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Air Force

Air Force Can Reopen Radar System Competition Following Errors, COFC Finds

The Air Force properly reopened a competition following an award because the agency deviated from the solicitation's evaluation scheme and held misleading discussions, the U.S. Court of Federal Claims ruled (*Raytheon Co. v. United States*, 2015 BL 173229, Fed. Cl., No. 15-77C, 6/2/15).

Judge Margaret M. Sweeney said the agency was entitled to correct errors that prevented a fair and equal competition.

Lawrence Block of Reed Smith LLP told Bloomberg BNA in an e-mail that this case was the first of its kind to challenge the need for an agency to take corrective action resulting from a GAO recommendation.

''Bidders and awardees in the past have challenged the scope of proposed corrective action, but this case required the COFC to review whether or not the GAO recommendation had a rational basis to determine whether or not the Air Force's reliance on the recommendation was rational in taking corrective action,'' he said.

Block also said the court provided a defined standard for motions to strike documents from the administrative record. The court stated that documents in the administrative record must be conducive to meaningful, effective judicial review.

John S. Pachter of Smith Pachter McWhorter PLC told Bloomberg BNA in an e-mail that this case is a helpful reminder of the importance of GAO bid protest outcome predictions, and is an infrequent example of a successful protest based on lack of meaningful discussions.

He added that the Air Force ''could have avoided this situation by being more alert to the imbalance in discussions with the offerors. Now, the Air Force must attempt to navigate a tricky situation without triggering additional protests.''

Radar System Acquisition. This protest involved the Air Force's Three Dimensional Expeditionary Long-Range Radar acquisition program to replace its existing AN/TPS-75 radar system. Raytheon Co., Northrop Grumman Systems Corp. and Lockheed Martin Corp. were selected to complete preliminary design reviews of their radar systems and demonstrate their prototypes.

The Air Force selected Raytheon Co. as the sole firm to proceed with the engineering and manufacturing development phase in October 2014. Lockheed Martin and Northrop Grumman filed protests with the Government Accountability Office.

Northrop Grumman argued that discussions with the Air Force were misleading because the agency did not reveal a change in its view on the allowability of independent research and development (IR&D) costs.

After an outcome prediction conference, a GAO attorney said it was highly likely that the GAO would sustain the protests. The Air Force took corrective action and reopened discussions, and the GAO dismissed the protests as moot.

Before the court, Raytheon protested the Air Force's corrective action and the GAO's outcome prediction, and sought a declaration that its award was valid.

Deviation From Evaluation Scheme. The court granted Northrop Grumman and Lockheed Martin judgment on the administrative record, concluding that the GAO attorney reasonably determined that the Air Force erred in assigning Raytheon's technology readiness level rating.

The agency failed to require Raytheon to substantiate this rating following a design change as required by the evaluation scheme in the solicitation, the court said.

Jonathan T. Williams of PilieroMazza PLLC told Bloomberg BNA in an e-mail that this type of challenge is ''a notoriously difficult argument to win, especially in highly technical areas. Raytheon argued that the agency's experts should be given deference, but the GAO and the court did not agree.''

Failure to Disclose Costs Change. The Air Force reasonably relied on the GAO attorney's conclusion concerning the allowability of IR&D costs in deciding to take corrective action, the court said. The agency changed its interpretation of the allowability of IR&D costs but did not communicate this change to Northrop Grumman, resulting in misleading discussions.

The court said the Air Force at first communicated to the offerors that the costs were unallowable. Raytheon stated its disagreement with this position during discussions based on a 2010 Federal Circuit decision (93 FCR 260, 3/30/10).

Following an investigation, the Air Force decided Raytheon was correct and implicitly signalled its change of position to Raytheon but not to Northrop Grumman.

The court said the Air Force's failure to disclose its position change made discussions with Northrop Grumman misleading and unequal.

''Discussions arguments typically relate to weaknesses or solicitation requirements, so this was not a typical fact pattern,'' Williams said.

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Pachter stated that this ruling puts ''Raytheon's award at risk, particularly since it is public information that 'the three contractors proposed vastly different approaches to reducing the costs of performance'; Raytheon identified cost reductions for IR&D and Raytheon's overall price is now disclosed, but not the price of the other two offerors. For these reasons, Raytheon was compelled to take on the difficult task of challenging the corrective action in court.''

Raytheon's Motion to Strike Memorandum. The court also granted Raytheon's motion to strike an Air Force memorandum from the administrative record that the agency created ten days after it provided notice of its intent to take corrective action.

Block said this ruling was interesting because the court held that Raytheon's motion was not governed by Rule of the Court of Federal Claims 12(f) because the administrative record is not a pleading.

Relying on *Axiom Res. Mgmt. Inc. v. United States*, 2009 BL 95360, Fed. Cir., Nos. 2008-5072, 2008-5073 , 5/4/09, (91 FCR 399, 5/12/09), the court said it would not consider the challenged memorandum because it would not be conducive to meaningful, effective judicial review.

''This is the first COFC case to provide such detailed analysis on a motion to strike a document from the administrative record,'' Block said. ''This analysis is quite helpful for attorneys practicing before the COFC because (a) we now have a defined standard that is in accordance with the Federal Circuit's *Axiom* opinion and (b) many attorneys take the administrative record exactly how it is presented by an agency without challenging, if appropriate, the government's presumption of regularity, a practice that should be questioned in all bid protest cases.''

Block added that the Court recognized two alternatives: the first to strike the document from the administrative record or leave the document in the record and assign it no weight. ''The court did not fully explain why it choice one option over the other, but the court decided to strike the 'Memorandum of Record' from the administrative record.''

Mark Colley of Arnold & Porter LLP, Washington DC, represented plaintiff Raytheon Co. Marcia Madsen of Mayer Brown LLP, Washington, DC, represented intervenor Lockheed Martin Corp. Deneen Melander of Robbins Russell Englert Orseck Untereiner and Sauber LLP, Washington, DC represented intervenor Northrop Grumman Systems Corp.

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The court's decision is available at: http://www.bloomberglaw.com/public/document/RAYTHEON_COMPANY_v_USA_Docket_No_115cv00077_Fed_Cl_Jan_26_2015_Co.

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