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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Lockheed Martin Systems Integration-Owego; Sikorsky Aircraft Company--Modification of Recommendation

File: B-299145.7; B-299145.8

Date: December 15, 2009

John W. Chierichella, Esq., Anne B. Perry, Esq., Jonathan S. Aronie, Esq., Keith R. Szeliga, Esq., and Jesse J. Williams, Esq., Sheppard Mullin, for Sikorsky Aircraft Company; Marcia G. Madsen, Esq., David F. Dowd, Esq., and Roger D. Waldron, Esq., Mayer, Brown, Rowe & Maw, for Lockheed Martin Systems Integration-Owego, the protesters.

W. Michael Rose, Esq., Maj. Jonathan P. Widmann, Bridget E. Lyons, Esq., and Col. Thomas Doyon, Department of the Air Force, for the agency.

David A. Ashen, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Requests that recommended corrective action be modified to include reimbursement of proposal preparation costs--based on fact that agency ultimately canceled solicitation--is denied where agency undertook implementation of recommended corrective action (by reopening competition, amending solicitation, conducting discussions, and requesting and evaluating revised proposals), and there is no showing that cancellation was improper.

DECISION

Lockheed Martin Systems Integration-Owego (LMSI) and Sikorsky Aircraft Company request that we modify our recommendation in our decision Lockheed Martin Sys. Integration-Owego; Sikorsky Aircraft Co., B-299145.5, B 299145.6, Aug. 30, 2007, 2007 CPD ¶ 155, in which we sustained protests by LMSI and Sikorsky challenging the corrective action undertaken by the Department of the Air Force in response to our earlier decision, Sikorsky Aircraft Co.; Lockheed Martin Sys. Integration-Owego, B-299145 et al., Feb. 26, 2007, 2007 CPD ¶ 45. In this latter decision, we sustained LMSI's and Sikorsky's protests against the Air Force's award of a contract to The Boeing Company under request for proposals (RFP) No. FA8629-06-R-2350, for the

Combat Search and Rescue Replacement Vehicle (CSAR-X).¹ LMSI and Sikorsky request that we recommend reimbursement of the costs of preparing their proposals.

We deny the requests.

We sustained the protests in our August 30, 2007 decision on the basis that the agency improperly amended the solicitation following our initial (February 26, 2007) decision. Specifically, the agency eliminated unique aspects of the proposed helicopters (including maintenance requirements) as a consideration in the agency's calculation of certain aspects of the evaluated Most Probable Life Cycle Cost, and substituted a subjective consideration of potential maintenance efficiencies, but precluded offerors from generally revising their proposals to take this change into account. Finding that this change could have a material impact on the non-cost/price aspects of the proposals, we recommended that the Air Force permit offerors to revise both the cost/price and non-cost/price aspects of their proposals in response to the changed evaluation scheme. We further recommended that the agency terminate Boeing's contract if the evaluation of revised proposals resulted in a determination that its proposal no longer represented the best value to the government, and that LMSI and Sikorsky be reimbursed the costs of filing and pursuing their protests, including reasonable attorneys' fees.

On June 2, 2009, the Air Force issued an amendment canceling the solicitation. LMSI and Sikorsky request that, in view of the cancellation, we modify our recommendation to include reimbursement of the protesters' costs of preparing their proposals.

Where our Office sustains a protest, we may recommend that the protester be reimbursed its costs of filing and pursuing a protest and preparing a proposal. 4 C.F.R. § 21.8(d) (2009). Although we normally do not recommend reimbursement of proposal preparation costs where a protester is given an opportunity to compete for the agency's requirement, we may recommend reimbursement of those costs where changed circumstances render a previously-submitted proposal no longer relevant, where appropriate corrective action may not be implemented, or where the agency unduly delays taking corrective action. See Rockwell Elec. Commerce Corp. –Modification of Recommendation, B-286201.8, Mar. 5, 2002, 2002 CPD ¶ 47 at 2; COBRO Corp., B-287578.2, Oct. 15, 2001, 2001 CPD ¶ 181 at 8-9; Occu-Health, Inc., B-270228.3, Apr. 3, 1996, 96-1 CPD ¶ 196 at 6; Aberdeen Tech. Servs. –Modification of Recommendation, B-283727.3, Aug. 22, 2001, 2001 CPD ¶ 146 at 2. Reimbursement of proposal preparation costs is not warranted under the circumstances here.

¹ We sustained the initial protests in our February 26, 2007 decision on the basis that the Air Force's evaluation of operations and support costs was inconsistent with the evaluation methodology set forth in the solicitation.

Following our August 30, 2007 decision, the Air Force undertook the recommended corrective action, including reopening the competition and amending the solicitation, conducting discussions, and requesting and evaluating revised proposals. Specifically, the agency issued draft amendment No. 5 on October 23; formally amended the solicitation the following month and requested revised proposals; received the revised proposals on January 7, 2008; arranged for offerors to make oral presentations in January 2008 and for an aerial refueling demonstration in February; conducted an interim evaluation briefing for offerors in April; issued evaluation notices and amendment No. 6 to the solicitation in April; requested new proposals, which were received on May 27; evaluated proposals and conducted discussions; was subjected to internal, independent Department of Defense oversight reviews of the procurement in August and September; issued amendment No. 7 to the solicitation on December 5; conducted interim evaluation briefings for offerors on December 17-18, followed by a request for final proposal revisions (FPR) on December 19; and received the new FPRs on January 20, 2009. The Air Force reports that, following the evaluation of the FPRs, it determined to reopen discussions with the offerors. Air Force Rept. at 5-9; LMSI Comments at 2-3. However, on April 6, the Secretary of Defense publicly announced that the Department of Defense would terminate the CSAR-X program and reexamine its requirements, including considering whether the combat search and rescue mission could only be accomplished by a single-service solution with a single-purpose aircraft. Air Force Rept., attach. 1. Finally, as noted above, on June 2, the agency issued an amendment canceling the solicitation.

As is clear from the record, the agency promptly implemented our recommended corrective action following our decision, and the protesters were furnished an opportunity to compete for the contract. LMSI and Sikorsky participated in the reopened competition on the same footing as the other competitive range offeror, Boeing, and all three offerors faced the same potential risk of a proper decision by the agency to cancel the procurement. This is the same risk that is inherent in any competitive acquisition. Since the protesters have made no showing that the cancellation of the CSAR-X solicitation was unreasonable or otherwise improper, the fact that the reopened competition did not ultimately result in an award provides no

basis for us to recommend reimbursement of their proposal preparation costs. See QuanTech, Inc.--Costs, B-278380.3, June 17, 1998, 98-1 CPD ¶ 165 at 3; Orange Personnel Servs., Inc.--Recon.; Eastex Maritime, Inc.--Modification, B-256164.2, B-256164.3, Jan. 18, 1995, 95-1 CPD ¶ 26 at 2; cf. Dept. of the Treasury, Bureau of Engraving and Printing--Request for Modification of Remedy; Johnson Controls Security Systems, LLC--Costs, B-296490.6; B-296490.7, May 31, 2007, 2007 CPD ¶ 101 at 3 (reimbursement of proposal preparation costs recommended where agency canceled solicitation rather than implement corrective action); Aberdeen Tech. Servs.--Modification of Recommendation, *supra*, at 2 (reimbursement of proposal preparation costs recommended where agency canceled solicitation rather than implement corrective action).

The requests are denied.

Lynn H. Gibson
Acting General Counsel