



Decision

Matter of: Raytheon Company

File: B-419393.5; B-419393.6

Date: December 22, 2020

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Andrew Shipley, Esq., Philip E. Beshara, Esq., and Chanda L. Brown, Esq., Wilmer Cutler Pickering Hale and Dorr LLP, for L3 Harris Technologies, Inc.; and Robert Nichols, Esq., Andrew Victor, Esq., and Samuel Van Kopp, Esq., Nichols Liu LLP, for Space Exploration Technologies Corp., the intervenors.

Colonel Patricia S. Wiegman-Lenz, Lawrence Anderson, Esq., Christopher Judge-Hillborn, Esq., and Lieutenant Colonel Amer Mahmud, Department of the Air Force, for the agency.

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DIGEST

Protest challenging scope of agency's proposed corrective action is dismissed where the protest is premature.

DECISION

Raytheon Company, of El Segundo, California, protests the scope of the corrective action taken by the Space Development Agency (SDA) under request for proposals (RFP) No. HQ0850-20-R-0003, for design, fabrication, assembly, and testing of space vehicles. Raytheon alleges that the scope of the corrective action fails to remedy the issues raised in its previously dismissed protest.

We dismiss the protest at this juncture.

BACKGROUND

On June 15, 2020, the agency issued the RFP to procure wide-field-of-view space vehicles deployed in low-earth orbit designed to detect hypersonic missile threats. Protest, exh. 2, RFP at 1; RFP, Statement of Work (SOW) at 2. The RFP contemplated

the award of two contracts, both made on a best-value tradeoff basis, considering schedule, technical, past performance, small business utilization, and price factors. Protest, exh. 3, RFP, § M at 1-8.

After evaluating proposals, the agency made awards to Space Exploration Technologies Corporation, of Hawthorne, California, and L3 Harris Technologies, of Palm Bay, Florida, on October 5, 2020. Protest, exh. 1, Debriefing Letter from the Agency to Raytheon, Oct. 5, 2020. Following its debriefing, Raytheon challenged the award in a bid protest filed with our Office. Prior Protest Pleading, B-419393.3, Nov. 3, 2020.

In that protest filing, Raytheon raised several allegations. Principally, Raytheon alleged that the agency misevaluated proposals because it used its expected budget as an unstated evaluation criterion, and improperly evaluated the firm's past performance and record of commitment to small business participation. Protest at 9-15.

Shortly thereafter, Raytheon filed two supplemental protests. In its first supplemental protest, Raytheon argued that the agency unreasonably evaluated the firm's technical proposal. First Supp. Protest, Nov. 9, 2020, at 17-25. Raytheon also argued that the agency unreasonably evaluated aspects of the awardees' technical and past performance proposals. *Id.* at 25-29.

In its second supplemental protest, Raytheon raised new allegations and provided additional support for some of its previous allegations based on public comments made by an agency official. Second Supp. Protest, Nov. 19, 2020, at 9-13. Chiefly, Raytheon alleged that the agency official's comments demonstrated that the agency used its budget constraints as an unstated evaluation criterion, and that the agency's requirements changed from a single overhead persistent infrared (OPIR) band to multiple OPIR bands in response to proposed solutions. *Id.*

Prior to the due date for the agency report, SDA notified our Office that it would take corrective action. Notice of Corrective Action, Nov. 18, 2020. The agency stated that it would reevaluate proposals, make a new award decision, and take any other corrective action deemed appropriate. *Id.* Raytheon objected, arguing that the agency's proposed corrective action did not remedy all of its allegations because the agency did not commit to amending the solicitation and allowing for submission of revised proposals. Resp. To Notice of Corrective Action, Nov. 20, 2020, at 2-7.

On November 23, 2020, the agency clarified the scope of its proposed corrective action, explaining that it would reassess its needs and determine if the current solicitation accurately reflected those needs. Notice of Corrective Action, Nov. 23, 2020. The agency explained that, if it determined that the current RFP did not reflect its needs, it would issue an amended RFP and solicit new proposals. The agency further explained that, if it determined that the current RFP accurately reflected its needs, it would simply reevaluate proposals and make a new award decision in accordance with the RFP. *Id.* at 2.

Raytheon again objected, insisting that the agency was required to revise the RFP and solicit new proposals because the current RFP did not accurately reflect the agency's needs, or the agency's desire to use its budget limitations as an evaluation factor. Resp. to Notice of Corrective Action, Nov. 25, 2020, at 2-3.

On November 30, 2020, our Office dismissed Raytheon's protest as academic. *Raytheon Co., B-419393.2 et al.*, Nov. 30, 2020 (unpublished decision). We concluded that Raytheon's allegations challenged the reasonableness of the agency evaluation, and that the agency's commitment to reevaluate proposals (or amend the solicitation and solicit revised proposals) and make a new selection decision, rendered academic, or moot, any further consideration of Raytheon's challenges to the agency's earlier selection decision. *Id.* at 2. We also noted that Raytheon's arguments that the agency should be required to amend the solicitation were distinct from its challenges to the evaluation, and should be the subject of a new protest filing. *Id.*

On November 30, after receiving our decision, the agency transmitted an email to the offerors. Protest, exh. A, Email from Agency to Offerors, Nov. 30, 2020. The agency explained that it intended to reevaluate proposals, and requested that the offerors extend their proposals through December 31, 2020. *Id.* The agency also explained that "[a]t this time, SDA does not intend to ask for proposal revisions." *Id.* After receiving this email, Raytheon filed the instant protest on November 30 continuing to argue, among other things, that the agency was required to amend the RFP and permit offerors to submit revised proposals.

Subsequent to the agency's issuance of the email described above, and while the current protest was pending, the agency sent Raytheon an "evaluation notice" on December 14. This evaluation notice requested that Raytheon provide additional information relating to the past performance examples previously submitted (and permitting the submission of additional past performance examples, provided that they were confined to past performance information that pre-dated the submission of proposals on September 15). This evaluation notice expressly stated that the agency would not consider revisions to any other portion of Raytheon's proposal.¹

After receiving this evaluation notice, Raytheon filed a supplemental protest on December 17. In this supplemental protest, Raytheon again maintained that the agency's corrective action is improper because, according to the protester, the agency is "forcing Raytheon to revise its proposal" without first amending the solicitation to reflect what Raytheon describes as the agency's actual requirements.

¹ We are unable to describe in any detail the substantive contents of the agency's evaluation notice. While those portions of the evaluation notice explaining that the agency would not consider proposal revisions to any other portion of the Raytheon proposal were provided by Raytheon, the substantive portion of the evaluation notice has been redacted by the protester for reasons that are not explained.

On December 18, the agency filed a request that our Office dismiss Raytheon's supplemental protest. In that filing, the agency advised that, after carefully reviewing its requirements, it has determined that it is not necessary to revise the RFP because the agency has concluded that the RFP as currently written reflects its actual needs. The agency maintains that Raytheon's December 17 supplemental protest fails to state a cognizable basis for protest because, contrary to Raytheon's position, the agency has, in fact, revisited its requirements, and determined that revision of the solicitation is unnecessary.

The agency further argues that Raytheon's supplemental protest--which has as its underlying assumption that the agency will improperly reevaluate proposals using unstated evaluation factors--merely anticipates improper agency action. The agency notes as well that its proposal reevaluation effort remains underway; that there is no basis at this juncture to assume that its reevaluation will use unstated evaluation factors, and that, in any case, it may yet solicit proposal revisions if it deems this necessary during the course of its reevaluation.

DISCUSSION

Raytheon argues that the agency's corrective action is improper because the agency has not committed to amending the RFP and soliciting revised proposals before performing any new proposal evaluation and making a new selection decision. As in its earlier protest, Raytheon argues that the current RFP improperly fails to provide for consideration of the agency's budget constraints in connection with the evaluation of proposals, and also improperly fails to reflect what Raytheon describes as the agency's preference for multiple OPIR bands.

In support of its position, Raytheon points to the public statements made by the agency official noted in its earlier protests described above; according to the protester, these statements demonstrate that the RFP as written does not reflect the agency's current requirements. Raytheon also points to the agency's November 30 email, along with its December 14 evaluation notice (which do not contemplate allowing revisions to the offerors' technical, schedule or price proposals) in support of its position that the agency improperly is proceeding with its reevaluation without affording offerors an opportunity to revise their proposals.

The agency requests dismissal of Raytheon's current protest. Specifically, the agency argues that Raytheon's allegations are premature until the agency completes its reevaluation of proposals. The agency also argues that Raytheon's insistence that it amend the RFP and afford offerors an opportunity to submit revised proposals fails to state a basis for protest, inasmuch as it is based only on the informal statements made by an agency official, and not on official agency action.

The agency also contends that Raytheon has misread its November 30 email, as well as its December 14 evaluation notice. According to SDA, the email states only that the agency is not soliciting revised proposals at this time. In addition, the agency points out

that, while the December 14 evaluation notice sent to Raytheon also states that the agency is not soliciting technical, schedule or price revisions at this time, the agency has specifically represented to our Office that it may yet solicit proposal revisions should it deem revisions necessary as a result of its reevaluation.

We have no basis to consider Raytheon's protest at this juncture. The public statements relied on by Raytheon are not probative evidence that the RFP as currently written necessarily fails to accurately reflect the agency's requirements. These statements do not legally bind the agency to evaluate proposals using any particular criteria; it follows that these statements--without more--do not compel the agency to amend the RFP and solicit revised proposals at this time. Until the agency takes some official, concrete action during its reevaluation effort--such as evaluating proposals using unstated evaluation factors--we consider Raytheon's challenge to the agency's proposed corrective action premature. Indeed, to the extent the agency's reevaluation is performed without consideration of the allegedly unstated evaluation factors that Raytheon claims reflect the agency's actual requirements, its decision not to amend the RFP and solicit revised proposals is entirely unobjectionable. Accordingly, we conclude that Raytheon's argument that the agency is required to amend the RFP and solicit revised proposals fails to state a cognizable basis for protest; we therefore dismiss this aspect of the protest. 4 C.F.R. § 21.5(f).

Raytheon also argues that the corrective action described by SDA is unreasonably vague and therefore should be addressed at this juncture. In support of this latter argument, Raytheon directs our attention to our decision in *Mythics, Inc.; Oracle America, Inc.*, B-418785, B-418785.2, Sept. 9, 2020, 2020 CPD ¶ 295, a case where our Office declined to dismiss a protest based on proposed corrective action, which we described as too vague to resolve the issues raised in the protest.

Our Office will only consider challenges to an agency's proposed corrective action after the agency takes some concrete action that either does--or does not--create a basis for challenging the terms of a reopened acquisition. For example, in *Accenture Fed. Servs., LLC*, B-414268.3 *et al.*, May 30, 2017, 2017 CPD ¶ 175 at 3, although we considered several protest issues on the merits, we dismissed as premature the protester's allegation that the agency should conduct discussions and solicit revised proposals as part of the corrective action process. There, as here, the agency had not ruled out the possibility that it would conduct discussions, and thus had not taken the concrete action necessary for challenging the reopened acquisition.

We do not consider the agency's November 30 email, or its December 14 evaluation notice, as embodying the requisite concrete action necessary to trigger our review of the agency's corrective action at this juncture. While the agency's correspondence with Raytheon does state that the agency does not presently intend to obtain revised technical, schedule or price proposals, the correspondence does not foreclose that possibility as part of the agency's corrective action. In fact, the agency has expressly represented to our Office that its corrective action may yet include soliciting proposal revisions, if necessary. Request for Dismissal, Dec. 18, 2020, at 7. Dismissing

Raytheon's current protest at this juncture does no more than afford the agency an opportunity to carefully consider how best to proceed with its acquisition in light of the allegations advanced by Raytheon in its earlier protests, and to announce its course of action once it has completed its deliberations. *Accenture Fed. Servs., LLC, supra*. Simply stated, we consider Raytheon's protest premature at this juncture.

As a final matter, we note that Raytheon's reliance on our decision in *Mythics, Inc.*; *Oracle America, Inc.* reflects a fundamental misunderstanding of that decision. As noted, Raytheon contends that we should decline to dismiss the current protest because, according to the protester, the current case is no different than the circumstances in *Mythics*, where we declined to dismiss a protest after concluding that the agency's proposed corrective action was too vague, partial or inadequate. However, Raytheon ignores important differences between the two cases.

The first difference between our prior decision and the current case--and of fundamental importance in understanding the *Mythics* decision--is the fact that *Mythics* involved a pre-closing challenge to the terms of a solicitation, not a post-award challenge to an agency's evaluation of proposals and source selection decision. As we noted in *Mythics*, the agency's attempts to take corrective action there were inadequate because they failed for one reason or another to render all of the protest issues academic.² *Mythics, supra*, at 5.

In contrast to *Mythics* (or any other pre-closing protest), Raytheon's earlier protests involved a post-award challenge to the agency's evaluation of proposals and selection decision. Raytheon's earlier protests were rendered academic because the agency committed to a reevaluation and a new selection decision. Notwithstanding Raytheon's insistence, an agency's corrective action need not resolve every protest issue or provide the precise remedy sought by the protester; rather it must only render the protest academic. See *Quotient, Inc.*, B-416473.4, B-416473.5, Mar. 12, 2019, 2019 CPD ¶ 106 at 3.

The second difference is that *Mythics* involved the question of whether actions taken in response to a pending protest rendered that protest academic. As we noted in that decision, those actions did not render the protest academic, for the simple reason that there were unresolved issues concerning the terms of the solicitation that precluded offerors from competing intelligently and on a relatively common basis. (We point out that in a pre-closing protest, an agency may render the protest academic simply by

² For example, in some instances, the agency proposed to eliminate certain challenged requirements, but failed to propose the elimination of other challenged requirements found elsewhere in the solicitation. In other instances, the agency's proposed corrective action identified several possible alternative courses of action that the agency could take in response to a concern identified by the protester, but failed to identify which of these alternative courses of action the agency would actually take. This proposed partial corrective action did not render protest academic because it left unresolved at least some of the issues advanced in the protest.

cancelling the underlying solicitation, without actually addressing the issues raised by the protest, or providing the remedy sought by the protester. *RCG of North Carolina, LLC*, LLC, B-418824, B-418824.3, Sept. 17, 2020, 2020 CPD ¶ 298 at 1 n.1.) The reason the agency's proposed corrective action in *Mythics* was inadequate was that it sought to resolve some--but not all--of the issues raised in the protest without cancelling the underlying solicitation.

Raytheon is now arguing that the agency's proposed corrective action is in some way improper because it does not address all of the matters Raytheon argued in its earlier--and current--protests. As discussed in detail above, the agency currently is weighing the extent of its corrective action, which could take one of two possible courses--the agency can either reevaluate the proposals already submitted in accordance with its existing solicitation, or the agency can engage in discussions and allow firms to revise their proposals, and thereafter perform its reevaluation and source selection. The fact that the agency has not yet reached a conclusion regarding whether to engage in discussions in no way invalidates, undercuts, or renders improperly vague, partial or inadequate the corrective action it has committed to take. *Accenture Fed. Servs., LLC*, *supra*. Since either approach might comply with procurement law or regulation, Raytheon has given us no basis to conclude that the agency's actions, at this juncture, are improper.³

Crucially, Raytheon is not prejudiced by the agency's failure to reach a conclusive decision about the extent of its intended corrective action at this time. If the agency elects to reevaluate proposals without engaging in discussions (and Raytheon is again not selected for award), Raytheon is free to challenge any improprieties in the agency's new evaluation and selection decision after the decision is made. Alternatively, if the agency elects to engage in discussions and solicit revised proposals, Raytheon will have a renewed opportunity to compete for the agency's requirements. Nonetheless, regardless of which of these two courses the agency selects, any current challenge to the agency's corrective action is premature at this juncture, as that challenge could prove immaterial in light of subsequent events.

In the final analysis, Raytheon's current protest amounts to no more than an attempt to force the agency to amend the RFP and solicit revised proposals. But for the reasons discussed above, there is no basis for our Office to conclude at this juncture that this is

³ For the record, in many cases where GAO sustains a protest challenging an evaluation, the recommendation reflects the same alternatives as the agency has reserved for itself here. We recommend that an agency either reevaluate proposals in accordance with its existing solicitation or, alternatively, amend the solicitation and engage in discussions as appropriate, request and evaluate revised proposals, and make a new selection decision. See, e.g., *Preferred Systems Solutions, Inc.*, B-292322, *et al.*, Aug. 25, 2003, 2003 CPD ¶ 166.

the appropriate course of action for the agency to take. Raytheon's interests are preserved, as is the agency's discretion to take the corrective action that it determines appropriate to the circumstances.

The protest is dismissed.

Thomas H. Armstrong
General Counsel