned argument that it can perform these services, while the Air Force has offered little in the way of response. Based on our review, we conclude that the Air Force position that Hughes proprietary data blocks the agency's ability to compete its requirement for WSS services--as presented and defended before our Office--is simply not supported by the record here.

#### Challenge to protected nature and estimated cost of data

Finally, with respect to the J&A's \$4 million estimated cost of obtaining any Hughes proprietary data, Marconi argues that the data for the three components should not be considered proprietary, and challenges the cost estimate for obtaining the data rights in any case. In general terms, Marconi points out that Hughes has been building the Maverick Missile for the government for 25 years, and that government funds have been used to produce the missile, not private funds. Thus, according to Marconi, Hughes's retention of proprietary data rights in the Maverick Missile is inappropriate, and contrary to government policy.

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<sup>4</sup>We note, for example, that the list of specifications used in the 1990 production and WSS contract contains specifications dated between February 5, 1970, and August 5, 1987. Within this range, the majority of the referenced specifications date from the 1970's.

In response to Marconi's supplemental document request seeking documentary support for the J&A's estimate that it would cost \$4 million to procure the data needed to perform the WSS services, the Air Force and Hughes provided a December 1982 modification to a 1978 contract (F33657-78-C-0468) between Hughes and the agency. In this modification to the underlying Maverick contract, the Air Force paid Hughes \$4,285,000 for use of the limited rights data for the three components identified above--the Autofocus Assembly, the ROAM device, and the A7 Correlator Circuit Card Assembly--to develop a second source (Raytheon Company) for the Maverick Missile. Hughes provided the text of this agreement to support its argument that the government purchase of rights to this data was limited to providing the data to a second production contractor, not a maintenance contractor.

Our review of the 1982 agreement suggests that Hughes is correct in its contention that the Air Force purchase of data rights for these components was limited to use by a second production source. On the other hand, the Air Force claim that Hughes would demand payment of a second \$4 million sum to permit the agency to provide even limited access to this data for the purpose of performing support services may be overstated. There is no evidence in the record beyond the 1982 agreement of any contemporary negotiations with Hughes on this subject,<sup>5</sup> nor is there any evidence that the data involved is worth as much to Hughes as it was when the system was newer, and the technology more modern.<sup>6</sup> In short, the Air Force's superficial conclusion that it will be required to pay Hughes the same price for the data it paid 11 years ago is not sufficient to justify a sole-source procurement, especially in light of our conclusion that Marconi may not need to use the data for these components in any event.

#### Availability of Equipment and Facilities

The J&A also points to equipment and facilities only available to Hughes that would be needed for a WSS contractor.

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<sup>5</sup>Since the Air Force purchased rights to these components in 1982, Congress has enacted an extensive statutory framework for determining the government's rights in technical data. See 10 U.S.C. §§ 2320, 2321 (1933 and Supp. IV 1992), enacted as part of the Department of Defense (DOD) Authorization Act for Fiscal Year 1985, Pub. L. No. 98-525; FAR Subpart 27.4; and DOD FAR Supplement Subpart 227.4.

<sup>6</sup>Presumably, if Hughes captured its costs 11 years ago in providing this data to permit competition for missile production, it need not be reimbursed its full costs again.

The categories of such items, although not always severable, include GFE, contractor-owned unique equipment, and contractor-developed unique facilities. The discussion below will summarize most of the items identified as needed and the arguments for and against Marconi's suggestion that it has access to the equipment and facilities needed to perform this contract.

The J&A first points to the System Engineering Validation Laboratory (SEVL) and related test facilities that were developed by Hughes over several years at a cost of over \$5 million. The J&A admits that the SEVL is stocked with GFE, which the Air Force estimates will cost \$3 to \$4 million to replace. It also explains that the GFE cannot be removed from the Hughes facility as it is being used by Hughes to produce the Standoff Land Attack Missile and the GBU-15 Glide Bomb IR seeker assemblies.

With respect to non-GFE equipment, the J&A states:

"Two critical portions of the SEVL are not owned by the government. The six degree-of-freedom (6-DOF) simulator is a hardware-in-the-loop simulation facility used to evaluate changes to missile hardware. The SIMFAX is a software simulation tool used to analyze flight profiles and determine Circular Error Probabilities (CEPs). These tools allow proofing of proposed engineering changes without live flight tests. These essential tools are owned by Hughes and were developed at considerable cost and effort over a number of years. The Air Force has no access to other similar equipment to provide to other contractors."

As with the contentions regarding proprietary data, the Air Force legal memorandum also enumerates other equipment and facilities needed to perform the WSS contract. These include: "the encoded symbology analyzer that provides tracker performance for launch analysis and trouble-shooting"; a system validation laboratory; a system engineering laboratory; the Maverick integration test station; and the Tucson final assembly and checkout (FACO) facilities for the Maverick missile.

In its responses, Marconi addresses each of the equipment and facility needs in detail, and, in some cases, suggests alternative sources for the equipment or the facility. Marconi also points out that the Air Force's arguments are inconsistent with the agency decision to compete a joint production and WSS contract for the Maverick in 1989. In that competition, between Hughes and Raytheon, there was no

contention that Raytheon would be unable to provide the WSS portion of the contract without Hughes equipment.

Starting with the SEVL, identified in the J&A, Marconi argues that its own laboratory facilities are extensive, and are adequate to perform the WSS contract if supplemented with the minimal testing and laboratory equipment discussed during the course of this protest. For example, for the two non-GFE items identified in the J&A, Marconi contends that the WSS contractor could make use of the Guided Weapons Evaluation Facility at Eglin Air Force Base. Specifically, Marconi states that the Eglin facility has the 6-DOF simulator and testing equipment far superior to that in the SIMFAX facility owned by Hughes. Marconi argues that the SIMFAX facility is largely outmoded, has not been used in the previous 2 years to perform any part of the WSS services contemplated here, and is scheduled to be closed in the near future.

The Air Force and Hughes respond that the equipment at the Eglin facility--such as the 6-DOF simulator and equipment similar to that in the Hughes SIMFAX facility--has only been used to perform testing on the MW Maverick, and is not yet compatible with the IR Maverick. According to the contracting officer, the facility "requires substantial time and cost to become fully Maverick capable." In addition, although Hughes concedes that it plans to close its Canoga Park, California, SIMFAX facility, it denies that the facility was unused in recent years to perform these services.<sup>7</sup> Hughes indicates that it has back-up capabilities for the services available in its Canoga Park facility and that it will not close the facility until the same services can be provided at a Hughes Tucson, Arizona, facility.

In its supplemental comments, Marconi provided a sworn statement from one of its managers describing a visit to the Eglin facility on April 14, 1993. In this document the Eglin facility is described as a \$27 million state-of-the-art guided missile laboratory designed to provide full system simulation capability for guided missiles. The laboratory is available for contractor or government use. The document explains that while the facility is not currently configured for the IR Maverick, it is capable of

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<sup>7</sup>According to Hughes, its SIMFAX facility is used to support a variety of contracts, but was used in late 1992 "to evaluate changes to Maverick's rate sensors in connection with an engineering change proposal."

being so modified.<sup>8</sup> In addition, Marconi's representative states that Air Force officials at the facility advised him that the facility was suitable and available to meet WSS needs, and that the plans to modify the facility to make it compatible with the IR Maverick were funded and would be completed in 12 to 18 months.<sup>9</sup> Marconi's representative further states that the Air Force officials indicated that the modifications could be made in as little as 3 months if needed.

With respect to the encoded symbology analyzer and the laboratories mentioned in the Air Force legal memorandum, Marconi responds that the Air Force has funded the construction of several symbology analyzers for the Air Force and the Navy. In addition, Marconi claims that the analyzer delivered to the Navy was provided without use restriction, and that Marconi personnel are trained to operate the device. Marconi also states that the laboratories mentioned in the Air Force legal memorandum are duplicated by Marconi laboratories, or by the Eglin facility discussed above.

The final item discussed in detail by the parties is the Tucson FACO facilities. According to the Air Force, the FACO facilities were designed and built by Hughes and house various Maverick test equipment and fixtures in special ordnance assembly and test facilities. The Air Force explains that the facility cost more than \$3 million and allows active warheads and rocket motors to be loaded and unloaded, permitting rapid investigation of problems with "full up" missiles. The Air Force legal memorandum

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<sup>8</sup>Apparently, the modification of one of the two major components at issue--the 6-DOF simulator--has already been done once. In one of its submissions, Hughes points out that it has already provided a copy of the software needed to modify the 6-DOF simulator for use with the IR Maverick to the Naval Air Development Center, Warminster, Pennsylvania. According to Hughes, this modification cannot be made available here because it is dedicated to the support of a program at the Naval Air Development Center, and because the software makes use of a math library that is proprietary to Hughes. Marconi, on the other hand, claims it does not need Hughes's math model to conduct the 6-DOF simulation.

<sup>9</sup>These representations were bolstered by other sworn statements explaining: (1) that only the programming of the guidance algorithm needed to be accomplished to make the 6-DOF compatible with the IR Maverick; (2) that the program for the guidance algorithm is completely described in Air Force-owned data; and (3) that the process can be quickly carried out for less than \$100,000.

discusses the FACO facility under the heading of support facilities that would not be available to another contractor.

In its initial comments on the agency report, Marconi points out that the FACO facilities indicated in the Air Force legal memorandum "are part of GOCO<sup>10</sup> plant (No.) 48 [and that] . . . [t]he statement that [Hughes] designed and built the FACO for the Maverick is misleading in that the government owns the facility." In addition, Marconi claims that any need for the FACO facility can be duplicated at the site where Raytheon assembles the Maverick, or at the Air Force Depot at Hill Air Force Base. While the Air Force agrees that the Raytheon or Hill facilities might be an adequate substitute for the FACO, it contends that neither is available; Hughes argues that the Hill facility is not set up to accommodate contractor operations and could not be used for these purposes.

The issues in this case requires a balancing both of the strengths and merits of each argument, and of the adequacy of each side's response to arguments raised by the other. The standard for such a balancing requires that the protester show not just disagreement, but that the agency arguments and positions are unreasonable. Allied-Signal Inc., B-247272, May 21, 1992, 92-1 CPD ¶ 461. We conclude that the protester has made that showing.

In its pleadings, Marconi has produced substantial and convincing evidence that the two items of equipment identified in the J&A as unique to Hughes are available at the Eglin facility. Although the equipment at Eglin has been used to perform testing on the MW Maverick, Marconi has also produced convincing evidence that the items there can be quickly and inexpensively modified to make them compatible with the IR Maverick. In addition, the Air Force has at no point attempted to refute the claims made in Marconi's sworn statements about the view of Air Force personnel that the facility could be quickly modified. We also note that Hughes has already performed and provided the work needed to accomplish most of the modification, and provided that work to the government. Since Hughes has only suggested that part of the work is proprietary--the math library--the Air Force may be able to move even more quickly in making these changes.

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<sup>10</sup>GOCO is an acronym for a government-owned, contractor-operated facility.

Likewise, Marconi has produced strong arguments in response to the alleged necessity and unavailability of the SIMFAX software simulation tool. Based on the silence of the Air Force in response to Marconi's detailed assertions, it appears that the Eglin facility does, in fact, contain simulation equipment suitable for use in this capacity. Further, although Hughes rebutted Marconi's contention that Hughes had made no use of the SIMFAX capability at its Canoga Park facility, and was, in fact, planning to close the facility, we note that Hughes offered but one example of a need for the capability. Since it does not appear that the SIMFAX capability is a driving force in performing the WSS contract, and that similar capabilities apparently exist at Eglin, we cannot agree that the unavailability of this equipment forms a valid basis for failing to competitively procure these services.

Finally, the Air Force does not respond to Marconi's contention that any need for an encoded symbology analyzer can be addressed within the government, or that the FACO facility is in fact a government-owned facility.<sup>11</sup> Rather, the Air Force and Hughes simply argue that the alternative suggested by the protester is unsuitable. Given this record, we cannot conclude that the government has put forth reasonable arguments in support of its conclusion that the need for

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<sup>11</sup>For the record, our Office, as well as Marconi, was initially misled by the Air Force legal memorandum's reference to the FACO facility in the context of facilities and equipment unique to Hughes. The legal argument stated that Hughes "designed and built the Tucson final assembly and checkout utilities for the Maverick Missile." In this case, the distinction between whether equipment and facilities are available for use by another contractor turns on whether the item was paid for by the contractor or by the government--and thus is generally the government's equipment to use as it sees fit. Since the FACO facility is, in fact, owned by the government it should not be listed as a facility available only to Hughes.



unique facilities and equipment<sup>12</sup> requires this procurement to be conducted on a sole-source basis.

#### Term and Value of Contract

Marconi also challenges the Air Force's assumptions about the size and term of the WSS contract as set forth in the J&A. As explained above, the J&A estimated the value of this contract as \$4.3 million, based on the amount of time remaining before the end of the Maverick production contract at the end of 1994. As a result, the J&A concluded that:

"The net costs of competing WSS, especially compared to the dollar value of the entire effort, make a sole source acquisition reasonable from both a program cost and risk standpoint."

Our review of the record indicates that the estimated value of this contract in the J&A may be understated, and that, as a result, the J&A's conclusion that a sole-source acquisition is reasonable may be unjustified. We reach this conclusion for the reasons below.

Although not explained in the J&A, the estimate there was based on an assumption about the amount of time that would be required to purchase rights to the Hughes data for the three components discussed above. According to the contracting officer, the lead time for purchase of this data would be 9 months. The contracting officer then used this 9-month period to reduce the performance period of the WSS contract, concluding that the remaining value of the contract would be \$4.3 million; the \$4.3 million figure cited in the J&A thus represents the value of the contract if fully competed. Without this assumption, the legal memorandum states that the effort here--i.e., the value of the sole-source contract to Hughes--is worth approximately \$8 million.

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<sup>12</sup>Although the Air Force J&A did not enumerate the specific GFE that would have to be used--nor did the Air Force ever produce such a list in response to Marconi's document requests--Hughes has identified other GFE it claims is needed to perform the WSS contract. Hughes identifies the Guidance Unit Test Stand and the Missile Final Test Stand as important GFE, and claims that Marconi's failure to identify the need for these items indicates that it does not understand the scope of the effort required. In our view, Hughes's claim is not dispositive of whether the Air Force has adequately justified a sole-source contract. Nor has there been a clear answer from the Air Force to the question of whether the capabilities of these items are duplicated elsewhere, such as at the Eglin facility.

In our view, the contracting officer's estimate of the time required to procure this data is unreasonable. Given that the proprietary data has been limited to the three components for which data was previously purchased for use by Raytheon, we fail to understand why 9 months are needed to complete this transaction--assuming that the purchase proves to be necessary at all. Since there should be no need for a 9-month delay, we assume that the value of this contract may be substantially higher than the value stated in the J&A.<sup>13</sup>

Marconi's second challenge to the size and term of the contract is its contention that the WSS services will not automatically end at the end of the current Maverick production contract. Although the Air Force stated in response to Marconi's document request that it has no current written plans for additional procurement of Maverick missiles, and thus, no documents to produce, the contracting officer concedes, in his supplemental statement, that there may be additional production of these missiles based on foreign military sales. Documents submitted by Hughes support Marconi's contention as well.<sup>14</sup>

Under these circumstances, we find that Marconi has successfully called into doubt both the value and term of the procurement as set forth in the J&A, much as it raised strong challenges to the other costs the Air Force claims will have to be incurred to compete these services. These doubts call into question the underlying balance of costs supporting the J&A's conclusion that the cost of competition will not be recouped here.

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<sup>13</sup>Agency procurement officials must be vigilant about the value of contracts slated for exclusion from other than full and open competition in their J&A documents. Under the provisions of FAR § 6.304, written approval of J&A documents is required at higher levels when the value of the contract increases. For contracts valued between \$1 and \$10 million, approval is required by the head of the procuring activity or a designee who: (a) if in the military, is at the general or flag officer level; and (2) if a civilian, is a grade GS-16 or above. FAR § 6.304(a)(3).

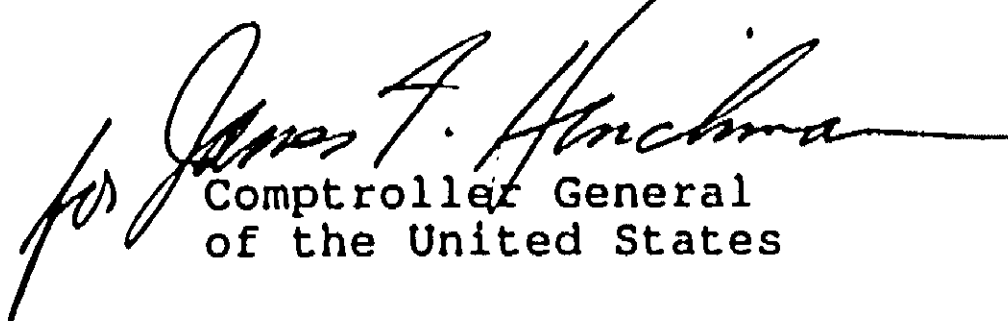
<sup>14</sup>Although Hughes is silent on this point in its legal arguments, one of its attachments to its comments on the agency report, attachment 4, contains an endnote with the statement that Hughes expects its last delivery of IR Maverick Missiles "will probably be in 1996 or later, assuming that [Hughes] builds the [foreign military sales] and Saudi IR Mavericks."

## CONCLUSION AND RECOMMENDATION

Given our review of the record, we find that the Air Force J&A document does not support the agency's decision to procure WSS services from Hughes on a sole-source basis. The Air Force has not shown that Marconi will need access to protected documents to perform these services, nor has the agency justified its estimated cost of the documents if needed for contract performance. The Air Force also has not shown that there is insufficient equipment or facilities available for a competition. Finally, the value of the contract may be substantially greater than claimed in the J&A, and thus the conclusion that the cost of competition will not be recouped is unjustified.

Accordingly, we recommend that the Air Force draft a solicitation that permits at least a limited competition between Hughes and Marconi for these services. We also find that the agency should reimburse Marconi for its costs of filing and pursuing its protest. 4 C.F.R. § 21.6(d)(1). In accordance with 4 C.F.R. § 21.6(f), Marconi's certified claim for such costs, detailing the time expended and costs incurred, must be submitted directly to the Air Force within 60 days after receipt of this decision.

The protest is sustained.

  
Comptroller General  
of the United States