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Comptroller General of the United States

Washington, D.C. 20548

Decision

Matter of: Hughes Missile Systems Company

File: B-257627.2

Date: December 21, 1994

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

DIGEST

1. Contention that agency improperly accepted two offerors' technical proposals submitted in response to the first step of a two-step negotiated procurement is denied where the record shows that the agency reasonably concluded that the technical proposals met all of the essential requirements of the solicitation.

2. Protester's challenge that the request for price proposals issued as the second step of a two-step negotiated procurement is flawed for failure to include a cost realism review and for choosing not to consider transition costs to the government as part of the agency's evaluation of prices is denied where the agency reasonably concluded that the presence of adequate price competition precluded the need for a cost realism review, and decided that the effect of considering transition costs would favor the previous incumbent and would hinder competition.

DECISION

Hughes Missile Systems Company protests the decision of the Department of the Air Force that Marconi Dynamics, Inc. and Raytheon Company submitted acceptable technical proposals in response to request for technical proposals (RFTP) No. F42630-93-R-27074, issued for follow-on engineering services, called Weapon System Support (WSS), for the AGM-65D, AGM-65F, and AGM-65G Maverick Missiles. Hughes argues that only it can perform these services, and that the agency's conclusion that Marconi and Raytheon submitted acceptable technical proposals is unreasonable.

Hughes also challenges certain solicitation provisions included in the step-two price competition.

We deny the protest.

BACKGROUND

This protest is the second review of this procurement by our Office. In the earlier case, Marconi Dynamics, Inc., B-252318, June 21, 1993, 93-1 CPD ¶ 475, our Office sustained a protest by Marconi challenging the Air Force's decision to procure these services sole-source from Hughes, without permitting other potential offerors to compete for the opportunity to perform the work. In holding that the agency should convene at least a limited competition for these services, our prior decision concluded that neither Hughes proprietary data, special equipment or facilities, nor the estimated time of the remaining contract, justified forgoing the benefits of competition.

Specifically, with respect to proprietary data, our decision concluded that: (1) the amount of Hughes proprietary data needed to service the Maverick missiles was overstated by the agency; (2) Marconi made a substantial, detailed and well-reasoned showing that it would be able to perform these services without using any Hughes proprietary data; and (3) Marconi cast substantial doubt on both the validity of Hughes's claim to proprietary rights for this data, and the Air Force's claimed cost of purchasing such data from Hughes, if needed.

With respect to facilities and equipment, our decision concluded that Marconi provided convincing evidence, including the views of Air Force technical personnel, that its own capabilities, combined with certain equipment at the Guided Weapons Evaluation Facility at Eglin Air Force Base, would permit Marconi to perform the needed services. Finally, our decision rejected the agency's contention that the remaining time for performance of these services--estimated as a matter of months--would not justify the cost of a competition.[1]

In response to our decision in Marconi, the Air Force decided to hold a competition for these services, and structured its competition in the form of a two-step negotiated procurement.[2] Included in the RFTP issued

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[1]For the record, we note that the RFTP at issue now is for 1 base year and 2 option years.

[2]This form of procurement is a negotiated variation of two-step sealed bidding. See Federal Acquisition Regulation (FAR) subpart 14.5; Infotec Dev., Inc., B-235568, Sept. 6,
(continued...)

on March 1, 1994, for step one of the procurement was a document entitled, "Statement of Work for the Weapon System Support for the Infrared Maverick Weapon System, WS-319." As explained in our prior decision, the Infrared (IR) Maverick is the last variation in a series of Maverick Missiles produced for the Air Force over the last 25 years. Previous versions of the missile included the Television (TV) Maverick, and the Laser Maverick.

The statement of work (SOW) defined the effort for the D, F, and G versions of the missile--the IR versions--to include "systems engineering, systems safety, configuration management, aircraft integration, on-call technical support, and logistical and technical support of Air Force, Navy and Foreign Military Sales operations units." Offerors were also required to manage the product baselines for these missiles. SOW ¶ 1.1. In addition to the IR missiles, the SOW anticipated certain specified technical support for the A, B, and E versions of the missile--the TV and Laser versions--and for two other missiles, the GBU-15 and the SLAM.

The RFTP identified seven evaluation factors, each of which was equal in weight. These were: (1) systems/project management; (2) systems engineering; (3) interface support; (4) engineering change technical support; (5) aircraft integration; (6) training and live launch support; and (7) technical support. Offerors were advised that for each evaluation factor, the agency would assess compliance with requirements, soundness of approach, and understanding the requirement.

The RFTP further advised that the agency would attempt to resolve proposal inadequacies by issuing clarification requests (CRs) and deficiency reports (DRs). CRs were to be used to request more information about a specified topic, while DRs were to be used to notify an offeror of an unacceptable or inadequate element of the proposal. The RFTP anticipated that offerors would be allowed to attempt to address deficiencies and propose corrective solutions where needed.

In response to the RFTP, the Air Force received technical proposals from Hughes, Marconi, and Raytheon; convened an evaluation panel to review the proposals; and prepared CRs and DRs for each offeror. The proposal of Marconi clearly

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[2](...continued)
1989, 89-2 CPD ¶ 215. In this approach, the agency requests technical proposals, without prices, in step one, and requires the submission of pricing information in response to a request for pricing proposals in step two. For purposes of the challenge to the step-one evaluations here, we see no essential difference between the two methods. Id.

concerned the evaluators--they issued approximately 54 CRs and 10 DRs, to each of which Marconi provided a written response. The proposal of Raytheon triggered approximately 27 CRs, to which Raytheon responded.[3] After reviewing the responses of Marconi and Raytheon to the areas of agency concern, the Air Force decided that both had submitted acceptable technical proposals.

On June 2, the Air Force notified Hughes that its proposal was acceptable and provided Hughes with the request for price proposals (RFP). The RFP sought price proposals by July 6 for 1 base year followed by two 1-year options. The RFP requests fixed prices for the system engineering, data/configuration management effort and program management effort, and time-and-materials (T&M) prices for various "on call engineering support tasks." The RFP advises that award will be made to the lowest-priced offeror based on the sum of the proposed prices for the fixed-price and T&M portions of the contract for the base year and both option years. This protest followed.

PROTESTER'S CONTENTIONS AND TIMELINESS

In its initial protest, Hughes argues that no offeror other than Hughes can perform these support services, and that the Air Force unreasonably concluded that Marconi and Raytheon submitted acceptable proposals. Hughes also argues that the RFP governing the submission of step-two price proposals improperly fails to consider transition costs to the government associated with selecting a new contractor, includes T&M provisions which Hughes claims are impermissible in a two-step procurement, and lacks procedures for a cost realism analysis of the proposals.

The agency and Raytheon requested that our Office dismiss as untimely Hughes's protest issues related to the ability of Marconi and Raytheon to perform these services. Both argue that any challenge to the ability of other offerors to perform these services should have been raised in response to Marconi's protest against the agency sole-source decision, in which Hughes participated as an interested party. _See_ 4 C.F.R. § 21.2(a)(2) (1994).

While we agree with the agency and Raytheon that many of the issues raised by Hughes were discussed in our previous decision--_i.e._, whether any offeror could perform these services without Hughes proprietary data, and whether any offeror would have the necessary facilities to perform these services--the issue now is not whether the Air Force

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[3]Hughes's proposal triggered nine CRs, however, we will assume there was never any overriding concern on the part of the agency that Hughes would be unable to provide these services.

adequately justified a sole-source procurement. Rather, the essence of Hughes's challenge is whether the Air Force properly determined that Marconi and Raytheon submitted acceptable technical proposals given the particular requirements and evaluation criteria set forth in the RFTP.[4] In our view, Hughes's challenge to the evaluation assessments made here is timely and will be considered on the merits. Likewise, we see nothing untimely in Hughes's challenges to the provisions in the step-two RFP, which were filed prior to the time for submission of step-two price proposals. See 4 C.F.R. § 21.2(a)(1).

EVALUATION OF TECHNICAL PROPOSALS

As stated above, the Air Force here has adopted a negotiated variation of two-step sealed bidding. Compare FAR subpart 14.5 with FAR § 15.609(d); Infotec Dev., Inc., supra. In furtherance of the goal of maximized competition, the first step contemplates the qualification of as many technical proposals as possible under negotiation procedures. See 50 Comp. Gen. 346, 354 (1970); Shughart & Assocs., Inc., B-226970, July 17, 1987, 87-2 CPD ¶ 56. This procedure requires that technical proposals comply with the basic or essential requirements of the specifications but does not require compliance with all details of the specifications. 53 Comp. Gen. 47 (1973); 50 Comp. Gen. 337 (1970); Trans-Dyn Control Sys., Inc., B-221838; B-221838.2, May 22, 1986, 86-1 CPD ¶ 478. Thus, the acceptability of a step-one technical proposal should not be affected by its failure to meet all specification details "if the procuring agency is satisfied that the essential requirements of the specification will be met." 50 Comp. Gen. 337, 339, supra.

Our review of an agency's technical evaluation under an RFTP is limited to whether the evaluation was reasonable. Kay and Assocs., Inc., B-234509, June 16, 1989, 89-1 CPD ¶ 567. Where technical supplies or services are involved, the contracting agency's technical judgments are entitled to great weight; we will not substitute our judgment for the contracting agency's unless its conclusions are shown to be arbitrary or otherwise unreasonable. Chemical Waste Mgmt., Inc., B-232276, Dec. 13, 1988, 88-2 CPD ¶ 590. Although an agency should seek to qualify as many step-one technical proposals as possible, Sytek, Inc., B-231789.2, Dec. 7,

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[4]We agree with the agency to the extent that any particular Hughes challenge that fails to focus on a requirement in the RFTP, and argues instead that no other offeror could perform these services, should have been raised either during the Marconi protest, in a reconsideration request, or prior to the submission of technical proposals in this procurement. However, we did not agree that the protest, as a whole, could be seen in this light.

1988, 88-2 CPD ¶ 568, it may reject any proposal that fails to meet essential requirements.

For the reasons stated below, and based on our review of the RFTP requirements, the Marconi and Raytheon proposals, the CRs and DRs prepared by the agency and answered by the offerors, and the materials provided by the evaluators--including the evaluator who disagreed with the agency's assessment of the Marconi and Raytheon proposals--we conclude that the Air Force reasonably considered these proposals acceptable, and reasonably invited both offerors to submit price proposals along with Hughes.

Marconi's Proposal

The majority of Hughes's protest focuses on the alleged unacceptability of the technical proposal submitted by Marconi. According to Hughes, the Air Force unreasonably concluded that Marconi could perform the services required by the RFTP because, in Hughes's view, Marconi lacked: (1) several elements of the necessary computer simulation software; (2) in-depth knowledge of certain Maverick components available only in documents which Hughes claims are proprietary; and (3) knowledgeable personnel without improper reliance on former Hughes employees, that Hughes says are barred by post-employment agreements from assisting Marconi in performing these services.

Computer simulation capability

In its challenge to the agency's assessment of Marconi's simulation capabilities, Hughes complains that Marconi lacks the 6-Degrees of Freedom (6-DOF) Software Model, has no "Hardware in the Loop" simulation capability, has insufficient "All-Up Round (AUR) Tear Down/Build Up and Test Capability," and has a high-risk Sub-Assembly Test Station for testing circuit cards. While we will not set forth here every Hughes challenge to each of these capabilities, we have considered each challenge in detail and have concluded that none of them states a basis for concluding that the agency acted unreasonably in deciding that Marconi's technical proposal was acceptable.

For example, Marconi's ability to develop a 6-DOF model for the IR Maverick system was a concern both in this protest and in the earlier case. The 6-DOF is a computer tool used to predict the movement and/or trajectory of a missile during launch and free flight across the entire range of possible motions. To do this, the 6-DOF models portions of the missile's seeker, autopilot, and control surfaces which guide the missile from its launch to its intended target.

In response to the requirement in the SOW at 3.3.1 directing offerors to propose capability to perform computer simulation of Maverick missile performance, Marconi

acknowledged that it lacked existing 6-DOF capability but proposed to develop and validate that capability within 3-1/2 months after award. In reviewing the proposed approach, the Air Force issued two DRs addressing Marconi's 6-DOF capability. The first, DR-4, expressed concern about the amount of government furnished information (GFI) Marconi identified in its proposal as necessary to develop its 6-DOF capability. The second, DR-5, stated that the time period for developing the capability was too long.

In reviewing Marconi's response to DR-4, the Air Force stated that Marconi provided a detailed approach to the problem of developing 6-DOF capability by planning several contingencies for performing without GFI. The agency also noted that a great deal of GFI was available for use, even if the GFI was not comprehensive. Based on this respc. e, the Air Force concluded that Marconi would be able to develop this capability even without the GFI, but reasoned that the GFI that is available would assist Marconi. Likewise, in reviewing Marconi's response to DR-5, the Air Force concluded that the 3-1/2 month development time would be acceptable since recent past experience showed infrequent use of 6-DOF simulation to solve problems, and since the Air Force was unaware of any current known task requiring the immediate use of 6-DOF capability.[5]

According to Hughes, the Air Force decision that the Marconi proposal was acceptable in this area was unreasonable. Regarding this issue, and others, Hughes argues that our Office should consider instead a dissenting memorandum in the record prepared by one of the evaluators.[6] With respect to the issue of 6-DOF capability, the evaluator concluded that the responses of Marconi should not be viewed as adequate to overcome the deficiencies identified in DRs 4 and 5. Hughes also argues that the agency evaluation materials on this point are insufficient to overcome the specific expressions of concern identified in the dissenting memorandum.

We consider reasonable and within its discretion the Air Force decision not to disqualify Marconi from the step-two price competition because of Marconi's approach to developing 6-DOF capability. As stated above, the purpose of conducting a two-step negotiated procurement is to

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[5]In addition, the Air Force explained that the 3-1/2 month period seemed less significant in light of the fact that the agency has had no contractor to perform these services since Hughes's contract expired in early 1994.

[6]We note that at least two other evaluators expressed concerns about the optimism and risk of Marconi's proposal, although these evaluators did not prepare a memorandum dissenting from the overall evaluation conclusion.

qualify as many potential competitors as possible, providing they meet the agency's essential requirements. See 50 Comp. Gen. 346, 354, supra. Here, the agency identified problems and appropriately labeled them as serious, but after requiring Marconi to elaborate on its approach and to prepare contingencies to work around the possibility that certain GFI might be unavailable, concluded that the overall response was acceptable. Similarly, after expressing concerns about the 3-1/2 month period Marconi proposed for developing 6-DOF capability, the Air Force reconsidered its view after focusing on the frequency of past use of this capability. Since the Air Force considered these issues in light of its actual needs, with an eye towards increasing competition, and did not abandon the essential requirements of its solicitation, we find that the decision was reasonable.

We also disagree that the evaluation materials were insufficient to support an agency decision contrary to the views of the dissenting evaluator. While we respect the healthy dissent of agency personnel, we note that it is not unusual for individual evaluators to have disparate, subjective judgments which are subject to reasonable differences of opinion. Unisys Corp., B-232634, Jan. 25, 1989, 89-1 CPD ¶ 75. The dissent in this case, while appropriate for consideration in the final decision-making, does not mandate a conclusion on our part that the agency acted improperly when it decided that the Marconi proposal was acceptable. Id.

With respect to the evaluation materials, we note that the agency here conducted an evaluation by exception--i.e., it identified through CRs and DRs the areas where the proposal needed additional attention. We have expressly recognized that the use of CRs and DRs is a valid method of evaluating technical proposals submitted in response to step one of a two-step procurement. Datron Sys., Inc., B-220423; B-220423.2, Mar. 18, 1986, 86-1 CPD ¶ 264. While the Air Force did not consolidate its views into one evaluation memorandum, the 54 CRs and 10 DRs issued to Marconi, and the breadth of the issues raised therein and responded to, shows that the Air Force, in fact, thoroughly reviewed Marconi's proposal. Further, the record includes a memorandum to the file expressly rejecting the views expressed in the dissenting memorandum, and Hughes has not succeeded in showing that this decision was unreasonable. See Unisys Corp., supra.

A second example of our conclusion regarding simulation capability concerns the "All-Up Round[7] (AUR) Tear Down/Build Up and Test Capability" and involves issues similar to those discussed above. In this area, section 7

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[7] "All-up round" refers to a complete, ready-to-fire missile.

of the Technical Proposal Preparation Instructions advised potential offerors to "describe in detail the procedures and technical approach to be used in the event of a missile anomaly investigation that would require significant tear-down, analysis, build-up, and re-test of an AUR Maverick." If potential offerors were to rely in part on the use of government facilities, they were advised to identify the facilities and explain how they would be used.

In its proposal, Marconi stated that it would perform these tasks at a Navy facility in Fallbrook, California, but explained that the Fallbrook facility lacked the capability to separate and remove the warhead from the center-aft section of the missile. To address this issue, Marconi proposed to fabricate its own warhead extraction tool and train Fallbrook personnel to use the device. After reviewing the proposal, the agency concluded that the approach would work, and that the 3-month transition required to develop and validate the extraction tool should not cause the rejection of Marconi's technical proposal.

In its protest, Hughes argues again that the 3-month fabrication time is too long, and that the Air Force unreasonably rejected the views of its dissenting evaluator, who termed Marconi's approach inadequate and not convincing. In our view, the answer is the same as before. In concluding that the Marconi approach was acceptable, the Air Force apparently considered that only 10 missiles were torn down in the last 2 years of WSS performance. In addition, the Navy personnel at Fallbrook were already able to disassemble several components of the missile--such as the guidance and control section from the center-aft section--but had not previously needed to break the center aft section into its two major components: the warhead and the rear missile body. After reviewing Marconi's plan to supplement Fallbrook's current ability with a specially designed tool, and then training the Navy personnel to use the tool, the Air Force reasonably decided that Marconi would be able to perform the AUR services. As before, we also conclude that it was reasonable to consider the relatively infrequent need to tear down AUR missiles in reaching the conclusion that 3 months was an acceptable delay in complying with the solicitation requirement.

Availability of proprietary data

Hughes argues that the agency unreasonably concluded that Marconi (and Raytheon as well) would be able to perform the services required here without access to Hughes proprietary data.[8] In support, Hughes points to two specific

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[8]The record in this case, and in the earlier one, shows that Hughes claims a proprietary interest in certain data used to (continued...)

admonitions in the Technical Proposal Preparation Instructions where offerors are advised to be sure that their proposals adequately set forth how they will meet the requirements of the RFTP without using such data. Instructions at c.(4) and c.(7).

Hughes's complaint in this regard--woven throughout its initial and subsequent protest pleadings--raises several distinct issues. To the extent that Hughes raises a general claim that the work here cannot be done without using Hughes proprietary data, this issue is untimely. In our prior decision on this procurement, wherein Hughes participated as an interested party, we considered in great detail the impediment to competition caused by unavailable Hughes proprietary data. Marconi Dynamics, Inc., supra at 5-10. While Hughes correctly argues that our prior decision reviewed the adequacy of the Air Force justification for a sole-source procurement, Hughes fails to acknowledge that the decision also reaches several conclusions regarding the need for Hughes proprietary data to perform these services.[9] Since Hughes participated in the earlier case, we conclude that any challenge to the general conclusion regarding the ability to perform these services without Hughes proprietary data, should have been filed as a request for reconsideration of the decision in Marconi. See 4 C.F.R. § 21.12(b).

The second issue is that Hughes's proprietary data claims are implicit throughout its specific challenges to the acceptability of the other two offerors' proposals. Although Hughes claims that the RFTP contains requirements regarding the nonuse of Hughes proprietary data, the references it cites are from the Technical Proposal Preparation Instructions, not the SOW. In our review of the

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[8](...continued)
produce this missile over the past 25 years. So far as we know, the Maverick missile has only been produced for the United States government, has been produced entirely with public funds, and has never been produced for a commercial purchaser. Under these circumstances, we expect the Air Force will carefully scrutinize Hughes's claims pursuant to the statutory framework for determining the government's rights in technical data. See 10 U.S.C. §§ 2320, 2321 (1988 and Supp. V 1993), and other statements of government policy on this subject.

[9]For example, the prior decision concluded that Marconi had made a "substantial, detailed, and well reasoned argument that it can perform these services" and that "the Air Force position that Hughes proprietary data blocks the agency ability to compete its requirement for WSS services--as presented and defended before our Office--is simply not supported by the record here." Id. at 9.

adequacy of Marconi's response to the SOW, set forth above, and Raytheon's response, set forth below, we consider whether the agency reasonably conclud d that the proposal addresses the solicitation's technical requirements. Since our review of these specific challenges is grounded in the requirements of the RFTP, and since the RFTP is silent on the subject of Hughes proprietary data, we need not address this issue beyond our consideration of Hughes's specific challenges to the adequacy of the proposals.

There is also a third category of issues regarding Hughes proprietary data. In some instances, Hughes links its general complaint regarding the proprietary data to a provision in the SOW, but does not raise a specific substantive challenge to the offeror's approach, as it did with respect to computer simulation capability. For example, Hughes argues that the agency unreasonably accepted the offerors' claimed reliance on technical orders (and other sources of information) to perform services related to engineering change proposals. In response, the Air Force argues that Hughes has adopted an overly expansive view of the SOW, not supported by the document itself, in order to claim that the technical orders are insufficient to perform certain tasks.

Based on our review of the record, we agree with the agency on this issue. Hughes's complaints fail to acknowledge that the level of support here is differentiated between the infrared Maverick and the other two versions of the missile, and that the SOW requires only that contractors shall isolate faults and determine the most probable cause of the faults. Since Hughes's arguments regarding the adequacy of technical orders and other available information is based on its misreading of the SOW, and not on a specific and substantive challenge to the offerors' approaches--like the challenges Hughes raised to the 6-DOF, Hardware in the Loop, AUR Testing, and other computer simulation issues--we find no basis for its assertion that the evaluation was unreasonable.

Reliance on former Hughes employees

Related to its claim regarding unauthorized use of proprietary information, Hughes argues that Marconi will circumvent the need for such data by using former Hughes personnel. According to Hughes, these personnel were required to sign employment agreements which restrict their post-employment activities. Hughes explained that it intends to enforce these agreements in order to deprive Marconi of the expertise it will need to perform this contract. Hughes argues that since it will be successful in challenging Marconi's use of these former Hughes employees, the Air Force evaluation unreasonably permitted the expertise of these employees to contribute to the agency's assessment of Marconi's acceptability.

We find that the agency neither overlooked this issue nor reached an unreasonable conclusion regarding its impact. As part of its evaluation of the Marconi proposal, the Air Force issued CR-49 to clarify whether the former Hughes employees had signed employment agreements with Hughes restricting their post-employment activities. CR-49 also asked what legal risks would be involved in accepting the planned use of the former Hughes employees. Marconi explained that none of the employees is covered by any current restriction--Marconi says all the restrictions have expired--and that it expects no negative technical or legal impact on its performance as a result of the use of these employees. In addition, in its response to this protest, Marconi explained that it had obtained signed statements from the employees in question stating that they would not use any Hughes proprietary information in performing this contract. Given these steps, we conclude that the Air Force adequately concluded that this issue did not render the Marconi technical proposal unacceptable.

To the extent that Hughes seeks a more detailed review of whether the former Hughes employees are able to impart proprietary information to Marconi, this is essentially a dispute between private parties, and will not be considered by our Office. See Unisys Corp., supra.

Raytheon's Proposal

Hughes argues that Raytheon's technical proposal is unacceptable in the area of computer simulation because Raytheon admittedly lacks 6-DOF software for the F and G versions of the Maverick Missile. Because 6-DOF software is a component of "Hardware in the Loop" simulation capabilities, Hughes argues that the proposal is unacceptable in this area as well. In addition, Hughes contends that Raytheon's proposal fails to comply with the requirement that all work required to perform WSS shall be included under the fixed-price portion of the contract.

With respect to Raytheon's ability to perform computer simulation for these services,[10] we note that its proposal explains that it has developed 6-DOF software applicable to the D version of the missile, but that it will need to modify the software to make it applicable to the F and G versions. As part of its review, the Air Force prepared a

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[10] We note that Raytheon has built more than 10,000 Maverick missiles as a result of having been developed as a second source to Hughes for this system. While Raytheon, as any other offeror, must have its acceptability determined by whether its proposal meets the RFTP requirements, it seems unlikely that an offeror who has built a substantial number of the missiles at issue here would lack the capability to service them.

CR for Raytheon, CR-24, in which it sought information regarding how and whether Raytheon would be able to extend its 6-DOF capability for the D missile, to the F and G versions of the missile. Based on its review of Raytheon's response, which explained that the software modification was straightforward and would be added to the existing capability if needed, the Air Force concluded that Raytheon could provide this capability.

In our view, there was nothing unreasonable in the Air Force decision to accept Raytheon's explanation of the required modification to the 6-DOF software. As Raytheon explained, it currently has a 3-DOF model and other simulation capability that will meet most of the agency's need for these services. Since Raytheon has already reviewed the modification necessary to adapt the current 6-DOF to the other required missile versions, there appears to be little reason for rejecting Raytheon's proposal on this basis. In addition, we find nothing in the record--even from the evaluator with strong views regarding Marconi's acceptability--to suggest that Raytheon should have been considered unacceptable for this reason.

With respect to Hughes's challenge to Raytheon's approach to pricing its proposal, Hughes complains that Raytheon will attempt to bill the Air Force for the modifications to its simulation software under the T&M portion of the contract, rather than under the fixed-price portion reserved for these services. In response, the Air Force states that Raytheon never suggested that it would bill for such a modification to its existing software under the T&M portion of the contract, and that if it tried, the Air Force would not allow Raytheon to do so.

We think that the Air Force response settles the matter. There is nothing in Raytheon's proposal to support Hughes interpretation of what Raytheon might do, nor is there any such indication in the clarification response addressing how Raytheon would modify its 6-DOF software if needed. In addition, the Air Force response has put Raytheon on notice that such costs will not be permitted under the T&M portion of the contract. Given no showing of any such intent, we will not assume that an offeror will propose one course of action, and pursue another, in a bad faith attempt to shift costs from a fixed account to a reimbursable one. <u>See Vitro Corp.</u>, B-247734.3, Sept. 24, 1992, 92-2 CPD ¶ 202.

Finally, as with its challenge to Marconi's proposal, Hughes complains that the Raytheon proposal does not adequately demonstrate how Raytheon will perform these services without using Hughes proprietary data. In our view, the answer remains the same. Just as Hughes claimed in its response to the agency request for dismissal, Hughes is permitted to challenge the reasonableness of the agency's conclusions regarding specific solicitation provisions. To the extent

it raises such challenges, we have considered them. To the extent it raises general challenges about the capability of these offerors to perform without Hughes proprietary data, its protest is untimely.[11] 4 C.F.R. § 21.12(b).

CHALLENGE TO STEP-TWO SOLICITATION

Hughes complains that the RFP for the step-two price competition is flawed because it does not anticipate a cost realism review on the T&M portion of offerors' proposals, and because the final version of the RFP deletes the consideration of transition costs to the government.[12]

According to Hughes, the agency must perform a cost realism analysis here to assure that the proposed fixed and T&M prices are reasonable, that the government will obtain the services at the lowest overall price, and that the agency's assessment of lowest overall price will consider contractor efficiencies. We disagree. First, as we explained in Research Mgmt. Corp., 69 Comp. Gen. 368 (1990), 90-1 CPD ¶ 352, the requirement to perform a cost analysis is linked to the Truth in Negotiations Act, 10 U.S.C. § 2306a (1988 and Supp V 1993). The Act requires the submission of cost data for all negotiated contracts in excess of $500,000 except in certain circumstances. When such data is required

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[11] In this regard, we agree with the Air Force that it need not respond to Hughes's examples of problems where Hughes found it necessary to consult its proprietary data to troubleshoot the Maverick missile. As the agency explains, Hughes's examples show only that Hughes needed to use such data, not that another offeror would need to do so. In addition, Hughes is not permitted to supplement the RFTP here with its own list of sample tasks against which it will evaluate its competitors. It also appears that Hughes's complaints regarding the need for its proprietary data are based in part on an expansive view of the scope of work not shared by the agency, which is in the position to best define its own needs. Mine Safety Appliances Co., B-242379.2; B-242379.3, Nov. 27, 1991, 91-2 CPD ¶ 506.

[12] In its initial protest filing, Hughes complained that the Air Force could not properly include contract line items (CLIN) based on T&M prices, as opposed to fixed prices, in a two-step acquisition. Hughes based its claim on the provision in FAR § 14.502 which states that the two-step sealed bid acquisition procedure may only be used when "[a] firm fixed-price contract or a fixed-price contract with economic price adjustment will be used." In response, the Air Force amended the RFP to advise offerors that this procurement was a negotiated two-step procurement conducted under FAR § 15.609(d). Part 15 of the FAR does not contain a similar restriction addressing the types of contracts that may be used with this procedure.

under the Act, a contracting officer must perform a cost analysis. FAR § 15.805-1(b); Research Mgmt. Corp., supra. However, the Act (and the FAR provisions implementing the requirements of the Act) specifically exempt contracts awarded with "adequate price competition" from the data submission requirement. See 10 U.S.C. § 2306a(b)(1)(A); FAR § 15.804-3(a). Since the procurement here falls squarely within the definition of a procurement for which an agency has received adequate price competition, FAR § 15.804-3(b), we see nothing unreasonable about the Air Force decision not to request cost data or to plan on a cost realism review.

To the extent that Hughes suggests that such a review might be desirable anyway because offerors might attempt to shift costs between the fixed-price and T&M portions of the contract, or because the agency might otherwise fail to recognize efficiencies between the two offerors, we again disagree. The Air Force has prepared government estimates for evaluating proposals under the T&M portions of the contract. These include estimates for labor hours, amount of subcontractor materials, and travel and computer service dollars. By applying each offeror's hourly labor rates, and other rates, the Air Force will evaluate all offerors on the same basis. In addition, as discussed with respect to the Raytheon proposal, the Air Force has explained that all costs of developing capabilities related to the basic services must be included in the fixed-price portion of the contract, and that in administering the contract the agency will not permit offerors to shift costs related to providing basic services to any of the special tasks covered by the T&M portions of the contract. In our view, there is nothing unreasonable about this approach.

With respect to whether the contract method used here will cause the agency to fail to appreciate relative differences in efficiency between the offerors, we conclude that Hughes's protest is untimely. From the time the Air Force selected the approach of using a two-step procurement, Hughes was on notice that the final step of the procurement would be a competition based on price. In our view, Hughes's knowledge of the import of this decision is demonstrated by its unsuccessful lobbying efforts to convince the agency to procure these services using a negotiated "best value" procurement. Since the Air Force will be evaluating the T&M portion of the proposals using government estimates, and thus assuring that all offerors are treated equally, and since Hughes has been on notice for nearly a year that the Air Force would be procuring these services using a two-step procurement, we consider this basis of protest untimely.

Hughes also protests the agency's decision not to consider transition costs to the government in evaluating price proposals. According to the Air Force, although it initially considered applying an additional cost to the

proposal of any offeror other than Hughes in order to attempt to evaluate the cost to the government of selecting a new contractor, it has decided not to consider such costs in its evaluation in order to "foster competition" for these services. According to Hughes, this decision is unreasonable.

Based on our review of the pleadings, and a consideration of the relative positions of the offerors in this procurement, we conclude that the Air Force acted reasonably in deciding not to consider additional costs to the government in evaluating the price proposals submitted here. First, the Air Force explains that these costs--such as the cost of providing available data and the cost of shipping government-furnished equipment--are highly speculative. In addition, since the Air Force apparently concluded that consideration of these costs would only benefit Hughes, it decided that it would instead prefer to foster competition, not hinder it. Hughes is in no way harmed by this decision; rather, the decision creates more of a level field for the competition. Since the purpose of our bid protest function is to ensure that agencies obtain full and open competition to the maximum extent practicable, we will generally favor otherwise proper actions--like this one--which are taken to increase competition. Sea Containers America, Inc., B-243228, July 11, 1991, 91-2 CPD ¶ 45.

The protest is denied.

\s\ Ronald Berger
for Robert P. Murphy
General Counsel