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United States Government Accountability Office
Washington, DC 20548

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Decision

Matter of: Raytheon Company

File: B-410719.10; B-410719.11

Date: November 15, 2016

Kara L. Daniels, Esq., Mark D. Colley, Esq., and Stuart W. Turner, Esq., Arnold & Porter LLP, for the protester.
Lt. Col. Kevin P. Stiens, Esq., and Erika Whelan Rhetta, Esq., Department of the Air Force, for the agency.
Stephanie B. Magnell, Esq., and Amy B. Pereira, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest is denied where the agency's decision to amend, rather than cancel, the solicitation was not improper where there was no prejudice to the protester and, under the facts of this procurement, cancellation would not have increased competition.

2. Protest is denied where the agency allowed sufficient time after amendment of the solicitation for revision of proposals.

DECISION

Raytheon Company, of Tewksbury, Massachusetts, protests the terms of an amendment to request for proposals (RFP) No. FA8730-13-R-0001, which was issued by the Department of the Air Force in order to acquire three-dimensional, expeditionary, long-range radar (3DELRR) modules. The protester contends that the amendment is so substantial that, under the Federal Acquisition Regulation, the agency was required to cancel the solicitation. Raytheon also asserts that the amendment fails to address the underlying structural problem in the solicitation and that the agency improperly used offerors' cost data in restructuring the procurement. Finally, the protester alleges that offerors were not allowed sufficient time to revise their proposals following changes made to the solicitation in a subsequent amendment.

We deny the protest.

BACKGROUND

In 2009, the Air Force began the process of replacing the agency's outdated AN/TPS-75 radar system with a gallium-nitride-based 3DELRR system. Agency Report (AR), Tab 98, 2013 Justification and Approval (J&A), Apr. 24, 2013, at 4-5. The agency intended the new modules to "be the principal USAF long-range, ground-based sensor for detecting, identifying, tracking, and reporting aerial targets" for the Air Force on the battlefield. Id. at 2. The agency opened the technology development phase of the procurement, i.e., design of a 3DELRR system at technology readiness level (TRL) 6, by awarding development contracts to two offerors: Lockheed Martin Corporation (Lockheed) and Sensis Corporation (with Raytheon acting as a major subcontractor).[1] Id. at 4-5.

In August 2012, the Air Force entered the next stage of the procurement, the pre-engineering, manufacturing and development (EMD) procurement phase, awarding three 15-month contracts to Lockheed, Northrop Grumman Systems Corporation (Northrop), and Raytheon for design reviews and a prototype test event. Id. at 4-5.

On April 24, 2013, the Air Force issued a limited sources J&A to restrict the competition to Lockheed, Northrop, and Raytheon. Id. at 2.

The instant protest concerns the following stages of the procurement, which include the EMD phase, when three radar units will be constructed and tested; the low-rate initial production (LRIP) phase, when three more radar units will be constructed; and the full-rate production phase, when an additional 29 radar units will be constructed. AR, Tab 47, Air Force Update Brief, May 3, 2016, at 3. The Air Force anticipated the EMD phase would continue for 42 months and cost $287 million. AR, Tab 98, 2013 J&A, at 3. In the EMD phase, the contractor would complete the system design, conduct a critical design review, build production representative units, and advance the technological maturity of the design from TRL 6 to TRL 8.[2] AR, Tab 30, 2013 Statement of Work (SOW), at 12. The agency anticipated that the LRIP phase, in which the contractor would produce, deploy and support the system developed in the EMD phase, would follow the conclusion of the EMD phase, span 26 months and cost $173 million. Id.

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[1] A system evaluated at TRL 6 is a "model or prototype [whose success has been] demonstrate[ed] in a relevant environment." Department of Defense Technology Readiness Assessment (TRA) Guidance (April 2011), at 2-13.

[2] A system evaluated at TRL 7 must demonstrate successful performance "in an operational environment." Id. at 2-14. For a system to achieve TRL 8, there must be an "[a]ctual system completed and qualified through test and demonstration" where the "[t]echnology has been proven to work in its final form and under expected conditions." Id.

The 2013 RFP, issued on November 15, 2013, encompassed only the EMD and LRIP phases.[3] AR, Tab 29, 2013 RFP, at 6-11. The agency decided against including full-rate production because the difficulty of pricing 6-12 years in the future would add to the risks and costs of the program. AR, Tab 26, 3DELRR Acquisition Strategy Panel Meeting Notes, Mar. 13, 2013, at 1. The 2013 RFP established the following pricing structure:[4]

CLIN	Task	Price Format	Price Restrictions
0001	Engineering & Manufacturing Development (EMD)	Fixed Price Incentive Firm	Cap of $287M (incl. CLIN 0003 at $5M)
0003	EMD Studies & Analysis	Cost Plus Fixed Fee	Price cap of $5M
0020	Low Rate Initial Production (LRIP)	Fixed Price Incentive Firm	Cap of $173M (incl. CLIN 0021 at $5M)
0021	LRIP Studies & Analysis	Cost Plus Fixed Fee	Price cap of $5M
0030	Interim Contractor Support (ICS)	Cost Plus Fixed Fee	

2013 RFP § M ¶ 1.1.1.[5] The combined price cap for contract line item numbers (CLINs) 0001, 0003, 0020, and 0021 was $460 million, and the agency estimated the cost of performance at $421 million. AR, Tab 140, Cost/Price Consensus Report, at 8.

The solicitation, conducted in accordance with Federal Acquisition Regulation (FAR) part 15, anticipated award to the responsible offeror submitting a technically-acceptable proposal and submitting the lowest price, as determined by the best-value assessment. 2013 RFP § M ¶ 1.1. The 2013 RFP provided for evaluation of proposals under three factors: technical, small business participation, and cost/price. 2013 RFP § M ¶ 2.1. The technical factor comprised three subfactors: system design and performance, system producibility and sustainability, and exportability.[6] Id. Proposals would be evaluated under each technical subfactor for

[3] For clarity in this decision, the RFP prior to amendment 0008 is referred to as the 2013 RFP, while the RFP post-amendment 0008 is referred to as the 2016 RFP.

[4] The 2013 solicitation also included CLINs for studies and analysis, defense exportability features, and related data.

[5] In addition, the 2013 RFP established a price cap of $534 million for the total of: the fixed-price-incentive-firm CLINs 0001 (EMD) and 0020 (LRIP); the cost-plus-fixed-fee CLINs for interim contractor support (ICS); the two CLINs for EMD and LRIP studies and analysis at the RFP-established price of $5,000,000 each; and fixed-price CLIN 0004 (early LRIP materials). 2013 RFP § M ¶ 1.1.1.

[6] Proposals also would be evaluated under the small business participation factor on an acceptable/unacceptable basis, where an unacceptable rating would render the offeror ineligible for award. 2013 RFP § M ¶ 1.1.1.

compliance and risk on an acceptable/unacceptable basis. Id. A proposal receiving a rating of unacceptable would be considered unawardable. Id.

Calculation of the best-value assessment started with an offeror's total evaluated price, and included CLINs 0003 and 0021, studies and analysis for EMD and LRIP, at the government-established price of $5,000,000 each. 2013 RFP § M ¶ 2.6.5. Then, for evaluation purposes, the solicitation provided for a decrement from an offeror's total evaluated price, based on the offeror's ability to demonstrate performance capability at ranges beyond the threshold distance. Id. ¶ 2.6.6. These decrements were as follows:

	Threshold	Point 1	Point 2	Objective
Decrement	$0	$38 million	$77 million	$155 million

Id. Thus, an offeror's total evaluated price would be evaluated at $10 million if an offeror proposed $0 for all discretionarily-priced CLINs. 2013 RFP § M ¶ 2.6.5.

The Air Force received proposals from Northrop, Lockheed, and Raytheon by the due date of June 27. AR, Tab 104, Air Force Letter to Raytheon, June 20, 2014, at 4; Tab 105, Proposal Analysis Report, Aug. 12, 2014, at 7. All three proposals were evaluated as acceptable for compliance and risk under the three technical subfactors, as well as under the small business participation factor. AR, Tab 41, Competitive Range Determination, Jan. 8, 2016, at 4 (displaying data from June 30, 2014). The offerors' 2013 best-value assessments were calculated as follows:

	Lockheed	Raytheon	Northrop
Total Evaluated Price	$[DELETED]	$74,462,019	[DELETED]
Performance Decrement	-$155,000,000	-$155,000,000	-$155,000,000
Best Value Assessment	[DELETED]	($80,537,981)	[DELETED]

Id.

On October 6, 2014, the Air Force awarded the 2013 contract to Raytheon as the lowest-priced, technically-acceptable offeror. Id. at 5. The Air Force revealed Raytheon's total evaluated price of $74,462,019 to Northrop and Lockheed during their respective debriefings. Id.

In October 2014, Northrop and Lockheed filed protests of the 2013 contract award to Raytheon at our Office, alleging, respectively, that the agency had conducted misleading discussions and relied on a flawed technical evaluation. Following a hearing and alternative dispute resolution in the form of outcome prediction, during which the GAO attorney indicated that she would draft a decision sustaining the protests, the Air Force elected to take corrective action by reopening discussions

with offerors in order to clarify the allowability of independent research and development funds and to discuss evaluations at the appropriate technology readiness level. AR, Tab 33, Agency Notice of Corr. Action, Jan. 16, 2016. As a result of the agency's decision to take corrective action, we dismissed the protest as academic. Northrop Grumman Sys. Corp., Lockheed Martin Corp., B-410719 et al., Jan. 21, 2015 (unpublished decision), at 1. Raytheon then protested the Air Force's decision to take corrective action at the Court of Federal Claims and, after receiving an adverse ruling (see Raytheon v. United States, 121 Fed. Cl. 135 (2015)), appealed to the Court of Appeals of the Federal Circuit, which upheld the lower court's decision confirming the reasonableness of the agency's decision. Raytheon v. United States, 809 F.3d. 590 (Fed. Cir. 2015).

In September 2015, the Air Force released RFP amendments 0004, 0005 and 0006. AR, Tab 94, Amend. 0004, Sept. 2, 2015; Tab 95, Amend. 0005, Sept. 9, 2016; Tab 96, Amend. 0006, Sept. 15, 2016. Final proposal revisions were due on October 6, 2015. Memorandum of Law (MOL) at 4.

Northrop, Lockheed and Raytheon again submitted timely proposals, all three of which were considered unawardable due to unacceptable technical ratings. AR, Tab 41, Competitive Range Determination, Jan. 8, 2016, at 7. However, each proposal was evaluated as successfully proposing to meet the objective performance range, and thus all three received the benefit of the $155 million decrement to their total evaluated prices. Id. at 8-9. The offerors' proposed prices were evaluated as follows:

	Lockheed	Raytheon	Northrop
Total Evaluated Price	$10,000,000	$[DELETED]	$[DELETED]
Performance Decrement	-$155,000,000	-$155,000,000	-$155,000,000
Best Value Assessment	($145,000,000)	($[DELETED])	$[DELETED]

Id. Because CLINs 0003 (EMD studies and analysis) and 0021 (LRIP studies and analysis) were fixed at $5 million each, Lockheed's evaluated price reflected the fact that Lockheed had submitted a price of $0 for all other CLINs. AR, Tab 47, Air Force Update Brief, May 3, 2016, at 7 (presenting offerors' October 2015 interim prices). As Lockheed later informed the Air Force, it had "[seen] RTNs [Raytheon's] bid; [and knew that if Lockheed] came in around that they'd lose." AR, Tab 146, Source Selection Authority (SSA) Notes From Lockheed Meeting, June 7, 2016, at 2. Lockheed "[n]eed[ed] to go lower [than Raytheon's total evaluated price] to win." Id.

On January 11, 2016, the Air Force established a competitive range and eliminated Northrop Grumman on the grounds that its proposed price was not competitive. AR, Tab 41, Competitive Range Determination, Jan. 8, 2016, at 10. Although Northrop's proposal was also considered technically unacceptable, the Air Force

concluded that the flaws were easily correctible, and thus, Northrop was excluded solely on the basis of its proposed price. Id. After further revisions, Raytheon's and Lockheed's proposals were evaluated as technically acceptable. AR, Tab 43, Air Force Ltr. to Lockheed, Req. for Final Proposal Revisions, Mar. 7, 2016; Tab 44, Air Force Ltr. to Raytheon, Req. for Final Proposal Revisions, Mar. 7, 2016. The offerors also received the maximum performance decrement. Id. However, the Air Force advised Raytheon that its "calculated total evaluated price and resultant Best Value Assessment are considered high among the offerors in the competitive range." Id. AR, Tab 44, Air Force Ltr. to Raytheon, Req. for Final Proposal Revisions, Mar. 7, 2016, at 1.

On March 29, Raytheon lowered its final price to $0 for the discretionary EMD, LRIP, and Interim Contract Support (ICS) CLINs; its total evaluated price was thus $10 million, the same as proposed by Lockheed. AR, Tab 47, Air Force Update Brief, May 3, 2016 at 8. Lockheed and Raytheon had submitted technically acceptable proposals and were tied at the lowest best-value assessment possible under the solicitation: -$145 million. Hearing Transcript (Tr.) at 127:6-8, CO.

Despite its final letter encouraging Raytheon to lower its proposed price, the Air Force had not anticipated that Raytheon, too, would submit a zero-dollar bid. Id. at 304:20-21. Over the next two months, the Air Force considered how to proceed with the procurement. AR, Tab 45, Air Force Internal Paper, Apr. 4, 2016; Tab 46, Air Force Internal Paper, Apr. 11, 2016; Tab 47, Source Selection Update Briefing, May 3, 2016. The agency reviewed the solicitation and concluded that the 2013 RFP allowed for award of one contract or no contract, but not two contracts. Tr. at 37:12-15, SSA; 127:21-22, CO. Furthermore, the agency believed that the zero-dollar bids received were predicated on the expectation that the agency would award a single contract for the EMD stage, and that the EMD awardee would then be able to obtain all follow-on work. Tr. at 28:1-2 ("[H]ad it not been [a single-award contract], we probably wouldn't have gotten zero bid offers."). The agency found "no way to discriminate between the two [proposals] and award the contract." AR, Tab 145, SSA Email, Apr. 1, 2016.

The agency narrowed the possible steps to either drawing lots, as provided in FAR part 14, or adding full-rate production to the solicitation. AR, Tab 48, Source Selection Update, May 31, 2016. The Air Force hoped that adding the requirement for full-rate production for all 29 units--in addition to the 6 units produced under the EMD and LRIP phases--would prevent offerors from proposing similar zero-dollar prices and provide the price differentiation necessary for award. Id. at 3.

The full-rate production CLINs were structured as fixed-price option[7] CLINs with a not-to-exceed amount, and these values were to be used in the calculation of an offeror's total evaluated price. 2016 RFP § M ¶¶ 1.1.1, 2.6.5(f). The Air Force elected to require not-to-exceed amounts--rather than fixed prices--because of concerns that the fixed-price options might not be awardable due to later design changes. Tr. at 48:17-21, SSA. In contrast, the not-to-exceed amounts remained awardable because they shifted the price risk of design changes and "minor requirements change[s]" to offerors. AR, Tab 48, Source Selection Update, May 31, 2016 at 5-6; Tr. at 59:10-16, SSA; see also Tr. at 56-58, SSA. The not-to-exceed amounts acted as a "one-way ratchet" on price, allowing the agency to negotiate to a lower price based on any cost reductions, while shifting the risk of cost increases to the contractor. Tr. at 56:7-11, SSA. The Air Force used the cost and pricing data provided by the offerors in support of their zero-dollar bids in order to feel confident shifting additional price risk to the offerors through amendment 0008. Id. at 132:12-17, CO (considering the amount of the buy-in in the subsequent pricing structure); 70:7-10, SSA.[8]

The agency, however, recognized that the full-rate production amendment would fundamentally change the pricing scheme to reward the lowest per-unit price. To counterbalance the incentive for offerors to design less-costly, lower-performing units under amendment 0008's revised terms, the Air Force increased the value of the performance range decrement, as follows:

	Threshold	Point 1	Point 2	Objective
Decrement	$0	$103 million	$207 million	$416 million

AR, Tab 79, 2016 RFP § M ¶ 2.6.6. See also Tr. at 173:6-9 (The decrement value was increased because "we wanted to ensure that offerors were further incentivized, including the cost of production, to propose above-threshold range."). Thus, the amount of the price decrement for achieving the objective range performance increased by $261 million to $416 million.

[7] Despite the fact that the full-rate production was an option, the agency had always anticipated negotiating with the winning offeror of this stage of the procurement in order to purchase the 29 units. Tr. at 113:4-7, SSA; 164:4-14 (if the Air Force concluded that the fixed-price option was not exercisable, it would likely resolicit under a sole-source J&A).

[8] The agency characterized the request for not-to-exceed amounts as a request for "additional cost information." Tr. at 33:2, SSA. However, it is clear from the solicitation that the values provided are not merely informational, but are instead substantive in terms of the agency's best-value assessment and the contract to be awarded.

On June 7, the SSA met with a Lockheed senior vice president to discuss Lockheed's zero-dollar bid. AR, Tab 146, SSA Meeting Notes with Lockheed, at 2; Tr. at 111:5-8; AR, Tab 146, SSA Meeting Notes with Lockheed, at 2. On June 8, the SSA had a similar meeting with a Raytheon senior vice president. Id. at 1.

On July 12, the Air Force advised offerors that it intended to add full-rate production to the 2013 solicitation. AR, Tab 50, Notice of Contract Action, July 12, 2016. The agency also invited Northrop to rejoin the competition because of the nature of the amendment 0008 changes. Id.; Tr. at 33:3-4, SSA ("I felt we had to let them [Northrop] provide that [cost information] and compete."). The agency explained that, "[f]rom a competition standpoint, amending [the solicitation] and allowing Northrop Grumman back in was the same as canceling" the solicitation.[9] Tr. at 135:10-12, CO. Raytheon filed an agency-level protest on July 22, alleging that the agency had violated the FAR by failing to make award to Raytheon's lowest-priced proposal, regardless of whether it also made a second award to Lockheed. AR, Tab 119, Raytheon Pre-Award Protest.

On July 25, the agency signed the 2016 J&A to limit competition under the amended solicitation to Lockheed, Northrop and Raytheon.[10] AR, Tab 88, 2016 J&A, July 25, 2016, at 1.

On July 27, the agency issued amendment 0008 and established a due date for revised proposals of August 26. AR, Tab 58, Amendment 0008; Tab 57, Amendment 0008 Cover Ltr., July 27, 2016, at 2. Amendment 0008 added full-rate production to the solicitation, i.e., construction of the additional 29 3DELRR radar systems, production of the 3DELRR anti-radiation missile counter-measures subsystem (decoy sets), fielding and site acceptance testing of the units produced, and operator training. AR, Tab 85, 2013-2016 RFP SOW Redline, at 14-16. Amendment 0008 established a price ceiling of $725 million on the full-rate production portion of the solicitation and raised the total contract ceiling price from $534 million to $1.259 billion. AR, Tab 87, 2016 RFP § M, at 4-5. In addition, amendment 0008 specified that the CLIN for EMD phase, which the Air Force valued at $421 million, was now a zero cost item. AR, Tab 150, Amend. 0008, at 3 (CLIN 0001, EMD, provides "Total Item Amount: $0.00.").

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[9] The contracting officer (CO) testified that "some of the factors we discussed in terms of amending versus canceling, [were] that ultimately, because we are in a limited competition to begin with, based on our J&A, canceling and starting over would ultimately bring us to the same situation as amending, which is why we let Northrop Grumman back into the competition following amendment [000]8. So that is sort of what we considered." Tr. at 134:21-22; 135:1-7, CO.

[10] The 2016 J&A understates the value of the procurement by a factor of 1,000. AR, Tab 88, 2016 J&A, July 25, 2016, at 1. We believe this to be a typographical error.

On August 8, Raytheon timely filed a protest at our Office, arguing that the agency should have made award under the 2013 RFP, alleging that amendment 0008 was flawed and constituted a de facto cancellation of the procurement. This protest was docketed as B-410719.10. Raytheon also argued that the Air Force improperly disclosed Raytheon's price by fixing the value of the EMD CLIN in amendment 0008 at $0, i.e., the price proposed by Raytheon, although this protest ground was later withdrawn. Protest at 17; Raytheon Comments at 1.

On September 13, i.e., during the pendency of the protest of amendment 0008, the agency issued amendment 0009, and, among other changes, removed the "$0.00" from the "total item amount" for the EMD CLIN by deleting the line in its entirety. AR, Tab 181, Conformed Solicitation, Sept. 13, 2016. The agency maintained the proposal submission date of October 12, 2016. AR, Tab 179, Amend. 0009 Cover Ltr., Sept. 13, 2016, at 2.

On September 19, Raytheon asked the Air Force to extend the proposal submission date to November 23 in order to allow for time to respond to the changes effected by amendment 0009 and to raise questions regarding certain missing pages. AR, Tab 196, Raytheon Ltr., Sept. 19, 2016, at 1. The protester stated that the removal of the $0.00 amount "may result in a significant repricing effort of our response to the RFP." Id.

On September 22, the Agency rejected Raytheon's request for an extension of the proposal submission deadline. AR, Tab 199, Air Force Ltr. Sept. 22, 2016, at 2. On October 3, Raytheon filed a timely protest with our office challenging the Air Force's determination not to extend the deadline for submission of proposals after the issuance of amendment 0009.

Our Office held a hearing on October 11, at which the Air Force's CO and SSA testified, as well as an employee of the MITRE Corporation, who advised the agency on engineering matters. In addition, Raytheon provided the testimony of one of its directors as to its approach to this procurement.

DISCUSSION

The Air Force Was Not Required to Cancel the Solicitation

The protester asserts that the amendment 0008 changes are so substantial that FAR § 15.206(e) requires cancellation of the solicitation. Raytheon Post-Hearing Comments, at 11. As discussed below, we find that although the solicitation changes were sufficiently substantial so as to fall under FAR § 15.206(e), the

protester has failed to demonstrate how the agency's decision to amend--rather than cancel--resulted in any prejudice to it. Accordingly, we deny the protest.[11]

FAR § 15.206(e) discusses cancellation of a solicitation as follows:

> If, in the judgment of the contracting officer, . . . an amendment proposed for issuance after offers have been received is so substantial as to exceed what prospective offerors reasonably could have anticipated, so that additional sources likely would have submitted offers had the substance of the amendment been known to them, the contracting officer shall cancel the original solicitation and issue a new one, regardless of the stage of the acquisition.

The regulation contains two preconditions to cancellation that, together, test whether the change to the solicitation is so substantial that it could have affected an offeror's decision to participate in the competition. The FAR's cancellation requirement ensures that all potential offerors have the opportunity to decide whether to compete on the substantially revised terms. See Government Contract Servs. Co., B-294367, Oct. 25, 2004, 2004 CPD ¶ 215 at 4 (cancellation under FAR § 15.206(e) reopens the solicitation so "all interested firms are given an opportunity to respond to the changed requirement."); Information Ventures, Inc., B-232094, Nov. 4, 1988, 88-2 CPD ¶ 443 at 4 (sustaining protest where the agency failed to invite a potential offeror to return to the competition after a prior exclusion from the competitive range, where a subsequent amendment eliminated the basis for the exclusion).[12]

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[11] Raytheon also argues that amendment 0008 was inconsistent with the Air Force's acquisition strategy and Department of Defense Instruction (DODI) 5000.02, which requires approval from the milestone decision authority for certain changes. Raytheon Post-Hearing Comments, at 11, 15-20. The protester further contends that amendment 0008 violates the requirement in DODI 5000.02 to fairly allocate risk between the agency and the contractor. Id. at 20-26. Regardless of whether or not these allegations are correct, the protester derives no rights from the agency's acquisition strategy or a Department of Defense instruction. Management Plus, Inc., B-265852, Dec. 29, 1995, 95-2 CPD ¶ 290 n.1 (internal agency instructions confer no rights on outside parties); Quality Sys., Inc., B-235344; B-235344.2, Aug. 31, 1989, 89-2 CPD ¶ 197.

[12] Information Ventures considered this requirement as it existed in FAR § 15.606 (1994), where the relevant portion provides:

> (b) In deciding which firms to notify of a change, the contracting officer shall consider the stage in the acquisition cycle at which the change occurs and the magnitude of the change, as follows:

(continued...)

Here, the agency invited Northrop to return to the competition due to the magnitude of the changes in the solicitation's scope and pricing. Tr. at 33:1-4 ("Northrop Grumman had been eliminated based on cost. And we were requesting additional cost information. So I felt we had to let them provide that and compete."). Due to the 2016 J&A's restriction on competition to the three firms discussed herein, additional interested firms do not have the ability to respond to the amended solicitation, however great the change.

Section 15.206(e) of the FAR requires an agency to reopen the competition to potential offerors when a change to the solicitation is so substantial that it is possible that other offerors would respond to the changed procurement. Here, we find that the decision to amend--rather than cancel--was reasonable; to conclude otherwise would be to prioritize form over substance. By inviting Northrop to rejoin the competition, the agency achieved the result intended by FAR § 15.206(e). Furthermore, there is no argument here that, if the agency had cancelled and reissued the solicitation, again due to the 2016 J&A, the result would differ from the present situation.[13]

(...continued)

> (1) If proposals are not yet due, the amendment shall be sent to all firms that have received a solicitation.
>
> (2) If the time for receipt of proposals has passed but proposals have not yet been evaluated, the amendment should normally be sent only to the responding offerors.
>
> (3) If the competitive range (see 15.609(a)) has been established, only those offerors within the competitive range shall be sent the amendment.
>
> (4) If a change is so substantial that it warrants complete revision of a solicitation, the contracting officer shall cancel the original solicitation and issue a new one, regardless of the stage of the acquisition. The new solicitation shall be issued to all firms originally solicited and to any firms added to the original list.

FAR § 15.606(b) (1994); Information Ventures, supra, at 7.

[13] The agency's position regarding the effect of amendment 0008 is not entirely consistent. For example, the Air Force has expressly repudiated the description of the amendment and reintegration of Northrop as a "de facto cancellation," instead characterizing the change as merely "an amendment to request additional cost information . . . ." Tr. at 39:18-22, SSA. However, the agency also concluded that the amendment 0008 scope changes were so great that fairness required that Northrop be invited to rejoin the competition. Tr. at 33:1-4, SSA. It appears that

(continued...)

Raytheon, however, contends that it has suffered competitive prejudice in the Air Force's decision to reject its zero-dollar low bid and restructure the competition, despite no change in the agency's requirements. Raytheon Comments at 5.

The Air Force argues that Raytheon simply objects to allowing Northrop to rejoin the competitive range, a position we have previously dismissed for lack of prejudice. Air Force Post-Hearing Comments at 15, citing E.L. Hamm & Assoc., Inc., B-280766.5, Dec. 29, 1999, 2000 CPD ¶ 13 at 6 (relying on the principle that there was no prejudice to reopening the competition where all offerors retain the ability to compete). While we do not agree that the protest is so limited in scope, we find that Raytheon has not shown how it was prejudiced by the Air Force's decision to amend rather than cancel and resolicit the solicitation. That is, Raytheon has not shown how it was disadvantaged by the agency's election. See NV Servs., B-284119.2, Feb. 25, 2000, 2000 CPD ¶ 64 at 18-20 (protest that agency failed to amend solicitation to accurately reflect needs was denied where the protester failed to show prejudice). See also Sun Microsystems Fed., Inc., B-254497.2, B-254497.3, May 20, 1994, 94-1 CPD ¶ 318 at 9 (protest ground dismissed where decision to amend rather than reissue the solicitation did not affect protester).

Although FAR § 15.206(e) requires a CO to cancel a solicitation when he or she concludes that an amendment is so substantial that additional offerors likely would have submitted proposals, we find that the CO's failure to do so here did not prejudice the protester. The agency has issued a J&A limiting competition and invited Northrop to rejoin the competition, thus accomplishing the result it would have obtained with a cancellation of the solicitation. Our Office will not sustain a protest unless the protester demonstrates a reasonable possibility that it was prejudiced by the agency's actions, that is, unless the protester demonstrates that, but for the agency's actions, it would have had a substantial chance of receiving the award. McDonald-Bradley, B-270126, Feb. 8, 1996, 96-1 CPD ¶ 54 at 3. Accordingly, we deny this ground of protest.

(...continued)
this inconsistency is due to the procurement team's desire to avoid a formal cancellation and the ensuing delay. MOL at 22 ("A cancellation would have required the Agency to start over from requirements development and potentially technology development."); Tr. at 225:21-226:3 ("Going back and changing the requirements might invalidate those two technology development phases and pushed us even further back in the two-year delay that we estimated it would take to do this."). See also Tr. at 146:1-13, CO.

Amendment 0008 Reasonably Addresses the Underlying Procurement Issue

Next, Raytheon contends that amendment 0008 fails to resolve a known flaw in the solicitation, namely, the inability to resolve a tie between low-price offerors. Raytheon Post-Hearing Comments, at 34-35. The protester argues amendment 0008 is unreasonable because it does not address the basis for the issuance of amendment 0008. Id.

The Air Force acknowledges that amendment 0008 does not preclude the possibility that the technically-acceptable offerors might again propose the same price. Tr. at 148:12, CO (another tied result is "certainly a possibility"). And the agency also confirms that amendment 0008 contains no tie-breaking mechanism. Tr. at 38:17-20, SSA (cost is the only discriminator). Although agencies are obligated to engage in reasonable advance planning prior to conducting procurements, our Office has recognized that the specific activities associated with this requirement may vary from procurement to procurement, and that the obligation does not constitute a requirement that procurement planning be perfect, that is, completely error-free. See, e.g., Hart Security Ltd., B-400796.2, Dec. 16, 2008, 2008 CPD ¶ 229 at 3-4.

Amendment 0008 shifts substantial price risk to the offerors in order to avoid multiple zero-dollar proposals. Tr. at 147:16-22, 148:1-6, CO. The agency argues that, with the increased risk, the likelihood of equal lowest-priced proposals is sufficiently remote that the revised structure is reasonable. Tr. at 148:8-14, CO. We agree with the agency that, given the substantial increase in scope, it is unlikely that an offeror will propose to complete the entire contract for $0. While the amendment does not eliminate the risk of equal low-priced proposals created by the solicitation, the likelihood of tied low-price non-zero-dollar offers is sufficiently remote for us to find that amendment 0008 was reasonable in this respect.[14]

Evaluating Cost or Price

Raytheon also alleges that amendment 0008 is unreasonable because the use of not-to-exceed pricing does not allow the agency to evaluate the actual cost of performance and is not in compliance with FAR §§ 15.302, 15.304(b)(2). Raytheon Post-Hearing Comments at 31-34.

Our Office has sustained pre-award challenges to the terms of solicitations that fail to provide for a meaningful comparison of offerors' proposed prices or costs. E.g. CW Gov't Travel, Inc.-Recon; CW Gov't Travel, Inc. et al., B-295530.2, July 25, 2005, 2005 CPD ¶ 139 (sustaining pre-award challenge to solicitation that did not

[14] Raytheon also argues that the Air Force must formally cancel the solicitation and update the 2013 requirements and funding approvals. Raytheon Post-Hearing Comments, at 26. However, we find no obligation for the agency to do so.

require offerors to propose binding prices for an indefinite-delivery/indefinite-quantity contract).

Raytheon claims that it is possible that an offeror with a higher not-to-exceed price could nonetheless, after technical refinements produce radar systems at a lower cost than the not-to-exceed price proposed by another offeror. Raytheon Post-Hearing Comments at 33-34. Due to this possibility, the protester argues, the agency has failed to satisfy its obligation to evaluate cost or price. Although this scenario is possible, it is clear that the amended procurement asks offerors to build the possibility of such cost savings into their not-to-exceed prices. Tr. at 188:9-12, CO ("Using an NTE [not-to-exceed price] allows them the ability to include risk in that price rather than just a straight firm[-]fixed-price number."). As the offerors are in the best position to anticipate future cost savings for their unique design solutions, it is reasonable to conclude that, to the extent that savings are available, they will be reflected in the offeror's not-to-exceed pricing. The Competition in Contracting Act requires that agencies consider the cost to the government in evaluating competitive proposals. 10 U.S.C. § 2305(a)(3)(A)(ii); Raymond Express Int'l, B-409872.2, Nov. 6, 2014, 2014 CPD ¶ 317 at 6.

The agency acknowledges that it intended to negotiate the prices for the full-rate production options after completion of the EMD and LRIP phases, and states that it structured amendment 0008 so as to provide "additional information to us to negotiate those options later." Tr. at 31:15-16; see also Tr. at 55:16-21 ("A not-to-exceed option is basically an envelope on the cost. It is not definitized cost. So we would later need to negotiate those options."). The protester thus argues that the amendment 0008 pricing scheme is inconsistent with the goal of a best-value procurement that, as here, is structured as a lowest-price, technically-acceptable procurement, because it is not guaranteed to result in an award to the lowest-priced offeror.

While it is up to the agency to decide upon an appropriate and reasonable method for proposal evaluation, it may not use an evaluation method that produces a misleading result. Raymond Express, supra, at 6. The method chosen must include some reasonable basis for evaluating or comparing the relative costs of proposals, so as to establish whether one offeror's proposal would be more or less costly than another's. Id. Here, we find that the not-to-exceed amounts are likely to represent the difference in costs to be incurred under competing proposals and do not sustain this protest ground.

The Agency Did Not Improperly Restructure the Procurement

Raytheon also argues that the Air Force violated FAR § 3.101-1, which requires that "[g]overnment business shall be conducted in a manner above reproach." Raytheon Post-Hearing Comments, at 35. In this respect, the protester contends that the agency acted improperly when it used what it learned about the offerors'

proposal strategies in structuring amendment 0008 to force lower pricing and shift risk to offerors. Raytheon Comments at 22; Raytheon Post-Hearing Comments, at 35-38. Raytheon asserts that the agency's efforts to obtain better pricing lack circumstances that would justify any change to the terms of the solicitation.

Here, in contrast, there were two tied offerors who could not improve their prices, and the structure of the solicitation did not anticipate multiple awards. The agency needed to move the procurement forward. In doing so, the agency added full-rate production for all 29 units under the not-to-exceed pricing, considering not only the immediate tie bids, but also the extent of the offerors' financial commitments under the zero-dollar proposals. Tr. at 130:17-131:2; 132:12-17; 304:22-305:9. The agency had previously obtained offerors' cost information, including offerors' unique low-rate initial production costs, and thus had this knowledge when deciding to add the 29 full-rate production systems and use the not-to-exceed pricing. Tr. at 43:3-8; 84:15-85:11; 89:4-22. Although the protester may object, we find no legal support for the assertion that the use of the offerors' pricing information was improper in these circumstances.

Raytheon also objects to the fact that amendment 0008 shifts risk to the offerors. Raytheon Post-Hearing Comments at 31. However, there is no requirement that an agency eliminate all risk from a solicitation; to the contrary, an agency may provide for a competition that imposes maximum risks on the contractor and minimum burdens on the agency, provided the solicitation contains sufficient information for offerors to compete intelligently and on equal terms. CW Gov't Travel, Inc.-Recon.; CW Gov't Travel, Inc., et al., B-295530.2 et al., July 25, 2005, 2005 CPD ¶ 139 at 7. We find no basis here to sustain the protest.

The Time Allotted for Amendment 0009 Was Reasonable

Raytheon contends that the Air Force was unreasonable in its refusal to extend the deadline for proposal submission after deletion of the fixed zero-dollar amount for the EMD phase in amendment 0009. Supp. Protest at 8; Supp. Comments at 2. In this respect, the protester argues that the time allotted to implement the volume of the required changes was insufficient and intentionally limits competition, and that the agency's decision to maintain the deadline lacked a rational basis. Supp. Protest at 9; Supp. Comments at 2, 5.

There is no per se requirement that the closing date in a negotiated procurement be extended following a solicitation amendment. Holmes & Narver Servs., Inc., B-242240, Apr. 15, 1991, 91-1 CPD ¶ 373 at 3. The determination of what constitutes a sufficient amount of time for proposal preparation is a matter committed to the discretion of the contracting officer; we will not object to that determination unless it is shown to be unreasonable. See USA Info. Sys., Inc., B-291488, Dec. 2, 2002, 2002 CPD ¶ 205 at 4.

The agency considered the removal of the fixed zero-dollar pricing for the EMD phase to be correction of an "administrative error" accidentally generated by the agency's electronic contract writing system that did not warrant additional time past the October 12 due date. AR, Tab 197, CO Email to Procurement Team, Sept. 20, 2016; Amend. 0009, at 1. Here, although the deadline for submission of proposals was not extended, the solicitation remained open for 29 days after the issuance of amendment 0009. While the dollar magnitude of the amendment 0009 change is substantial, i.e., removal of a fixed zero-dollar amount for a CLIN capped at $287 million, we nevertheless find over four weeks to be a reasonable amount of time to implement this change.

Raytheon also argues that "the short time adopted for proposal submission has precluded meaningful technical changes that could impact the level of competitive pricing." Supp. Comments at 7 (emphasis in original). In this regard, the protester contends that the agency was intending to prevent offerors from making cost-cutting technical changes that might provide competitive benefit in pricing, but whose evaluation would add to the procurement timeline. Id. The record does include support for this conclusion. Tr. at 15-20, CO ("There was a concern that in order for an offeror to potentially reduce the costs of their system for production, that they could change their technical solution to make it not meet [the . . .] objective range."). Regardless, Raytheon has not articulated how the agency was itself precluded from managing the solicitation in this manner. Therefore, we find no basis to sustain the protest.

The protest is denied.

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General Counsel