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Air Force

Federal Circuit: Air Force's Radar Competition Reopening Was Rational

The Air Force reasonably reopened a competition for a radar system because the agency didn't treat offerors equally with regard to communicating cost allowability, the U.S. Court of Appeals for the Federal Circuit affirmed (*Raytheon Co. v. United States*, 2015 BL 349466, Fed. Cir., No. 2015-5086, 10/23/15).

The Air Force properly took corrective action after telling one, but not all, offerors about its policy on the allowability of independent research and development costs (IR&D), the three-judge panel concluded.

Lawrence Block of ReedSmith LLP told Bloomberg BNA in an e-mail that the court upheld a critical rule that bidders are to be treated fairly and equally.

He also said that ''challenging an agency's determination to take corrective action is a tough protest ground generally, as agencies must only show that the decision to take corrective action was rational.'' The issues Raytheon raised here didn't persuade the court to overturn the agency's action, he said.

Despite the adverse ruling, ''there is no guarantee that Raytheon will ultimately lose the contract award after re-evaluation, as each offeror will be afforded the opportunity to submit revised proposals,'' Block added.

Background. The Air Force selected Raytheon as the sole firm to proceed with the engineering and manufacturing development phase in a procurement for the Three Dimensional Expeditionary Long-Range Radar acquisition program.

Northrop Grumman Systems Corp. and Lockheed Martin Corp. filed protests with the Government Accountability Office. After a conference, the GAO said it was highly like that it would sustain the protests.

The Air Force took corrective action and reopened discussions, and the GAO dismissed the protests as moot.

Before the Court of Federal Claims (COFC), Raytheon protested the Air Force's corrective action and the GAO's outcome prediction, and sought a declaration that its award was valid. The COFC said the agency properly reopened the competition (103 FCR 618, 6/9/15), and Raytheon appealed.

Unequal Communications. The court affirmed, holding that reopening the competition was rational because the Air Force conducted unequal communications regarding the allowability of IR&D costs. Specifically, the Air Force violated 48 C.F.R. § 15.306(e)(1) by giving inconsistent information about these costs to Raytheon and Northrop, Judge Richard G. Taranto said.

In addition, the court said the COFC properly relied on evidence that this disparate treatment affected Northrop's bid price.

Block said both the GAO and the COFC acknowledged Northrop's ability as a large contractor to use IR&D costs to reduce prices, and therefore to reduce the price gap between its proposal and Raytheon's for a proper best evaluation determination.

Finally, the court said Northrop didn't waive its protest by failing to complain to the Air Force about the costs communication before the award was issued.

The disparate-information violation occurred during the Air Force's post-solicitation process of discussion and evaluation. Northrop couldn't have been aware that the Air Force changed its policy on IR&D costs before bidding closed, the court said.

Judges Pauline Newman and Timothy B. Dyk joined in the decision.

Mark Colley and others from Arnold & Porter LLP, Washington, D.C., represented Raytheon Co. Steven Michael Mager and others from the Justice Department, Washington, D.C.; Mark E. Allen and Adam N. Olsen of the Air Force represented the government. Marcia Madsen and others from Mayer Brown LLP represented Lockheed Martin Corp. Richard A. Sauber and others from Robbins Russell Englert Orseck Untereiner & Sauber LLP, Washington, D.C., represented intervenor Northrop Grumman Systems Corp.

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The court's decision is available at: http://www.bloomberglaw.com/public/document/Raytheon_Co_v_United_States_No_20155086_2015_BL_349466_Fed_Cir_Oc.

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