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**Comptroller General
of the United States**

**United States General Accounting Office
Washington, DC 20548**

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Decision

Matter of: Lockheed Martin Corporation

File: B-293679; B-293679.2; B-293679.3

Date: May 27, 2004

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Maj. Tami L. Dillahunt, and Lawrence M. Brady, Esq., Department of the Army, for the agency.

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DIGEST

1. Agency failed to conduct meaningful discussions where it did not advise protester that “contractor-specific” cost savings included in protester’s initial proposal would not be considered in the agency’s evaluation.
 2. Where agency provided protester with information during discussions that the agency knew to be erroneous, and protester relied on that information to its detriment, the agency’s discussions were misleading and call into question the reasonableness of the source selection decision.
 3. Agency’s evaluation of awardee’s proposal was not reasonable where, notwithstanding the proposal’s failure to address the minimally required description of features necessary to meet the performance requirements, agency credited awardee’s proposal with meeting those requirements based on an agency advisor’s perceptions regarding the capabilities of awardee’s proposed subcontractor.
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DECISION

Lockheed Martin Corporation protests the Department of the Army’s award of a contract to Alliant Techsystems Inc. (ATK) under request for proposals (RFP) No. DAAE30-03-R-0312 to perform system development and demonstration (SDD)

and low-rate initial production (LRIP) of the XM395 precision guided mortar munition (PGMM).¹ Lockheed protests, among other things, that the agency failed to conduct meaningful discussions with regard to projected ownership costs, and improperly credited ATK's proposal with performance that ATK did not propose.

We sustain the protest.

BACKGROUND

In February 2003, the agency published the solicitation at issue here, seeking proposals for the SDD phase and LRIP phase of the PGMM program.² The RFP advised offerors that the agency intended to award a contract on the basis of the proposal offering the "best value" to the government, and established the following evaluation factors, listed in descending order of importance: technical, program plan/critical processes, costs, past performance, and small disadvantaged business (SDB) participation. RFP §§ M.1.1, M.1.3, at 78. Under the most important evaluation factor, technical, the RFP identified the following subfactors, listed in descending order of importance: ownership costs; maturity/complexity; performance; and logistics training, supportability, safety and growth.³ Id.

With regard to evaluation of ownership costs, one of the two most important elements of the most important technical evaluation factor, the RFP provided for the agency's assessment of average unit production cost (AUPC)—that is, the average cost, per round, associated with the follow-on production contract—and provided that the AUPC of "[t]he offeror's proposed munition" would be evaluated based on an assessment of "the bidders' production costs estimates." RFP § M.3.1.1.1, at 79. More specifically, the RFP provided that the AUPC of "[t]he offeror's proposed

¹ The agency states that the XM395 PGMM will be "the Maneuver Commander's organic, extended range, indirect fire, precision munition," and that "[t]he weapon platform for this munition is the U.S. Army's 120 mm Battalion Mortar System . . . Stryker Brigade Combat Team." Source Selection Evaluation Plan at 1.

² The SDD and LRIP represent the third and fourth (of five) phases of the PGMM program. The first phase, which is referred to as "advanced technology development" (ATD), was performed under a contract awarded in 1994. The second phase, referred to as "component advanced development" (CAD) was performed under a contract awarded in 2002. The fifth and final phase, referred to as "follow-on production" (FOP) will be performed under a subsequent contract. Agency Post-Hearing Comments, May 10, 2004, at 1.

³ The solicitation provided that ownership costs and maturity/complexity were of equal importance and were "slightly more important" than the performance subfactor, which was "significantly more important" than the remaining subfactors. RFP § M.2, at 78.

munition” would be evaluated for “desirability” and indicated that the “bidders’ production cost estimates” would be subject to a cost realism assessment, including an assessment of whether the proposal offered “creative yet realistic” solutions. Id.

On April 15, 2003, initial proposals were submitted by four offerors, including Lockheed and ATK. Regarding Lockheed’s proposed AUPC for follow-on production, Lockheed’s proposal specifically advised the Army that its costs were based, in part, on establishment of [deleted].⁴ Lockheed Initial Proposal, Exec. Summary, at 1, 12. In this context, Lockheed’s proposal referenced a [deleted].⁵ Id. In the “AUPC Model” portion of its initial proposal, Lockheed also listed its [deleted], as well as other rates that are “contractor specific” in that they assume certain production activities will be performed at specified geographic locations. Lockheed Initial Proposal, AUPC Model, at 1-6.

The agency evaluated the initial proposals and, based on that evaluation, established a competitive range consisting of Lockheed’s and ATK’s proposals. With regard to Lockheed’s proposed AUPC, the agency’s evaluation assigned a value of [deleted] per round. Since this evaluated amount exceeded both the RFP’s stated “threshold” and “goal” amounts,⁶ the agency assigned a [deleted] rating and [deleted] risk to Lockheed’s proposal with regard to ownership costs.⁷ Initial Evaluation Report, Ch. 1. However, in calculating Lockheed’s AUPC, the agency “excluded [Lockheed’s] proposed [deleted] savings.” First Contracting Officer’s Statement, at 6. In explaining the basis for excluding the proposed [deleted] savings, the Army states that it excluded all proposed costs that were “contractor specific” because, the

⁴ More specifically, Lockheed’s proposal stated that, [deleted]. As proposed by Lockheed, [deleted] the costs associated with production of these portions of the munition would be lower due to [deleted].

⁵ [Deleted].

⁶ Section M of the RFP stated: “Average Unit Production Cost (AUPC) threshold is \$15K with a goal of \$5K.” RFP § M.3.1.1.1, at 79.

⁷ The RFP advised offerors that the following adjectival ratings, and associated definitions, would be applied to the technical evaluation factors: “Dark Blue” (excellent understanding of requirements, strengths far outweigh weaknesses, no significant weaknesses); “Green” (good understanding of requirements, strengths slightly outweigh weaknesses, no significant weaknesses); “Yellow” (acceptable understanding of requirements, strengths offset by weaknesses, no significant weaknesses) “Pink” (shallow understanding of requirements, weaknesses outweigh strengths, no significant weaknesses); “Red” (significant weaknesses or deficiencies, requirements can only be met with major proposal changes). RFP § M.3.2.1, at 85. The RFP also provided for risk assessments of “high,” “moderate,” and “low.” RFP § M.3.2.2, at 86.

agency asserts, it may compete the contract for follow-on production; thus, production costs that are unique to a given offeror may not be realized. The agency elaborates that, due to the potential for future competition of the proposed design, the agency's evaluation of ownership costs was "design specific, not contractor specific," and adds, "we used industry rates in computing the AUPC, not contractor specific rates."⁸ Id.

Separate and apart from the agency's exclusion of "contractor-specific" costs, the record establishes that the agency's calculation of Lockheed's ownership costs incorporated a significant error. At the hearing conducted by our Office in connection with this protest,⁹ the agency evaluator responsible for assessing AUPC testified that, in evaluating Lockheed's proposed AUPC, the agency erroneously applied cost factors that differed significantly from the cost factors applied to the other offerors' proposals.¹⁰ Specifically, the evaluator testified as follows:

Q. [D]id I understand your testimony to be that the initial [evaluation] report reflects different evaluation models for [another offeror's] proposal than for Lockheed Martin's?

⁸ In short, where production costs were considered uniquely related to an offeror, the agency replaced the proposed costs with its own assessment of what an "industry rate" would be.

⁹ In resolving this protest, our Office conducted a hearing over a 2-day period, during which testimony was provided by various agency witnesses, including the contracting officer, the co-chair of the source selection evaluation board (SSEB), the SSEB lead evaluator, the agency evaluator responsible for accessing AUPC, an agency advisor that participated in oral discussions, and Lockheed's program manager. Because the agency's procurement record includes classified material, a portion of the hearing was closed, that is, the hearing was limited to personnel with appropriate security clearances and conducted at a secure Army facility within Ft. Belvoir, Virginia; a portion of the Ft. Belvoir proceeding was not closed. The agency subsequently provided an unclassified version of the transcript for the closed portion of the hearing. For purposes of referencing the various hearing transcripts, our decision refers to the transcript for the portion of the hearing conducted at GAO as "Tr.1"; to the hearing transcript for the closed portion of the hearing at Ft. Belvoir (from which classified information has been redacted by the agency) as "Tr.2"; and to the hearing transcript for the portion of the hearing conducted at Ft. Belvoir that was not closed, as "Tr.3."

¹⁰ The agency used cost estimating relationships (CERs) in its assessment of what the agency evaluator described as [deleted]; such costs included those associated with [deleted]. Tr.1 at 300; Protester's Hearing exh., Vol. 1, Tab 7.

A. From my best memory of this, all the offerors, with the exception of Lockheed Martin, used the CER [cost estimating relationship] factors that I presented today.

Q. The offerors did? . . .

A. I -- we, the government, used in their evaluation of all the offerors, with the exception of Lockheed Martin, we used the factors I have presented today, which give you higher numbers. In this first evaluation, we used a different factor for -- different factor relationship for the first proposal for Lockheed Martin.

Q. Why?

A. It's an error. Say it how it is. It's an error. . . . It is something that slipped by me, I will tell you. I had all four [proposals] . . . and my direction to everybody was ["use the same thing."] And it just -- it just slipped by me. . . . I found out about it just as the numbers were getting done.¹¹

Tr.1 at 308-10.

Thereafter, the agency opened discussions with both competitive range offerors. As part of discussions, the agency provided each offeror with the portion of the agency's initial evaluation report that related to their respective proposals. Although the information provided by the agency to Lockheed advised Lockheed that the Army had evaluated its AUPC at [deleted] per round, and had assigned a [deleted] rating with [deleted] risk, nothing in the information provided to Lockheed suggested that "contractor-specific" costs generally, or Lockheed's proposed [deleted] savings

¹¹ The record is clear that the agency's erroneous application of differing cost factors resulted in a significantly lower evaluated AUPC for Lockheed than would have otherwise occurred. Specifically, with regard to [deleted], the agency's initial evaluation of Lockheed's AUPC reflected costs per round of [deleted] (for a total of [deleted]). Protester's Hearing exh., Vol. 1, Tab 7. In its subsequent evaluation of Lockheed's final revised proposal, in which the agency applied the factors it acknowledges should have been applied in the initial evaluation, the evaluated amounts for these same costs were [deleted] (for a total of [deleted]). Final Total Cost of Ownership Evaluation Report, at 7. There is no dispute that the significant difference in evaluated costs for these line items resulted from the agency's application of differing cost factors--not from changes to Lockheed's proposal. In short, separate and apart from the agency's decision to exclude consideration of "contractor-specific" costs, the agency's initial evaluation of Lockheed's proposed AUPC was understated by [deleted] per round ([deleted]).

specifically, had been excluded from consideration. Additionally, although the agency was aware, prior to discussions, that its calculation of the [deleted] AUPC incorporated the agency's erroneous application of improper cost factors for [deleted] costs, it did nothing to advise Lockheed of this error.

During discussions, Lockheed's representatives specifically referenced the [deleted] savings and further discussed various other contractor-specific savings that could be effected by changing the geographic location for certain production activities. In addition, Lockheed discussed various "design-specific" changes, including the [deleted] of its proposed munition. During discussions, the agency gave no indication that only "design-specific" savings would be reflected in the agency's calculation of AUPC or, alternatively, that "contractor-specific" savings would be excluded from the calculation.

Final proposal revisions (FPRs) were subsequently requested, and both offerors submitted FPRs by September 17. In its FPR, Lockheed made various changes to its proposal in order to lower its AUPC, but did not fundamentally reconfigure its proposed munition. Among other things, Lockheed's FPR reflected an [deleted].

Upon receipt of the FPRs, the agency evaluated them and, as discussed above, again calculated Lockheed's AUPC by excluding any savings related to the proposed [deleted] on the basis that such savings were "contractor-specific."¹² First Contracting Officer's Statement, at 6. Additionally, in evaluating Lockheed's final

¹² Following submission of the FPRs on September 17, the agency apparently became concerned about its decision to exclude the proposed [deleted] savings from the AUPC calculation. Inconsistent with its determination that such costs could not be considered because they were "contractor-specific," by letter dated September 24, the agency asked that Lockheed provide "clarifying" information regarding its proposed [deleted]. In responding to this protest, the agency now asserts that the documentation provided by Lockheed concerning the proposed [deleted] was inadequate, and maintains that the absence of sufficient supporting documentation provides an alternative basis for excluding consideration of the proposed savings. We find no credible basis for this purported rationale. At the hearing, after confirming the agency's position that it had excluded consideration of all "contractor-specific" costs, the agency evaluator was asked to identify any information that Lockheed could have provided in response to the agency's alleged concerns regarding adequate supporting documentation that would have rendered the proposed savings something other than "contractor-specific" savings. Tr.1 at 22. In response, the evaluator acknowledged, "I really would not have expected anything." Id. In light of this testimony, which is consistent with the balance of the contemporaneous record, we give no weight to the agency's assertion that, in calculating AUPC, it excluded consideration of the [deleted] based on Lockheed's failure to provide adequate supporting documentation.

AUPC, the agency applied the cost factors for [deleted] costs that the agency evaluator testified should have been applied in evaluating Lockheed's initial proposal. Final Total Cost of Ownership Report at 7. As noted above, the result of this change, alone, increased Lockheed's evaluated AUPC by over [deleted]. Based on its final evaluation, the agency evaluated Lockheed's AUPC to be [deleted]. Because this amount still exceeded the RFP's stated \$15,000 threshold for AUPC, the agency again assigned Lockheed's proposal a [deleted] rating with regard to ownership costs.

On December 31, ATK's proposal was selected for award. During the GAO hearing, the source selection authority testified that Lockheed's [deleted] rating for ownership costs played a significant role in his source selection decision. Tr.3 at 44.

On February 11, 2004, the agency provided Lockheed a debriefing. During that debriefing, the agency, for the first time, advised Lockheed that, in calculating AUPC, the agency had not considered any "contractor-specific" costs, including the savings flowing from Lockheed's proposed [deleted]. This protest followed.

DISCUSSION

Lockheed first protests that the agency failed to engage in meaningful discussions with regard to the "contractor-specific" cost elements of Lockheed's proposed AUPC. Additionally, Lockheed protests that the evaluated AUPC provided to Lockheed during discussions—which, due to the agency's errors, was materially understated—misled Lockheed. We agree that the agency's discussions were fundamentally flawed.

It is a fundamental precept of negotiated procurements that discussions, when conducted, must be meaningful; that is, discussions may not mislead offerors and must identify deficiencies and significant weaknesses in each offeror's proposal that could reasonably be addressed in a manner to materially enhance the offeror's potential for receiving award. Federal Acquisition Regulation (FAR) § 15.306(d); Metro Mach. Corp., B-281872 et al., Apr. 22, 1999, 99-1 CPD ¶ 101; Bank of Am., B-287608, B-287608.2, July 26, 2001, 2001 CPD ¶ 137. Specifically, an agency may not, through its questions or silence, lead an offeror into responding in a manner that fails to address the agency's actual concerns; may not misinform the offeror concerning a problem with its proposal; and may not misinform the offeror about the government's requirements. Price Waterhouse, B-254492.2, Feb. 16, 1994, 94-1 CPD ¶ 168 at 9-11; DTH Mgmt. Group, B-252879.2, B-252879.3, Oct. 15, 1993, 93-2 CPD ¶ 227 at 4.

Here, as discussed above, despite Lockheed's inclusion in its initial proposal of "contractor-specific" savings, including the savings associated with the [deleted], the

agency declined during discussions to indicate in any way that such savings would be excluded from the agency's calculation of AUPC.¹³ The agency asserts that Lockheed should have known that "contractor-specific" savings would be excluded from the agency's AUPC calculation due to the RFP's statements that an "independent Government estimate" of AUPC would be conducted and that various estimating tools would be used to "either validate contractors' cost estimates or to develop Government cost estimates." RFP § M.3.1.1.1. We disagree.

Neither the language of the solicitation, nor the information provided by the agency during discussions, reasonably placed the offerors on notice that "contractor-specific" savings would have no effect on the agency's calculation of AUPC. Although we agree that, if the agency actually intends to compete the follow-on production contract, there is nothing inherently unreasonable in evaluating only "design-specific" costs,¹⁴ the offerors were not clearly advised of this. As noted above, the RFP stated that the agency would evaluate the AUPC of "the offeror's proposed munition" and that such evaluation would be based on an assessment of "the bidders' production cost estimates." RFP § M.3.1.1.1. Further, the agency clearly knew, or should have known, that Lockheed's initially proposed AUPC was based on "contractor-specific" costs, including the costs associated with the proposed [deleted]; yet the agency failed to advise Lockheed during discussions that such costs would be replaced with "industry rates" in calculating the evaluated AUPC. Consistent with the terms of the solicitation, and the information provided during discussions, Lockheed reasonably believed that it could reduce its evaluated AUPC by increasing its proposed "contractor-specific" savings. On this record, the agency failed to conduct meaningful discussions because it failed to advise Lockheed that "contractor-specific" savings would not be reflected in the agency's calculation of AUPC.

¹³ During the GAO hearing, the agency evaluator testified: "[W]e were told that we had to ask the exact same questions of [each] offeror, to be fair." Tr.1 at 199. This advice is directly contrary to the FAR, which provides that discussions should be "tailored to each offeror's proposal." FAR § 15.306(d)(1).

¹⁴ As noted above, the agency states that its calculation of AUPC excluded "contractor-specific" cost savings due to the agency's intent to subsequently compete the follow-on production contract; accordingly, proposed savings specific to a given offeror will not be realized if that offeror is not awarded the follow-on production contract. We note, however, that the terms of ATK's proposal regarding [deleted], on which the award here was based, would appear to effectively preclude such competition [deleted]. Agency's Award Decision Document, at 3-28. We further note that such a proposal of [deleted]--which would reasonably lead to reduced [deleted] costs for the agency--would appear to constitute "contractor-specific" cost savings.

Similarly, the agency's specific advice to Lockheed during discussions that its initial proposal reflected an AUPC of [deleted]--when the agency knew at that time that this amount was significantly understated due to the agency's erroneous application of improper cost factors--reflects a separate, material discussion flaw. That is, Lockheed was materially misled with regard to the cost factors the agency intended to ultimately apply. We will not speculate regarding the changes that Lockheed may have made to its FPR if the agency had conducted meaningful discussions; in our view, the record establishes that the agency's discussion flaws were sufficiently material to establish prejudice.¹⁵ Accordingly, the agency's subsequent source selection decision was not reasonably based.

Lockheed also protests that the agency improperly credited ATK's proposal with meeting the RFP's countermeasure requirements based on performance that ATK did not propose. We agree.

Specifically, with regard to evaluation under the performance subfactor,¹⁶ the solicitation provided that the proposed munition would be evaluated on its performance against enemy countermeasures and specified three particular countermeasures against which performance would be assessed. RFP § M.3.1.1.3, at 81. In this regard, section L of the RFP directed that each offeror "shall provide estimates for the number of additional rounds needed to achieve threshold performance" in the context of the specified enemy countermeasures, and stated: "Compelling rationale for each estimate shall be provided. As a minimum, rationale shall include a full description of design features that enable stated performance." RFP § L.17.2.2.3, at 71 (emphasis added).

In its proposal, ATK identified [deleted] approaches to deal with countermeasures that required [deleted]. Specifically, at the hearing conducted by our Office, the agency's lead SSEB evaluator responded to questions concerning the countermeasure requirements as follows:

Q. Do I understand you to say that. . . [deleted] proposed the [deleted] CCM [counter-countermeasure] approach?

¹⁵ The record contains significant evidence that, following receipt of the agency's evaluation report during discussions, Lockheed seriously considered various [deleted] that would have significantly reduced the AUPC of its proposed munition. Ultimately, Lockheed did not [deleted], attempting to reduce its evaluated AUPC through other means, including [deleted], which as discussed above, was reasonably consistent with the provisions of the RFP and the agency's discussions.

¹⁶ As noted above, the performance subfactor was "slightly" less important than the two most important subfactors, ownership costs and maturity/complexity.

A. Yes.

Q. Okay. . . . which would be incorporation of [deleted] technology, I assume?

A. Not exactly. The incorporation of [deleted] CCM techniques. The actual [deleted] will [deleted] because of the different [deleted].

Tr.2 at 136.

After acknowledging that [deleted] associated with ATK's proposed approach would be [deleted], the agency evaluator responded to further questioning as follows:

Q. [Did ATK] tell you what [deleted] approaches they were going to use [to respond to the countermeasures]?

A. No, they did not. Mr. [deleted] told me that.

Q. Mr. [deleted] was one of your advisers in the evaluation?

A. Yes.

Q. And he told you what ATK was going to do in its proposal?

A. He told me what [deleted] [an ATK subcontractor] knew and had in their back pocket.

Q. I guess to follow up, that was not an ATK proposal, was it?

A. No, it was not.

Tr.2 at 137.

Finally, the agency evaluator testified that ATK's subcontractor had not provided ATK with the specific information regarding [deleted] because to do so would have required "[the subcontractor's] giving proprietary secrets to ATK." Tr.2 at 138. The evaluator elaborated: [deleted]. Id.

Since an offeror is not bound to provide goods or perform services that it has not offered to provide or perform, agencies may properly evaluate proposals only on the basis of the information and representations contained therein. See, e.g., Microcosm, Inc., B-277326 et al., Sept. 30, 1997, 97-2 CPD ¶ 133 at 6-7. Here, as shown above, the agency credited ATK's proposal with meeting the required level of counter-countermeasure performance—even though ATK's proposal did not address the [deleted] necessary to achieve the specified level of performance. Rather, the agency's determination that ATK's proposal "include[d] a full description of design feature[s] that enable stated performance" was based on an agency advisor's

perception of the knowledge and capabilities of an ATK subcontractor. Since ATK's proposal did not address the [deleted], it is not clear that all of the costs associated with ATK's proposed [deleted] were included in its proposal, nor that ATK, or its subcontractor, is bound to provide the [deleted] the agency assumed to be part of ATK's proposal. Based on this record, the agency's evaluation of ATK's proposal lacks a reasonable basis.

The protest is sustained.

RECOMMENDATION

We recommend that the agency reopen negotiations, conduct meaningful discussions with the competitive range offerors, request final revised proposals, and evaluate those proposals consistent with applicable statutes and regulations, as well as the solicitation's stated requirements.¹⁷ If, as a result of this reevaluation, Lockheed's proposal is selected for award, the agency should terminate ATK's contract for the convenience of the government and make award to Lockheed. We also recommend that Lockheed be reimbursed the reasonable costs of filing and pursuing the protest, including attorneys' fees. 4 C.F.R. § 21.8(d)(1) (2004). The protester should submit its certified claim for such costs, detailing the time expended and the costs incurred, directly to the contracting agency within 60 days after receipt of this decision.

Anthony H. Gamboa
General Counsel

¹⁷ In the event the agency intends to calculate AUPC in a manner that replaces "contractor-specific" costs with "industry rates," offerors should be so advised.