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Decision

Matter of: Sikorsky Aircraft Corporation

File: B-416027; B-416027.2

Date: May 22, 2018

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DIGEST

1. Protest of agency's interpretation of solicitation, following an agency-level protest during discussions, is denied where the agency's interpretation of the solicitation is reasonable and the protester's alternative interpretation is unreasonable.
 2. Protest of agency's interpretation of solicitation is dismissed as untimely where the agency advised all parties of that interpretation prior to the time for receipt of proposals, and the protest was filed after that time.
 3. Protest alleging evaluation errors and unequal treatment is dismissed as premature when brought during discussions prior to award.
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DECISION

Sikorsky Aircraft Corporation (Sikorsky), of Stratford, Connecticut, protests the agency's interpretation of the terms of request for proposals (RFP) No. FA8629-17-R-2507 issued by the Department of the Air Force for a helicopter to replace the UH-1N helicopter. The protester objects to a number of positions taken by the agency during discussions and additionally alleges that the agency is treating offerors unequally.

We deny the protest in part, and dismiss it in part.

BACKGROUND

The RFP at issue here seeks to procure a fleet of helicopters, along with associated equipment and services, to replace the Air Force's UH-1N helicopter, which was initially manufactured in the 1960's. Agency's First Request to Dismiss at 2. The agency released an initial draft version of the RFP on December 2, 2016, following two industry day events. Id. Following the release of the draft RFP, the agency conducted an additional industry day, and published a second draft RFP on April 19, 2017. Id. at 3. Between May and July of 2017, the government conducted and published five rounds of questions and answers (Q&As) concerning the second draft RFP. Id.

Of particular relevance to this protest, the second draft RFP contained several special contract clauses describing the agency's intellectual property requirements. Specifically, clause H002 required offerors to provide license agreement information conforming to specific requirements for all commercial computer software¹ licenses "to be obtained on behalf of or transferred to the Government under this contract." See Second Draft RFP at 53; Final RFP at 50. Additionally, clause H003 described the delivery and license rights for technical data² and noncommercial computer software³ required for operation, maintenance, installation, and training (OMIT) of the proposed UH-1N replacement systems.⁴ See Second Draft RFP at 55-56; Final RFP at 52-53. In

¹ The Defense Federal Acquisition Regulation Supplement (DFARS) defines computer software as computer programs, source code, source code listings, object code listings, design details, algorithms, processes, flow charts, formulae and related material that would enable the software to be reproduced, recreated, or recompiled. DFARS clause 252.227-7013(a)(3). Computer software does not include computer data bases or computer software documentation. Id.

² The DFARS defines technical data as recorded information, regardless of the form or method of the recording, of a scientific or technical nature (including computer software documentation). DFARS clause 252.227-7013(a)(15). The term does not include computer software or data incidental to contract administration, such as financial and/or management information. Id.

³ The DFARS defines commercial software as software developed or regularly used for non-governmental purposes which: (1) has been sold, leased, or licensed to the public; (2) has been offered for sale, lease, or license to the public; (3) has not been offered, sold, leased, or licensed to the public but will be available for commercial sale, lease, or license in time to satisfy the delivery requirements of a contract; or (4) satisfies any of the prior criteria and would require only minor modification to meet the requirements of this contract. DFARS clause 252.227-7014(a)(1). Noncommercial computer software is any computer software that does not meet the definition of commercial software. DFARS clause 252.227-7014(a)(14).

⁴ The DFARS provides that the government shall receive unlimited rights in technical data necessary for OMIT, but excludes technical data that constitutes detailed

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addition to the conventional DFARS definitions of technical data and computer software, clause H003 specially defined an additional category of “OMIT Data”, which includes, among other things, both technical data and computer software required for OMIT. Id.

On July 12, a senior executive at Lockheed Martin (the parent company of Sikorsky) sent an email to the agency expressing concerns about the content of clauses H002 and H003. Agency’s First Request to Dismiss at 3; Agency’s First Request to Dismiss, Enclosure 4, Email from Lockheed Martin Executive to Agency, July 12, 2017. On July 13, the agency released the final RFP, with no substantive changes to the portions of the RFP discussed above, notwithstanding the July 12 email from Sikorsky’s parent company. Id.

Between August and September of 2017, the agency conducted and published five additional rounds of Q&As following the publication of the RFP. Agency’s First Request to Dismiss at 3-4. In the final RFP, clause H003 contained the following provisions (which existed in a similar, but not identical, form in the second draft RFP):

b. 2. Maintenance Technical Data and Computer Software. OMIT Data [...] must comprise a complete package of all technical data and computer software for enabling Maintenance of the entire UH-1N Replacement System without exception. This includes technical data and computer software used in the installation and deinstallation, and disassembly and reassembly, at the lowest practicable segregable level that does not require detailed manufacturing or process data.

* * * * *

c. License Rights. Pursuant to the contract clauses governing rights in technical data and computer software (e.g., DFARS 252.227-7013, 252.227-7014, and 252.227-7015), the Government is granted unlimited rights⁵ in all technical data required for OMIT (other than detailed manufacturing or process data) and computer software documentation.

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manufacturing or process data (DMPD) from that grant of rights. DFARS clause 252.227-7013(b)(1)(v). As noted above in footnote 2, the DFARS definition of the term technical data does not include computer software, and there is no similar DFARS provision providing unlimited rights in computer software necessary for OMIT.

⁵ The DFARS defines three levels of rights in technical data in order of descending scope: unlimited rights, government-purpose rights, and limited rights. DFARS clause 252.227-7013(a), (b)(1)-(3). Similarly the DFARS defines three levels of rights in noncommercial computer software in order of descending scope: unlimited rights, government-purpose rights, and restricted rights. DFARS clause 252.227-7014(a), (b)(1)-(3).

However, for OMIT Data (other than commercial computer software), the Government is willing to accept Government Purpose Rights as defined in DFARS 252.227-7013(a) or 252.227-7014(a). Commercial computer software to be delivered as OMIT Data shall be subject to a commercial license that meets the requirements of H002.

Final RFP at 53 (emphasis added). Additionally, the final RFP contained a statement of work (SOW) provision, which required a contractor to produce a baseline technical data package. Among other things, a contractor is to provide: (1) the necessary information to enable the procurement of an interchangeable item that duplicates the physical and performance characteristics of all configuration items; and (2) provides technical data and computer software necessary to perform depot-level maintenance for the item and its subsystems. SOW § 4.3.11.3.1. In connection with these requirements, the SOW provision references two specific contract data requirements list items (CDRLs): (1) CDRL A097, concerning the technical data package generally; and (2) CDRL A136, concerning, among other things, drawings and engineering data for a variety of repair-related activities, as well as necessary data to permit competitive acquisition of identical items for maintenance of original items. Id.; CDRL General Instructions at 1-6.

Proposals were due September 14, and Sikorsky submitted its proposal on September 12. Agency's First Request to Dismiss at 4. Sikorsky's proposal advanced several interpretations of the solicitation and included additional attachments, specifically: (1) Sikorsky read clause H003 as not requiring the delivery of software source code; (2) Sikorsky read SOW § 4.3.11.3.1 as not requiring the delivery of all described data under both CDRLs, but rather as only requiring delivery of OMIT data under one CDRL and non-OMIT data under the other CDRL; (3) Sikorsky read clause H002 as not applying to software licenses already in the government's possession; and (4) Sikorsky provided two attachments specifically identifying what it believed to be its baseline configuration items and depot-level repairables for which it would provide data under SOW § 4.3.11.3.1. Protest, Exhibit 3, Evaluation Notices.

On December 19, the agency issued evaluation notices (ENs) to Sikorsky, and conducted a teleconference concerning the ENs on December 20. Agency's First Request to Dismiss at 4. In the ENs, the agency objected to Sikorsky's interpretations of the solicitation and to the inclusion of the additional attachments. Specifically, the agency viewed Sikorsky's interpretations as contrary to the terms of the RFP. Protest, Exhibit 3, Evaluation Notices. In addition, the agency expressed its view that Sikorsky's inclusion of attachments specifically limiting the universe of baseline configuration items and depot-level repairables in its proposal limited the enforceability of SOW § 4.3.11.3.1, and thereby took exception to material requirements of the solicitation. Id.

On December 29, Sikorsky filed an agency-level protest on substantially the same six grounds of protest which are currently before our Office. Agency's First Request to Dismiss at 4. On January 31, 2018, the agency dismissed Sikorsky's first five protest grounds as untimely, and the sixth ground as legally insufficient, but, additionally, provided a detailed substantive response on the merits of each of the protest grounds. Id. This protest followed.

DISCUSSION

The protester advances seven grounds of protest. The protester contends that: (1) the agency's interpretation of clause H003 would require offerors to deliver source code and relinquish rights in excess of what is permitted by regulation; (2) the agency's interpretation of clause H003 is contrary to the plain meaning of the RFP, which provides that offerors should not deliver source code and detailed manufacturing or process data (DMPD); (3) the agency's interpretation of SOW § 4.3.11.3.1 renders it impossible for offerors to determine which CDRL items will include OMIT or other than OMIT data, preventing offerors from competing on a common basis; (4) the agency's application of clause H002, governing the government's license rights in commercial computer software "to be" obtained on behalf of or transferred to the government, to software licenses already in the government's possession is contrary to the terms of the RFP; (5) the agency's rejection of Sikorsky's proposed identification of configuration items and insistence that such items be identified during contract performance is unreasonable; (6) the agency's rejection of Sikorsky's proposed identification of depot-level repairable items and insistence that such items be identified during contract performance is also unreasonable; and (7) the agency is holding Sikorsky to a different standard than other offerors, because another offeror is proposing the same base aircraft, which is manufactured by Sikorsky, but that offeror has not approached Sikorsky to secure the rights in intellectual property that the agency's reading of the solicitation would require. Protest at 3-5. We address each argument in turn below.

Clause H003 as Contrary to Regulation

With respect to its first argument, the protester contends that clause H003, as written, would require offerors to deliver source code and relinquish rights in excess of what is permitted by regulation.⁶ According to the protester, the RFP, as written, contravenes

⁶ We note that the protester also argues that the agency's requirements are contrary to law, but that view is not supported by the cited statutory text. Protest at 8-13. In this connection, the protester cites 10 U.S.C. § 2320, which requires the Secretary of Defense to prescribe regulations with specific content regarding technical data rights in federal procurements. Id. Specifically, 10 U.S.C. § 2320(a)(2)(H) indicates that such regulations should establish that, subject to certain exceptions, a contractor or subcontractor may not be required, as a condition of being responsive to a solicitation or as a condition for the award of a contract to sell or otherwise relinquish to the United States any rights in technical data. This provision, with respect to technical data, is implemented at DFARS clause 252.227.7103-1(c), and a similar provision pertaining to computer software is implemented at DFARS clause 252.227.7203-1(c). However, the cited subsections of 10 U.S.C. § 2320 merely require that the Secretary of Defense prescribe regulations with specific content, which are now embodied in the DFARS. It is not clear that the identified sections of the statute create any additional rights or obligations.

DFARS § 227.7203-1(c), which provides that offerors “shall not be required, either as a condition of being responsive to a solicitation or as a condition for award, to sell or otherwise relinquish to the Government any rights in computer software developed exclusively at private expense,” except for certain identified exceptions not at issue in this protest. Protest at 27-29. The protester notes that clause H003 provides that “for OMIT Data (other than commercial computer software), the Government is willing to accept Government Purpose Rights.” Final RFP at 53. Read in context, the protester argues, this implies that the government is unwilling to accept less than government-purpose rights in noncommercial computer software regardless of funding source. According to Sikorsky, the DFARS provides that the government is only entitled to receive restricted rights in noncommercial software developed at private expense. DFARS clause 252.227-7014(b)(3)(1). Clause H003, the protester argues, is clearly in violation of the DFARS provision because it requires offerors to relinquish greater rights than those to which the government is entitled. Protest at 27-29.

Our Bid Protest Regulations contain strict rules for the timely submission of protests. These rules reflect the dual requirements of giving parties a fair opportunity to present their cases and resolving protests expeditiously without unduly disrupting or delaying the procurement process. Verizon Wireless, B-406854, B-406854.2, Sept. 17, 2012, 2012 CPD ¶ 260 at 4. Our timeliness rules specifically require that a protest based upon alleged improprieties in a solicitation that are apparent prior to the closing time for receipt of initial proposals be filed before that time. 4 C.F.R. § 21.2(a)(1); see AmaTerra Envtl., Inc., B-408290.2, Oct. 23, 2013, 2013 CPD ¶ 242 at 3. However, our Regulations also provide that where a protest raises issues significant to the procurement system, our Office may consider an untimely protest. 4 C.F.R. § 21.2(c).

As an initial matter, the protester concedes that this argument is untimely because the alleged conflict between the RFP and the DFARS is plain on the face of the solicitation, but asks that our Office exercise an exception to our usual timeliness rules for issues significant to the procurement community because the solicitation as written is clearly contrary to regulation and implicates intellectual property issues significant to the procurement community. Protest at 8-13. Specifically, the protester alleges the issues are significant, in part, because the special contract clauses included in this RFP are clearly contrary to regulation, and similar special contract clauses have been included in multiple previous Air Force procurements over the last several months.⁷ Id.

Pursuant to 4 C.F.R. § 21.2(c), our Office may consider the merits of an untimely protest where good cause is shown or where the protest raises a significant issue of widespread interest to the procurement community. In order to prevent our timeliness

⁷ We additionally note that previous versions of these special clauses have generated significant commentary in the procurement community, specifically questioning their legality. See, e.g., W. Jay DeVecchio, Data Rights Assault: What In The H (clause) Is Going On Here? Air Force Overreaching On OMIT Data, 60 The Gov’t Contractor 8 (2018).

rules from becoming meaningless, however, exceptions are strictly construed and rarely used. Hawker Beechcraft Def. Co., LLC, B-406170, Dec. 22, 2011, 2011 CPD ¶ 285 at 4 n.4.

During the course of this protest the agency transmitted a clarification letter to all offerors, noting that it did not read the language of clause H003 as requiring the provision of government-purpose rights in either noncommercial computer software developed at private expense or in technical data that constitutes DMPD developed at private expense. Clarification Letter, March 8, 2018. The letter also provided offerors an opportunity to revise their proposals if necessary on the basis of the clarification. Id. This clarification renders academic the portion of the protester's argument concerning rights in noncommercial computer software developed at private expense,⁸ because the agency has clarified that it is not requiring offerors to provide greater rights than those to which it is entitled by the DFARS. As a general matter, we will not consider a protest where the issue presented has no practical consequences with regard to an existing federal government procurement, and thus is of purely academic interest. We only consider protests against specific procurement actions and will not render to a protester what would be, in effect, an advisory decision. Ferris Optical, B-403012.2, B-403012.3, Oct. 21, 2010, 2010 CPD ¶ 265 at 2. Accordingly, we decline to exercise the significant issue exception here, because the Air Force's clarification rendered academic the protester's argument that the special clauses are contrary to regulation, and the protester did not otherwise provide any basis to excuse an untimely protest of the terms of the solicitation. This protest ground is therefore dismissed.

Timeliness of the Other Issues

We note that the remaining six protest grounds come before us in an unusual procedural posture. On the one hand, challenges to the terms of a solicitation, to be timely, must be filed in our Office prior to the deadline for submitting proposals. 4 C.F.R. § 21.2(a)(1). The remaining protest grounds, while largely presenting challenges to the terms of the solicitation, do not fall under that timeliness requirement because Sikorsky claims it had no basis, prior to the submission of proposals and

⁸ In its comments on the clarification letter, the protester characterizes the clarification described in the letter as being inconsistent with the plain language of the RFP, and requests that the agency issue an amendment incorporating the changes described in the clarification. Protester's Comments on Agency Clarification Letter. We do not address the question of whether the clarification letter conflicts with the language of the RFP as originally issued, because, where, as here, the agency has issued a clarification letter to all offerors during discussions, coupled with an opportunity to revise their proposals accordingly, we view that clarification as tantamount to a solicitation amendment. See, e.g., Nova Research Company, B-236504, Dec. 13, 1989, 89-2 CPD ¶ 548 (no objection to the use of discussions to inform firms of agency requirements, so long as all firms receive the same information, because the agency's actions are tantamount to the issuance of an amendment).

receipt of the agency's ENs, to know that the agency interpreted the RFP in a manner that was inconsistent with Sikorsky's interpretation. Protest at 5-8. Sikorsky argues that the solicitation included an ambiguity⁹ that was not evident until it received the ENs, and that the ambiguity was made more acute when the agency reaffirmed its position in responding to Sikorsky's agency-level protest.¹⁰ Id.

On the other hand, protests that maintain that an agency has evaluated proposals in a manner that is inconsistent with the terms of a solicitation typically are filed after the agency announces its source selection decision or following a debriefing, consistent with the requirement that a protest must be filed within 10 days of adverse agency action or within 10 days of a required debriefing. 4 C.F.R. § 21.2(a)(2). We typically dismiss as speculative and premature protests alleging that an agency intends to evaluate proposals in a manner inconsistent with the terms of a solicitation that are filed prior to the agency's actual evaluation of proposals, particularly where, as here, they occur in the context of a negotiated procurement in which a debriefing will be available. See, e.g., The Boeing Company, B-311344 et al., June 18, 2008, 2008 CPD ¶ 114 at 28, 37; Cryo Techs., B-406003, Jan. 18, 2012, 2012 CPD ¶ 29 at 2 n.1.

We have previously noted that the principle governing the timeliness rules regarding solicitation improprieties is that challenges going to the heart of the underlying ground rules of a competition should be resolved as early as possible during the solicitation process to promote fundamental fairness and efficiency in the competitive process. Protect the Force, Inc.--Reconsideration, B-411897.3, Sept. 30, 2015, 2015 CPD ¶ 306

⁹ We note that while Sikorsky's protest couches these issues as latent ambiguities, the protest does not allege the elements of a latent ambiguity, which require, among other things that there be two reasonable readings of a solicitation provision. See, e.g., Crew Training Int'l, Inc., B-414126, Feb. 7, 2017, 2017 CPD ¶ 53 at 4. Sikorsky argues, instead, that its reading of the solicitation is the only reasonable reading, and that the agency's reading is both unreasonable and contrary to the solicitation or relevant regulations. E.g., Protest at 9-13, 30-32. We have generally concluded that where a protester alleges that the agency has taken a position with all offerors that is clearly inconsistent with the solicitation, such an argument represents, at best, a patent ambiguity that must be protested before the next time for closing. Harrington, Moran, Barksdale, Inc., B-401934.2, B-401934.3, Sept. 10, 2010, 2010 CPD ¶ 231 at 4-6.

¹⁰ The agency contends that Sikorsky's protest grounds are, with the exception of the final protest ground alleging unequal treatment, untimely challenges of the terms of the solicitation because the agency's interpretations were clear on the face of the solicitation. Agency's First Request to Dismiss at 4-9. However, the protester is arguing that the agency's interpretations are contrary to the terms of the solicitation when read as a whole, and the protester has advanced alternative readings. E.g., Protest at 9-13, 30-32. To dismiss the protests as untimely because the agency's readings are reasonable and plain on the face of the RFP would effectively require prejudging the merits of the protester's claims.

at 4. In contrast, the timeliness rules identified in the debriefing exception applicable to negotiated procurements allow a delay in filing a protest challenging a selection decision so that unsuccessful offerors may seek, and contracting agencies may provide, more information related to whether the offeror has a basis to file a protest. Id. Debriefings are also meant to preclude strategic or defensive protests before the agency has taken final action, and before actual knowledge that a basis for protest exists. Id. In summary, the rules governing solicitation challenges encourage filing a protest as early as possible, while the debriefing exception allows a delay in filing a protest until offerors have additional facts about the agency's actions.

These two principles are in tension where, as here, an issue of the interpretation of the solicitation arises during discussions, but our decisions identify a handful of guideposts in this respect. For example, our decisions unambiguously require that, where the agency advises all offerors of an interpretation of the solicitation that the protester finds objectionable or ambiguous, a protester must file a protest prior to the next time for closing, or, if there is no opportunity to submit revised proposals, within 10 days. See, e.g., Savannah River Tech. & Remediation, LLC; Fluor Westinghouse Liquid Waste Servs., LLC, B-415637 et al., Feb 8, 2018, 2018 CPD ¶ 70 at 5-6; Armorworks Enters., LLC, B-400394, B-400394.2, Sept. 23, 2008 CPD ¶ 176 at 6; Protect the Force, Inc.-- Reconsideration, supra; see also Domain Name Alliance Registry, B-310803.2, Aug. 18, 2008, 2008 CPD ¶ 168 at 7-8. Contrarily, allegations brought during discussions that amount to allegations of unequal or other than meaningful discussions are unambiguously treated as premature. See, e.g., Northrop Grumman Tech. Servs., Inc., B-404636.11, June 15, 2011, 2011 CPD ¶ 121 at 4; Intermarkets Global, B-400660.10, B-400660.11, Feb. 2, 2011, 2011 CPD ¶ 30 at 4-5; Computer Associates International, Inc., B-292077.2, Sept. 4, 2003, 2003 CPD ¶ 157 at 4.

Our decisions assessing the question of whether an offeror should bring a protest of an agency interpretation of the solicitation during discussions, where, as here, that interpretation has been advanced to one offeror in discussions as part of the agency's evaluation, have come to fact-specific conclusions. Compare Learjet, Inc., B-274385 et al., Dec. 6, 1996, 96-2 CPD ¶ 215 at 3-4 (failure to dispute agency interpretation of solicitation announced during discussions rendered post-award protest untimely); and PM Servs. Co., B-310762, Feb. 4, 2008, 2008 CPD ¶ 42 at 3 (failure to dispute agency's interpretation, at the latest, during discussions rendered post-award protest untimely, where the requirement was clear in the RFP and the protester was additionally advised of the agency interpretation during discussions); with Paragon Tech. Group, Inc., B-412636, B-412636.2, Apr. 22, 2016, 2016 CPD ¶ 113 at 13 n.11 (protester need not file defensive protest of agency interpretation advanced during discussions because the communications during discussions did not constitute the agency's final evaluation); and The Boeing Company, supra, at 28, 37 (protester need not file defensive protest of agency interpretation advanced during discussions where record did not establish that the protester fully understood the agency's interpretation).

We conclude here that, where the agency has clearly advanced an interpretation of the solicitation during discussions that is contrary to the protester's understanding of the

solicitation, and the protester challenges that interpretation in an agency-level protest, the agency's substantive response to that agency-level protest renders the issue sufficiently final such that our Office's consideration of the issues during discussions is the most efficient, least intrusive alternative. See Blue Origin, LLC, B-408823, Dec. 12, 2013, 2013 CPD ¶ 289 at 8-9 (protest of agency interpretation of solicitation filed after closing, but before award, is timely where the protester brought a timely agency-level protest regarding the issue, which was denied). However, where a protest issue related to an interpretation of the solicitation is, in essence, an evaluation challenge brought during ongoing discussions, we will not address it. See The Boeing Company, *supra*, at 28, 37; Paragon Tech. Group, Inc., *supra*.

Accordingly, we conclude that some of the remaining protest grounds are timely, some are untimely, and some are premature, as discussed in detail below.

DMPD and Source Code

With respect to its second protest ground, the protester argues that the agency's interpretation of clause H003, as potentially requiring the delivery of source code and DMPD, is contrary to the plain meaning of the RFP. Protest at 8-11, 23-42. The protester contends that it reasonably read certain exclusions of DMPD as entirely excluding delivery of DMPD and, by extension, entirely excluding delivery of source code. *Id.* Sikorsky alleges that it learned of the agency's contrary readings for the first time during discussions. *Id.* Specifically, the protester argues that the agency has indicated in discussions that the RFP may require the delivery of both technical data that constitutes DMPD and of source code, which the protester contends is a novel and impermissible reading of the RFP. *Id.* at 35. The agency affirmed its view that the RFP may require delivery of DMPD and of source code in its response to Sikorsky's agency-level protest. Agency's First Request to Dismiss, Enclosure 10, Agency Decision on Agency-Level Protest at 7-9.

Sikorsky filed its protest with our Office within 10 days of receiving the Air Force's decision on its agency-level protest. This protest ground is not speculative or premature, because the agency effectively has announced how it intends to evaluate proposals. To the extent the agency protest decision advanced an interpretation of the solicitation that is inconsistent with Sikorsky's reading of the RFP, this protest ground is appropriate for resolution at this time.

Turning to the merits of this protest ground, the protester contends that the agency's view that the RFP may require the delivery of DMPD is impermissible and inconsistent with the solicitation. Specifically, Sikorsky notes that the DFARS clause granting unlimited rights in technical data necessary for OMIT excludes DMPD from that grant of rights. DFARS clause 252.227-7013(b)(1)(v). Furthermore, the protester observes that subsection b.2 of clause H003 requires an offeror to provide certain technical data and computer software necessary for OMIT at the lowest practicable segregable level that does not require DMPD. Protest at 25-29. This suggests that DMPD should not be provided for both technical data and computer software necessary for OMIT. *Id.* (citing

Final RFP at 53). The protester additionally argues that, conceptually, the equivalent to DMPD for computer software would be source code, which is the detailed information necessary for manufacturing computer software. Id. The protester contends that it reasonably read the solicitation as not requiring the delivery of either DMPD or of source code, and argues that the agency's contrary reading is unreasonable. Protest at 29-42.

Where a dispute exists as to a solicitation's actual requirements, we will first examine the plain language of the solicitation. Intelsat General Corporation, B-412097, B-412097.2, Dec. 23, 2015, 2016 CPD ¶ 30 at 8. Where a protester and agency disagree over the meaning of solicitation language, we will resolve the matter by reading the solicitation as a whole and in a manner that gives effect to all of its provisions; to be reasonable, and therefore valid, an interpretation must be consistent with the solicitation when read as a whole and in a reasonable manner. Crew Training Int'l, Inc., B-414126, Feb. 7, 2017, 2017 CPD ¶ 53 at 4.

Here, the protester's reading of the solicitation is not reasonable. The solicitation provisions, when read in light of the solicitation as a whole and in light of the regulatory background, are not susceptible to the reading advanced by the protester.

With respect to technical data which constitutes DMPD, the protester is correct that the cited DFARS section excepts DMPD from a more general grant of unlimited rights in data necessary for OMIT. DFARS clause 252.227-7013(b)(1)(v). The arguments advanced by the protester, however, conflate use rights with delivery of items, which are legally distinct concepts. The provision at issue only addresses the rights the government may be entitled to in delivered DMPD; the provision has no bearing on whether the government may contract for delivery of DMPD. Id. That is to say, while the DFARS does not furnish the government with unlimited rights in DMPD, it does not follow that the government may not contract for delivery of DMPD, subject to the appropriate rights provided by the DFARS. In fact, the relevant DFARS provisions specifically contemplate that the government may sometimes receive DMPD with lesser rights. See, e.g., DFARS clause 252.227.7013(a)(14)(i)(B)(2) (limiting the government's ability to disclose DMPD which the government has acquired with limited data rights).

Furthermore, we agree with the protester that clause H003 contemplates that some OMIT data required by that clause should be delivered in a way which excludes DMPD. The relevant portion of subsection b.2 of clause H003 indicates that the technical data and computer software to be provided "includes technical data and computer software used in the installation and deinstallation, and disassembly and reassembly, at the lowest practicable segregable level that does not require detailed manufacturing or process data [DMPD]." Final RFP at 53. OMIT data, however, is not limited to the categories of installation, deinstallation, disassembly and reassembly, but rather includes several additional categories (e.g. data necessary for maintenance other than for assembly or disassembly, or data necessary for training and operations). Final RFP at 52-53. Therefore, the RFP, by its terms, does not categorically exclude delivery of DMPD from the technical data package.

With respect to the delivery of source code, the protester's reading is also unreasonable. Of note, clause H003 requires delivery of certain "OMIT Data" which is defined to include both "technical data" and "computer software." Final RFP at 52-53. While computer software is not expressly defined in the solicitation, clause H003 incorporates the DFARS definition of computer software, which specifically includes "source code." DFARS clause 252.227-7014(a)(4); Final RFP at 52-53. Therefore, a requirement to potentially deliver source code necessary for OMIT is plain on the face of the solicitation.

In essence, the protester's argument hinges on the erroneous premise that the RFP treats computer software as though it were technical data. Clause H003 does not, by its terms, treat computer software as though it were technical data, and distinguishes between the two categories where relevant. Final RFP at 52-53. Clause H003 also incorporates the DFARS definitions of technical data and computer software, which are mutually exclusive. Compare DFARS clause 252.227-7013(a)(3) with DFARS clause 252.227-7013(a)(15). Therefore, the mere inclusion of computer software alongside technical data in the defined category "OMIT Data" cannot be reasonably read as a redefinition of technical data to include computer software.

While, as the protester notes, subsection b.2 of clause H003 excludes certain DMPD from delivery as part of the technical data package, the protester's argument that this language similarly excludes source code, because source code is the equivalent to DMPD for computer software, ignores the DFARS definition of DMPD. Final RFP at 52-53. The DFARS defines DMPD as "technical data that describe the steps, sequences, and conditions of manufacturing, processing or assembly used by the manufacturer to produce an item or component or to perform a process." DFARS clause 252.227-7013(a)(6) (emphasis added). By its terms, DMPD does not include computer software, which the DFARS defines to include source code. Accordingly, the exclusion for DMPD in that clause meaningfully can only refer to technical data.

Furthermore, the protester's arguments concerning the application of DFARS clause 252.227-7013(b)(1)(v) and DFARS § 227.7203-1(c) are similarly flawed since they again conflate rights with delivery, which are entirely separate concepts. Even accepting, for the sake of argument, the protester's contention that DMPD extends to source code, as discussed above, DFARS clause 252.227-7013(b)(1)(v) only affects the rights which the government is entitled to in delivered DMPD. See DFARS clause 252.227-7014(a)(4). DFARS clause 252.227-7013(b)(1)(v) has no bearing on whether the government may contract for delivery of DMPD, and is therefore wholly inapplicable to the question of whether the RFP requires delivery of source code. See DFARS clause 252.227-7013(b)(1)(v). Likewise, a requirement to deliver source code does not run afoul of the requirements of DFARS § 227.7203-1(c). That provision only restricts what rights in computer software the government may require from offerors (unlimited, government-purpose, restricted, etc.), not the kinds of computer software deliverables for which the government may contract. DFARS § 227.7203-1(c).

Accordingly, the protester's reading of the RFP as categorically not requiring the delivery of technical data that constitutes DMPD or of source code is not consistent with the RFP and the incorporated DFARS sections when read as a whole, and is therefore unreasonable. This protest ground is therefore denied.

Separation of OMIT and Non-OMIT Data

With respect to its third protest ground, the protester contends that the agency's interpretation of SOW § 4.3.11.3.1, concerning the baseline technical data package to be provided under the contract, renders it impossible for offerors to determine which CDRL items will include OMIT or other than OMIT data, preventing offerors from competing on a common basis. Protest at 35-42. The protester argues that it reasonably read SOW § 4.3.11.3.1 to mean that OMIT data (including data necessary to perform depot maintenance) should be provided under CDRL A136 (concerning product drawings or models and associated lists), while non-OMIT data, including data necessary for reprocurement, should be provided under CDRL A097 (concerning the technical data package generally), and it learned of the agency's contrary readings for the first time during discussions. Id. Specifically, the protester argues that the agency has indicated in discussions that the RFP makes no distinction between OMIT data and non-OMIT data at the CDRL level, and that this reading is not consistent with the RFP. Id. at 35. The agency affirmed this view in its response to Sikorsky's agency-level protest. Agency Decision on Agency-Level Protest at 8-9.

Sikorsky filed its protest with our Office within 10 days of receiving the Air Force's decision on its agency-level protest. This protest ground is not speculative or premature, because the agency effectively has announced how it intends to evaluate proposals. To the extent the agency protest decision advanced an interpretation of the solicitation that is inconsistent with Sikorsky's reading of the RFP, this protest ground is appropriate for resolution at this time.

Turning to the merits of this protest ground, Sikorsky argues that because the SOW provision requires offerors to furnish data necessary for reprocurement and data necessary for depot maintenance in two separate sentences, and also references two separate CDRLs, that a division of the two types of information at the CDRL level is a natural reading of the SOW provision. Protest at 37-39. Sikorsky argues that the agency's contrary reading--that the RFP does not distinguish between OMIT data and non-OMIT data at the CDRL level--is confusing and contrary to the RFP because it provides offerors with no guidance as to what should be provided in response to the two CDRLs. Id. at 39-41.

As noted above, where a dispute exists as to a solicitation's actual requirements, we will first examine the plain language of the solicitation. Intelsat General Corporation, supra, at 8. Where a protester and agency disagree over the meaning of solicitation language, we will resolve the matter by reading the solicitation as a whole and in a manner that gives effect to all of its provisions; to be reasonable, and therefore valid, an

interpretation must be consistent with the solicitation when read as a whole and in a reasonable manner. Crew Training Int'l, Inc., *supra*, at 4.

Contrary to the protester's assertion, the reading the protester advances is not a reasonable reading of the provision. While the SOW paragraph separately requires information necessary for reprourement and information needed for maintenance, the referenced CDRLs are not clearly distinguished along those lines, nor do they, by their own terms, distinguish between OMIT and other than OMIT data. Final RFP at 140-141; CDRL General Instructions at 1-6. For example, CDRL A136 appears to include requirements for data necessary for both maintenance and reprourement. CDRL General Instructions at 4-6. Additionally, as the protester acknowledges, the RFP includes a data assertion list which allows contractors to identify whether each specific item of data answerable to various CDRLS are OMIT or non-OMIT, which, contrary to the protester's assertion, reinforces the fact that the RFP contemplated that the distinction between OMIT and non-OMIT data would be made for individual data items, and not at the CDRL level. Protest at 38-39; Final RFP, Section J, Attachment 8. Accordingly, the protester's reading of the provision is unreasonable when read in light of the solicitation as a whole, and this protest ground is denied.

Rights in Commercial Software Licenses

With respect to its fourth argument, the protester contends that the agency's application of clause H002, governing the government's license rights in commercial computer software "to be" obtained on behalf of or transferred to the government, to software licenses already in the government's possession is contrary to the terms of the RFP. The protester argues that, during discussions, it became clear that the agency was unreasonably reading clause H002 as applying to commercial computer licenses already in the government's possession, such as licenses provided through the DOD Enterprise Software Initiative. Protest at 43-48. Specifically, the protester argues that H002, by its terms, only applies to licenses "to be obtained on behalf of or transferred to the Government under this contract," and therefore cannot be read to apply to licenses already in the government's possession. *Id.* (citing Final RFP at 50-52). This argument, however, is untimely where the agency advised all offerors of its view of this clause in June, 2017.

Sikorsky specifically asked during the question and answer period whether an offeror may provide commercial computer software licenses from the DOD Enterprise Software Initiative. Agency Request to Dismiss, Enclosure 3, Draft RFP Questions and Answers at 26. On June 22, 2017, the agency answered the question by noting "[o]fferors are encouraged to provide commercial computer software licenses from the DOD Enterprise Software Initiative if such licenses comply with H002." *Id.* (emphasis added). The protester, and all other offerors, were on notice¹¹ of the agency's view of the

¹¹ During a teleconference held to clarify certain portions of the record, the protester additionally argued that, because the questions and answers were not incorporated into
(continued...)

applicability of H002 to such licenses prior to the time for receipt of proposals, and over six months prior to the filing of this protest. As discussed above, where an agency has provided information to all offerors concerning how it intends to evaluate specific elements of proposals, a protest of that interpretation must be filed prior to the time for receipt of proposals, or prior to the next time for closing, as appropriate. See Savannah River Tech. & Remediation, LLC, Fluor Westinghouse Liquid Waste Servs., LLC, supra at 5-6. This protest ground is therefore untimely.

Identification of Configuration Items and Depot-Level Repairables

With respect to its fifth and sixth arguments, the protester contends that the agency erred in rejecting its proposed attachments identifying a list of configuration items and depot-level repairables on the grounds that the solicitation contemplates finalizing the lists of such items post-award. Protest at 49-56. Specifically, Sikorsky contends that the RFP did not prohibit the furnishing of such attachments, and that the agency is insisting on an unbounded view of what these items might comprise, and therefore is imposing an impossible standard on offerors for the first time in discussions. Id. In the alternative, the protester argues that it did not claim in its proposal that additional items could not be identified during performance, and therefore did not intend for the attachments to be viewed as taking exception to the terms of the solicitation. Response to First Request to Dismiss at 18-19.

The agency responds by noting that the solicitation did not request or require the submission of such a list, and that certain provisions of the solicitation contemplate the identification of configuration items and depot-level repairables after award. First Request to Dismiss at 8-9; Agency Decision Regarding Sikorsky's Agency-Level Protest at 10-11. Additionally, the agency noted in its ENs that the associated CDRLs themselves include timetables for finalizing the relevant lists of configuration items and depot-level repairables. Evaluation Notice SAC-K-008 at 2-3. The agency views the attachments as an attempt on Sikorsky's part to limit the enforceability of SOW § 4.3.11.3.1. Id.

In our view, this protest ground is, at best, a premature evaluation challenge. Here, the protester's contention that the RFP does not forbid the furnishing of such attachments is not incompatible with the agency's view that the RFP does not specifically request or require that an offeror provide them. Rather, the parties disagree about whether or not

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the RFP as an amendment, they did not feel entitled to rely on the answer because it so clearly conflicted with the language of the RFP. As discussed above, this simply reinforces that this protest ground is untimely. If, as the protester contends, the agency had advanced an interpretation of the RFP to all parties that was clearly contrary to the terms of the RFP prior to the time for receipt of proposals, the time to protest it was prior to the time for receipt of proposals. 4 C.F.R. § 21.2(a)(1); Harrington, Moran, Barksdale, Inc., supra.

the solicitation, as applied to the attachments, renders Sikorsky's technical proposal unacceptable. To the extent there is a legitimate disagreement concerning the meaning of the solicitation here,¹² it is so inextricably tied to the evaluation of a specific proposal that it would be impossible to resolve without also addressing the embedded evaluation challenge. If, as Sikorsky implies in their alternative argument, the protester does not contend that additional configuration items and depot-level repairables could not be identified post-award, and did not intend the lists to be definitive or to take exception to the solicitation, then the attachments may simply represent information about Sikorsky's technical approach. This reinforces our view that this protest ground is, essentially, a challenge of the agency's technical evaluation prior to award, and is therefore, premature. See Computer Associates International, Inc., supra at 4; Parcel 47C, LLC, B-286324, B-286324.2 Dec. 26, 2000, 2001 CPD ¶ 44 at 10 n.13.

Unequal Treatment

Lastly, Sikorsky argues that, because another offeror has offered a Sikorsky-manufactured aircraft but has not approached Sikorsky to secure necessary intellectual property licenses, the agency is treating offerors unequally or conducting unequal discussions. Protest at 56; Supplemental Protest at 1-5. Even assuming the protester is correct about the contents of another offeror's proposal and the agency's response to it, this argument is premature. As noted above, we have consistently concluded that claims of unequal discussions or unequal treatment are premature when raised prior to award and during discussions. See, e.g., Northrop Grumman Tech. Servs., Inc., supra at 4 (unequal discussions protest ground is premature because an award decision had not yet been made). If Sikorsky is excluded from the competitive range or not selected for award, it may raise whatever evaluation errors it deems appropriate, including unequal discussions or unequal treatment, at that time. See Intermarkets Global, supra, at 4-5; Computer Associates International, Inc., supra, at 4 (protests that merely anticipate prejudicial agency action are speculative and premature).

The protest is denied in part and dismissed in part.

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General Counsel

¹² However, to the extent the protester is arguing that the RFP, as written, imposes an unbounded or impossible standard, this is an untimely protest of the terms of the solicitation. The RFP provided timetables for identifying configuration items and depot-level repairables, and to some extent, specifically contemplates the identification of items in those categories post-award. See, e.g., CDRL General Instructions at 1-6; RFP at 146-148. Therefore, to the extent the requirements of the RFP are unbounded in this respect, they were clearly so prior to the time for receipt of proposals and a protest on that basis should have been filed prior to that time.