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Decision

Matter of: Raytheon Company and Kongsberg Defence & Aerospace AS

File: B-409615; B-409615.2

Date: June 24, 2014

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DIGEST

1. Protest of an intended sole-source award of a follow-on contract for highly specialized equipment and services is denied where the agency reasonably determined that an award to any other source would be likely to cause substantial duplication of costs that were not expected to be recovered through competition, and unacceptable delays in meeting the agency's needs.
 2. Protest that the 2014 National Defense Authorization Act prohibits sole-source award is denied where the relevant prohibition in the Act does not apply to the intended award.
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DECISION

Raytheon Company, of Tucson, Arizona, and Kongsberg Defence & Aerospace AS, of Kongsberg, Norway, jointly protest the intended award by the Department of Defense (DOD), Defense Advanced Research Projects Agency (DARPA), of a sole-source contract to Lockheed Martin Corporation, of Orlando, Florida, pursuant to

sole-source notice No. DARPA-SN-14-14, for the Long Range Anti-Ship Missile (LRASM) Follow-on Development Program. The protesters argue that the sole-source award is not justified under applicable law and regulation, and prohibited by the 2014 National Defense Authorization Act.

We deny the protest.

BACKGROUND

In March 2008, the DOD issued an urgent operation needs statement to fill a capability gap in anti-surface warfare capabilities. In response to this statement, DARPA and the Office of Naval Research jointly began a technology demonstration program known as the LRASM program. The program was initiated with the publication of a broad agency announcement (BAA), DARPA-BAA-08-41, on June 6, 2008, seeking competitive proposals for a research and development effort to “[r]apidly develop and demonstrate a ship launched standoff anti-ship strike weapon.” Agency Report (AR), Tab 6, BAA, at 5. The BAA advised that the extension of the system to future delivery vehicles and launch platform flexibility were of interest, and that “[a]lthough the intended demonstration under this effort is a ship launched anti-ship missile, solutions which could be adapted to other launch platforms, such as aircraft and submarines . . . are considered advantageous.” Id. at 27. The BAA was for a research and development effort only, and did not require a contractor to develop and deliver a production version of an anti-ship strike weapon.

Nine offerors submitted proposals in response to the 2008 BAA, including Lockheed and protester Raytheon. Following the evaluation of all proposals, Lockheed’s proposal was selected for funding. On June 29, 2009, DARPA awarded a contract to Lockheed for the LRASM demonstration program.

As anticipated by the BAA, Lockheed’s efforts under the LRASM program proceeded in two phases. In the first phase, Lockheed designed a missile system that could be launched from either a ship or tactical aircraft. AR, Tab 3, Justification and Approval (J&A), at 2. Lockheed developed this LRASM system through a preliminary design level of maturity, culminating in the successful completion of the phase 1 preliminary design review.

Based on the preliminary design review, DARPA continued the LRASM development into the second phase--detailed design, fabrication, integration, and flight testing. See AR, Tab 11, LRASM Timeline, at 1. At the outset of phase 2 DARPA determined, due to funding constraints, that limiting development to the air-launched variant of the LRASM would be in the best interests of the government. AR, Tab 3, J&A, at 2. In August 2013 and November 2013, Lockheed completed two successful flight tests demonstrating the capabilities of the prototype air-launched LRASM variant. See AR, Tab 11, LRASM Timeline, at 1.

On December 20, 2013, DARPA posted the sole-source notice challenged here, DARPA-SN-14-14, publicizing its intent to award a sole-source follow-on contract to Lockheed, for continued maturation of the LRASM subsystems and system design. The follow-on effort was to include “further sensor and avionics hardware development based on previous results achieved under the current contract,” and the “fabrication of missile hardware to enable additional missile flight tests.” AR, Tab 17, Sole-Source Notice, at 1. The follow-on effort was to be completed within 24 months of contract award. The notice advised that DARPA intended to issue the sole-source contract under the authority of 10 U.S.C. § 2304(c)(a) and FAR § 6.302-1, on the basis of “Only One Responsible Source and No Other Supplies or Services Will Satisfy Agency Requirements.”¹ AR, Tab 17, Sole-Source Notice, at 1.

The sole-source notice further advised that it was not a request for competitive proposals and that no solicitation existed, but that “[i]nterested parties may identify their interest and capability to meet the requirements of this follow-on effort by submitting a white paper and past performance data no later than 4:00PM EST, February 5, 2014.” Id. The notice also cautioned that “[i]nformation received will be considered by the Government solely for the purpose of determining whether to conduct a competitive procurement,” and that a determination not to compete the proposed effort was solely within the discretion of the government. Id.

Both protesters submitted white papers in response to the sole-source notice. Raytheon, in its white paper, stated that it disagreed with DARPA’s intent to award a sole-source contract, and described technology upgrades to its Tomahawk Block IV missile, which it asserted would enable the Tomahawk Missile to meet the Navy’s unmet anti-surface warfare capabilities. According to Raytheon’s white paper, the Tomahawk Missile upgrades established that the government should not move

¹ As relevant, FAR § 6.302-1(a)(2)(ii) provides that:

Supplies may be deemed to be available only from the original source in the case of a follow-on contract for the continued development or production of a major system or highly specialized equipment, including major components thereof, when it is likely that award to any other source would result in

(A) Substantial duplication of cost to the Government that is not expected to be recovered through competition; or

(B) Unacceptable delays in fulfilling the agency’s requirements.

forward with any anti-surface warfare acquisitions without formally evaluating Raytheon's weapon systems.

Kongsberg, in its white paper, stated that it is developing its existing Joint Strike Missile for long-range precision strike missions. Kongsberg claimed that the Norwegian Ministry of Defense has invested approximately \$1 billion in development of the missile and ongoing integration on the F-35 aircraft. Kongsberg asserts that the Government has a unique opportunity to leverage the Norwegian investment to achieve near-term long-range anti-ship capabilities at a reduced cost.

On March 5, 2014, DARPA responded to each protester advising that, on review of the white papers, it had determined that the proposed technical solutions would not enable DARPA to complete technology maturation of the LRASM within 24 months, and would result in substantial duplication of costs and unacceptable delay. However, DARPA did provide the protesters with the opportunity to submit additional information by March 7. Raytheon requested additional time to submit further information, which the agency denied. Ultimately, Raytheon did not submit additional information. Kongsberg submitted additional information by the deadline. On March 14, DARPA responded to Kongsberg, restating its intent to award a sole-source contract to Lockheed.

Later on March 14, DARPA posted a J&A for a sole-source contract award to Lockheed to complete the LRASM follow-on development effort. Consistent with the earlier notice, DARPA's J&A justified the use of other than full and open competition for the requirement on the basis of 10 U.S.C. § 2304(c)(a) and FAR § 6.302-1, "Only One Responsible Source and No Other Supplies or Services Will Satisfy Agency Requirements." AR, Tab 3, J&A, at 2. Specifically, DARPA explained that only Lockheed could meet the agency's timeline for completion of research and development, and transition of the LRASM technology to the Navy within the necessary timeframe, as follows:

The [Navy] is planning for an early operational capability (EOC) for LRASM on the B-1B aircraft in 2018 and an EOC on the F/A-18 E/F aircraft in 2019. DARPA plans to complete its R&D work under the LRASM Demonstration Program and transition the program from DARPA to the [Navy] in FY 2016. In order to complete its R&D work under the LRASM Demonstration program and effect a timely transition of the program to the [Navy] in FY 2016, DARPA must immediately initiate the LRASM follow-on R&D effort. [. . .]

To date, the LRASM that [Lockheed] designed, developed and built under the current R&D contract, HR0011-09-C-0096, is the only known missile system that has successfully demonstrated a technology maturity with the ability to

autonomously engage the threat at the required range to fill the capability gap identified by the [Navy] within the EOC timeframes. [Lockheed] is the sole designer, developer, and manufacturer of the LRASM and the prime integrator of the highly specialized equipment that constitutes the LRASM and its subsystems. It is the only known contractor with the requisite knowledge, experience, and technical data that can provide the highly specialized services to meet DARPA's requirements for completing the LRASM Demonstration Program and transitioning the program to the [Navy] on time and without causing substantial duplication of cost to the Government that cannot be recovered through competition.

Id. at 3. Additionally, DARPA explained that an award to another contractor would result in an unacceptable delay estimated at 60 months, and that the LRASM technical data package includes proprietary data, computer software, items, components and processes for which the government has only limited or restricted data rights, which are insufficient to support full and open competition of the follow-on contract.

In response to DARPA's review of Raytheon's and Kongsberg's white papers and its publication of the J&A, the protesters' filed this joint protest on March 18, and a joint supplemental protest on March 24.

DISCUSSION

The protesters assert that DARPA's sole-source award to Lockheed does not satisfy the requirements for other than full and open competition under FAR § 6.302-1. According to the protesters, this is because DARPA has unreasonably defined its requirements in an overly restrictive manner, and has failed to announce any statement of mission needs or threat scenarios that outline the government's actual requirement for an anti-surface warfare capability.² The protesters contend

² Additionally, they argue that the award does not satisfy the requirements of FAR § 6.302-1 because the effort is not a "follow-on contract" where the requirements have allegedly mutated since the time of the 2008 BAA. In this regard, the protesters assert that 2008 BAA for research and development into a ship-launched anti-surface warfare capability has become a major weapons systems contract for an air-launched offensive anti-ship missile. We disagree with the protesters on both counts. First, the sole-source notice and J&A make clear that the follow on effort remains a research and development effort--the protesters themselves acknowledge that this contract will not produce a production-ready weapon for operational use. Supplemental Protest at 12, n.6. Second, the 2008 BAA expressed a preference for technologies adaptable across a range of launch

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that if DARPA appropriately defined its requirements, the requirements would be suitable for competition between Lockheed's LRASM, Raytheon's Tomahawk, and Kongsberg's Joint Strike Missile, or between the LRASM and a weapon system offered by a Raytheon/Kongsberg partnership. The protesters also argue that the sole-source award to Lockheed is prohibited by the FY 2014 National Defense Authorization Act (2014 NDAA), which restricts the use of non-competitive contracting procedures for Navy offensive anti-surface warfare weapons systems.³

Sole-Source Award

As a general matter, when an agency uses noncompetitive procedures, it must execute a J&A with sufficient facts and explanation to support the use of the specific authority. See 10 U.S.C. § 2304(f). Our review of an agency's decision to conduct a sole-source procurement focuses on the adequacy of the rationale and conclusions set forth in the J&A. When the J&A sets forth reasonable justifications for the agency's actions, we will not object to the award. Turbo Mechanical, Inc., B-231807, Sept. 29, 1988, 88-2 CPD ¶ 299 at 3-4. The protester's disagreement with the agency's rationale does not provide a basis to sustain the protest; rather, the protester must show that the agency's position is unreasonable. Allied-Signal Inc., B-247272, May 21, 1992, 92-1 CPD ¶ 461 at 10.

Regarding the allegation that DARPA has unreasonably defined its requirements, the protesters essentially attempt to re-cast this contract as a "back-door" attempt to award a major weapons system contract to Lockheed, on behalf of the Navy. Protest at 19. In this connection, the protesters' arguments concerning the rationale set forth in the sole-source notice and J&A proceed from the premise that DARPA's requirement is not the completion of additional LRASM missile technology maturation, fabrication, and test flights for the LRASM Development Program, as claimed, but is in fact the production of a weapon system to meet Navy requirements and fulfill the DOD capability gap in anti-surface warfare capability. By redefining DARPA's current requirement as a generic "capability," required by the Navy, rather than as the completion of an ongoing LRASM research and development effort involving highly specialized and proprietary skills and equipment, the protesters position themselves to make the argument that their competing missile technologies can meet the government's "true requirement."

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vehicles, including an air-launched LRASM. Thus, we disagree that this contract is for an entirely different requirement, or is somehow outside the scope of the 2008 BAA.

³ Certain documents relevant to this protest are classified. Although our Office reviewed the relevant documents during our consideration of the protest, the classified materials are not described or referred to in any way in this decision.

We conclude that the protesters' attempts in this regard are misplaced. As our office has held, agencies have broad discretion to determine their needs and the best way to meet them. URS Federal Support Servs., Inc., B-407573, Jan. 14, 2013, 2013 CPD ¶ 31. In this case, both the sole-source notice and J&A define DARPA's requirement as relating to the specific LRASM missile technologies developed by Lockheed pursuant to the 2008 LRASM BAA.

For example, as stated in part above, the sole-source notice published by DARPA described a requirement to:

Continue maturation of the LRASM subsystems and system design that Lockheed Martin has developed under the current contract awarded in 2009 after full and open competition. The follow-on effort will conduct further sensor and avionics hardware development based on previous results achieved under the current contract. It will also provide for fabrication of missile hardware to enable additional flight tests.

AR, Tab 17, Sole-Source Notice, at 1. Similarly, the DARPA J&A contains a statement of requirements providing that:

Under the follow-on effort [Lockheed] will provide specialized services for continuing technology maturation work on the LRASM subsystems and system design. [Lockheed] will also continue to mature technologies developed under the current R&D contract for the air-launched anti-surface warfare (ASuW) LRASM.

AR, Tab 3, J&A, at 1. The J&A also further specified six specific areas of LRASM technological development to be pursued during the follow-on contract, including: the long range target sensor; sensor algorithms and software; missile control unit; electro-optical terminal target sensor hardware; missile autonomy and situation awareness software; and weapon data link.

We see nothing unreasonable or misleading in the agency's statement of its requirement. Pursuant to the 2008 BAA, DARPA has invested substantially in the research and development of the LRASM technologies proposed by Lockheed in its response to the 2008 BAA. Related to this effort, DARPA has now identified a need to devote additional resources in order to complete the maturation of Lockheed's specific LRASM technologies. We view this need, as identified in DARPA's sole-source notice and J&A, as reasonable and within DARPA's broad discretion as the DOD agency tasked with developing new technologies, without regard to whether the Navy, or DOD, has an operational requirement for similar capabilities in this area.

The protesters further argue that DARPA's requirements are unnecessarily restrictive with regard to time. In this regard, the protesters assert that DARPA's requirement to complete the follow-on effort within 24 months, or by 2016, is an artificial requirement where the Navy does not require an EOC in this area until 2018. We disagree.

The 24-month requirement reflects DARPA's desire to complete the research and development phase within a timeframe that will allow for transitioning the technology to the Navy so that it would be in a position to in fact leverage the LRASM technology to address its own need to achieve an EOC by 2018. Completing the research and development work in the 2018-2019 timeframe would simply be too late for the Navy to make use of DARPA's research and development work under the LRASM program. DARPA's schedule therefore is consistent with the very purpose of DARPA's efforts, and the 2008 BAA, which is to contribute technology that may have practical application in meeting the DOD's stated capability gap.

In light of our finding that DARPA has a legitimate requirement to complete the maturation of Lockheed's LRASM technologies, we also conclude that the protesters' objections to DARPA's use of other than competitive procedures to fulfill the requirement are clearly unavailing. For example, the protesters' allege that DARPA failed to provide a statement of mission needs or threat scenarios to allow the protesters to highlight their technologies. We fail to see a basis for DARPA's publication of such information where that information relates back to the 2008 BAA, under which Raytheon competed, and where DARPA's current requirement is not for a new technical solution to meet that need, but is a 24-month effort for further maturation of the Lockheed-developed LRASM technologies.

Similarly, the protester's arguments that DARPA's estimates of cost duplication and unacceptable delay derive from a flawed process and are baseless, hinge on the premise that the protesters can provide an "alternative solution that also meets the government's actual mission needs." Comments at 31. As stated, this premise is incorrect, where, without regard to the government's ultimate need to fulfill an anti-surface warfare capability gap, DARPA's expressed and reasonably based requirement is for continued maturation of Lockheed's LRASM technologies, not the production of a weapon system.

On our own review of the record here, we see nothing unreasonable in the rationale and conclusions set forth in DARPA's sole-source notice or J&A. The J&A states, and the protesters do not dispute, that Lockheed "is the sole designer, developer, and manufacturer of the LRASM and the prime integrator of the highly specialized equipment that constitutes the LRASM and its subsystems." AR, Tab 3, J&A, at 3. Further, to the extent that the protesters challenge the J&A's statement that the LRASM is the only missile system that has successfully demonstrated a technology maturity with the ability to fill the capability gap within the EOC timeframes, we

conclude that DARPA's market research and review of the protester's white papers support its conclusion.

For example, DARPA concluded that Raytheon's [DELETED] was significantly less mature than corresponding LRASM systems, and that its [DELETED] would require several years and significant funding to bring to the level of maturity required to provide a near-term capability equivalent to the LRASM. AR, Tab 19a, Response to Raytheon White Paper, at 2-3. Concerning Kongsberg, DARPA found that the firm's [DELETED] are not technically mature enough to fulfill agency requirements without substantial duplication of costs or unacceptable delays. AR, Tab 19b, Response to Kongsberg White Paper, at 2-3. DARPA also determined, based on earlier market research efforts seeking a viable second source for the LRASM [DELETED], that no alternative source had technology with a state of maturity sufficient to constitute a second source for the LRASM program. AR, Tab 16, Market Research Report, at 2. While the protesters have presented disagreement in this area, the protester's disagreement with the agency's rationale does not provide a basis to sustain the protest, Allied-Signal Inc., supra, at 10, and we conclude that the protesters have not shown the agency's conclusions to be unreasonable.

FY 2014 National Defense Authorization Act

Finally, the protesters also argue that the sole-source award to Lockheed is prohibited by the 2014 NDAA. Section 217(b), the relevant part of the Act, prohibits the use of FY 2014 funds from being used to noncompetitively enter into or modify a contract for the Navy's "offensive anti-surface warfare weapon." The 2014 NDAA, however, also provides an exemption from this prohibition, as follows:

(A) Exempted Activities.--The prohibition in paragraph (1) shall not apply to funds specified in such paragraph that are made available for the development, testing, and fielding of aircraft-launched offensive anti-surface warfare weapons capabilities.

Pub. L. No 113-66, 217, 127 Stat. 162 (December 26, 2013).

As a threshold matter, DARPA asserts that any allegation concerning the effect of the prohibition in the NDAA is not subject to our Office's bid protest jurisdiction because the prohibition language in the NDAA pertains to appropriations and is not a procurement statute. DARPA argues that under the Competition in Contracting Act of 1984 (CICA), 31 U.S.C. § 3552 (2006), our bid protest jurisdiction is limited to consideration of alleged violations of procurement statutes and regulations. We have previously considered and rejected that argument, holding that our jurisdiction under CICA is based on whether the protest concerns a procurement for property or services by a federal agency, and that in exercising that jurisdiction we could

properly consider the requirements of non-procurement statutes and regulations when they directly bear upon federal agency procurements. See e.g., Peter N.G. Schwartz Companies Judiciary Square Ltd. Partnership, B-239007.3, Oct. 31, 1990, 90-2 CPD ¶ 353 at 4 (jurisdiction exists over protest alleging violation of appropriation provision in 40 U.S.C. § 490(h) related to the General Services Administration's lease authority).

Turning to the merits, DARPA argues that the 2014 NDAA's prohibition is inapplicable to this award because the award is not a Navy contract for an offensive anti-surface warfare weapons system, and where, even if the prohibition applied, the award would be exempted from the prohibition because it relates to development, testing, and fielding of aircraft-launched offensive anti-surface warfare weapons capabilities.

We agree with the agency. The protesters' challenges in this regard again hinge on their belief that the follow-on development contract is a "back-door" attempt to procure a major weapons system on behalf of the Navy. Protest at 19. As explained above, we disagree with that contention. The protesters also assert that the sole-source award does not fall within the 2014 NDAA's exemption because the technologies being developed under the contract will have application to a ship-launched anti-surface warfare weapon. We again disagree. The award at issue here is specifically for the continued development of the air-launched variant of Lockheed's LRASM. The mere fact that certain technologies to be matured under the contract may prove useful in other missile variants does not remove the award from the 2014 NDAA's exemption. In reaching this conclusion we note that there is nothing on the face of the Act to support the dual-use limitation suggested by the protesters. To the contrary, it is apparent that the interpretation advanced by the protesters would render the NDAA's exemption essentially meaningless since any development effort for an air-launched offensive anti-surface warfare weapons capability will likely present some degree of technological overlap with a ship-based, or submarine-based capability.

Summary

As discussed above, the record supports the reasonability of DARPA's requirement to further mature the specific LRASM technologies developed by Lockheed under the 2008 BAA, and shows that DARPA had a reasonable basis for concluding that only Lockheed could fulfill these requirements. DARPA's market research and review of the protester's white papers support the agency's conclusion that no other offeror can provide the highly specialized skills and equipment to complete the LRASM development effort, without substantial duplication of costs, or unacceptable delays, where Lockheed is the sole developer of the LRASM, and where DARPA has concluded that no other firms' technologies offer a level of technological maturity equivalent to the LRASM program. Accordingly, we conclude that DARPA, in its sole-source notice and J&A, reasonably determined that a sole-

source award to Lockheed was appropriate under the circumstances. We also further conclude that such an award was not prohibited by the 2014 NDAA, where the contract is not a Navy contract for offensive anti-surface warfare weapons systems and, in any event, falls within the NDAA's exemption for development, testing, and fielding of aircraft-launched offensive anti-surface warfare weapons capabilities.

The protest is denied.

Susan A. Poling
General Counsel