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## Decision

**Matter of:** Alliant Techsystems, Inc.

**File:** B-410036

**Date:** October 14, 2014

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

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### DIGEST

Protest that participation of potential offeror in competition for full production lots would create an organizational conflict of interest (OCI) is denied where agency has reasonably concluded that: (1) while the current specifications may be based on the equipment as designed and developed by the offeror in conjunction with the agency, that fact alone does not demonstrate biased ground rules raising OCI concerns; and (2), while the offeror has access to certain proprietary information--unavailable to the protester even after request by the agency--as a result of its work designing and developing the current system in conjunction with the agency, such a competitive advantage enjoyed by a developer is not considered an unfair one prohibited under the OCI rules.

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### DECISION

Alliant Techsystems Operations, LLC protests the terms of request for proposals (RFP) No. FA8675-14-R-0027, issued by the Department of the Air Force for upgrade of the High-speed Anti-Radiation Missile (HARM) control section. Alliant challenges the terms of the solicitation and the agency decision that there are no organizational conflict of interests concerns resulting from Raytheon Missile Systems' participation in the competition.

We deny the protest.

## BACKGROUND

The HARM is an air-to-surface missile designed to seek and destroy enemy radar-equipped air defense systems. HARM has a proportional guidance system that homes in on enemy radar emissions through a fixed antenna and seeker head in the missile nose. The U.S. Navy utilizes the HARM on its F/A-18 and EA-18G aircraft, while the U.S. Air Force employs the HARM on some of its F-16 aircraft. The original AGM-88 HARM system was developed by the defense sector of Texas Instruments, which subsequently became part of Raytheon. Raytheon has since produced various HARM versions that changed over time to address evolving threat systems and to incorporate improvements in technology. Contracting Officer Statement (COS) at 1-2; Agency Legal Memorandum at 2-3.

The HARM missile consists of four sections: guidance section, warhead, control section and rocket motor. The current solicitation is for the HARM Control Section Modification (HCSM) Program under which control sections from Air Force HARMs in inventory are upgraded; the original rocket motors, fins, warheads, and guidance sections of the inventory AGM-88C missiles are re-used. In this regard, the early HARMs operate strictly by using a seeker to home in on radar signals that are produced by the radars associated with enemy air defense systems. [Redacted] The HCSM modified control system will have a highly accurate capability to direct the missile to particular geographic coordinates [Redacted]. COS at 1-2; Agency Legal Memorandum at 2-4.

In 2010, the Air Force awarded limited production contracts to Alliant and Raytheon for delivery of a number of HCSM units in order to prove that each offeror had the capability of manufacturing a product which met the agency's technical requirements. Subsequently, after testing each offeror's production units, the agency conducted a lowest-priced, technically acceptable competition between Raytheon and Alliant for HCSM Lots 1 and 2; award was made to Raytheon based on its lower evaluated price. COS at 1.

Of relevance here, Raytheon's HCSM design is traceable in part to development work that took place under a tri-national Precision Navigation Upgrade (PNU) development program led by the U.S. Navy, with participation by Italy and Germany, to integrate GPS/INS navigation into the HARM. See COS at 3; AR, Tab 45-01, PNU Memorandum of Agreement. For its part, Alliant is currently producing the AGM-88E Advanced Anti-Radiation Guided Missile (AARGM) for the U.S. Navy. Much of the development of Alliant's AARGM product was accomplished under the auspices of an international cooperative program, but involving the U.S. Navy and the Italian Air Force. As with HCSM and PNU, Alliant's AARGM re-uses the HARM warhead and rocket motor. However, the AARGM involves a more significant modification of inventory HARMs, with Alliant extensively modifying the HARM control sections (nearly all parts are new) and producing entirely new advanced

multi-mode missile guidance sections. COS at 2-3; Agency Legal Memorandum at 4-5.

The current solicitation contemplates a limited competition between Alliant and Raytheon for award of a contract for Full Rate Production Lots 3+ and 4 of HCSM units. AR, Tab 4-01, Presolicitation Notice; AR, Tab 6-02, HCSM Executive Summary, Alliant; AR, Tab 6-03, HCSM Executive Summary, Raytheon. Specifically, the solicitation contemplates award, on a lowest-priced, technically acceptable basis, of a fixed price contract for Lot 3+, including 3 engineering evaluation units, and a minimum of 250 and a maximum of 500 HCSMs (with a best estimated quantity of 383 HCSMs used for evaluation purposes), and an optional Lot 4, including 160-650 HCSMs (with an estimated quantity of 217 HCSMs). RFP § 3.2. The Lot 4 maximum quantity includes allowance for potential Foreign Military Sale (FMS) sales, but since the Air Force currently has no firm FMS requirements, the agency, at the request of Alliant, removed FMS quantities from the estimated quantity. COS at 4, 7, 11-12; AR, Tab 44, Government Responses to Industry Questions, at 1-2.

## DISCUSSION

Although the solicitation contemplates a limited competition between Alliant and Raytheon, Alliant asserts that the agency's procurement approach amounts to a de facto sole source acquisition from Raytheon. In support of its claim, Alliant generally asserts three deficiencies in the agency's approach: (1) the agency has not addressed an organizational conflict of interest (OCI) involving ground rules biased in favor of Raytheon and an unequal access to information benefitting Raytheon; (2) in providing for FMS orders of HCSM hardware (where allegedly Raytheon will have an advantage) but making no allowance for orders of required FMS software, integration and testing, the solicitation improperly contemplates subsequent improper, out-of-scope modifications for services; and (3) the solicitation otherwise provides for an unequal competition between Alliant and Raytheon. As discussed below, we find Alliant's protest arguments to be without merit.

### Organizational Conflict of Interest

Alliant asserts that the Air Force failed to conduct a meaningful OCI analysis and, as a result, failed to adequately consider that (1) Raytheon had an undue influence on the specifications such as to amount to biased ground rules, and (2) the unavailability to Alliant of certain proprietary information that was available to Raytheon demonstrated an unequal access to information. Alliant initially raised with the Air Force the potential for OCIs associated with the inappropriate use of certain documents and specifications. After consulting with legal counsel, the contracting officer, on February 23, 2014 (prior to issuance of the solicitation), concluded that Raytheon's participation in the competition would not result in any

OCIs. Contracting Officer's Memorandum to the File, Feb. 23, 2014; Protest at 39-41. The agency subsequently communicated to Alliant its rejection of Alliant's OCI concerns. AR, Tab 53-03.

The Federal Acquisition Regulation (FAR) requires that contracting officials avoid, neutralize, or mitigate potential significant conflicts of interest so as to prevent an unfair competitive advantage or the existence of conflicting roles that might impair a contractor's objectivity. FAR §§ 9.504(a), 9.505. The responsibility for determining whether an actual or apparent conflict of interest will arise, and to what extent the firm should be excluded from the competition, rests with the contracting officer. PricewaterhouseCoopers LLP; IBM U.S. Federal, B-409885 et al., Sept. 5, 2014, 2014 CPD ¶ \_\_ at 19; Aetna Gov't Health Plans, Inc.; Found. Health Fed. Servs., Inc., B-254397.15 et al., July 27, 1995, 95-2 CPD ¶ 129 at 12.

We review the reasonableness of a contracting officer's OCI investigation and, where an agency has given meaningful consideration to whether a significant conflict of interest exists, we will not substitute our judgment for the agency's, absent clear evidence that the agency's conclusion is unreasonable. See TeleCommunication Sys. Inc., B-404496.3, Oct. 26, 2011, 2011 CPD ¶ 229 at 3-4. In this regard, the identification of conflicts of interest is a fact-specific inquiry that requires the exercise of considerable discretion. Guident Techs., Inc., B-405112.3, June 4, 2012, 2012 CPD ¶ 166 at 7; see Axiom Res. Mgmt., Inc. v. United States, 564 F.3d 1374, 1382 (Fed. Cir. 2009). A protester must identify hard facts that indicate the existence or potential existence of a conflict; mere inference or suspicion of an actual or potential conflict is not enough. TeleCommunication Sys. Inc., supra, at 3; see Turner Constr. Co., Inc. v. United States, 645 F.3d 1377, 1387 (Fed. Cir. 2011); PAI Corp. v. United States, 614 F.3d 1347, 1352 (Fed. Cir. 2010).

As set forth below, Alliant has failed to satisfy the standard required to demonstrate the existence of the alleged OCI. Thus, we have no basis to question the CO's conclusion that Raytheon's participation in this procurement does not raise potential OCI concerns.

#### 1. Biased Ground Rules

As relevant here, a biased ground rules OCI arises where a firm, as part of its performance of a government contract, has in some sense set the ground rules for the competition for another government contract by, for example, writing the statement of work or providing materials upon which a statement of work was based. FAR §§ 9.505-1, 9.505-2; Networking & Eng'g Techs., Inc., B-405062.4 et al., Sept. 4, 2013, 2013 CPD ¶ 219 at 10. Alliant bases its claim of biased ground rules on that fact that several of the specifications incorporated into the solicitation here are specifications for the HCSM as designed and developed by Raytheon for the Air Force; according to the protester, these specifications are

unnecessary, at least insofar as pertains to the Alliant HCSM design, and impose additional costs on Alliant to comply, thereby competitively disadvantaging Alliant.

However, while the current specifications may be based on the HCSM as designed and developed by Raytheon in conjunction with the Air Force, that fact alone does not constitute biased ground rules raising OCI concerns. In this regard, the mere existence of a prior or current contractual relationship between a contracting agency and a contractor does not create an unfair competitive advantage unless the alleged advantage was created by an improper preference or unfair action by the procuring agency. See Science Applications International Corp., B-405718, B-405718.2, Dec. 21, 2011, 2012 CPD ¶ 42 at 6 n.12; Philadelphia Produce Market Wholesalers, LLC, B-298751.5, May 1, 2007, 2007 CPD ¶ 87 at 3; Optimum Tech., Inc., B-266339.2, Apr. 16, 1996, 96-1 CPD ¶ 188 at 7-8. Likewise, the FAR states that, while a “development contractor,” such as Raytheon, “has a competitive advantage, it is an unavoidable one that is not considered unfair; hence no prohibition should be imposed.” FAR § 9.505-2(a)(3). Accordingly, the FAR recognizes the unique role played by a development contractor with respect to a solicitation work statement by providing as follows:

(b)(1) If a contractor prepares, or assists in preparing, a work statement to be used in competitively acquiring a system or services--or provides material leading directly, predictably, and without delay to such a work statement--that contractor may not supply the system, major components of the system, or the services unless--

. . . . .

(ii) It has participated in the development and design work . . . .

FAR § 9.505-2(b)(1). Thus, even if certain current specifications were based on the HCSM as designed and developed by Raytheon in conjunction with the Air Force, this fact alone does not confer an unfair competitive advantage on Raytheon to be addressed under the OCI rules.

Further, to the extent that Alliant’s arguments amount simply to claims that the specifications exceed the agency’s needs and are unduly restrictive of competition, the arguments furnish no basis upon which to question the specifications. In this regard, a contracting agency has the discretion to determine its needs and the best method to accommodate them. Womack Mach. Supply Co., B-407990, May 3, 2013, 2013 CPD ¶ 117 at 3. In preparing a solicitation, a contracting agency is required to specify its needs in a manner designed to achieve full and open competition, and may include restrictive requirements only to the extent they are necessary to satisfy the agency’s legitimate needs. 10 U.S.C. § 2305(a)(1) (2014); Innovative Refrigeration Concepts, B-272370, Sept. 30, 1996, 96-2 CPD ¶ 127 at 3. Where a protester challenges a specification as unduly restrictive, the procuring

agency has the responsibility of establishing that the specification is reasonably necessary to meet its needs. Streit USA Armoring, LLC, B-408584, Nov. 5, 2013, 2013 CPD ¶ 257 at 4; Total Health Res., B-403209, Oct. 4, 2010, 2010 CPD ¶ 226 at 3. The adequacy of the agency's justification is ascertained through examining whether the agency's explanation is reasonable; that is, whether the explanation can withstand logical scrutiny. See SMARTnet, Inc., B-400651.2, Jan. 27, 2009, 2009 CPD ¶ 34 at 7; Chadwick-Helmuth Co., Inc., B-279621.2, Aug. 17, 1998, 98-2 CPD ¶ 44 at 3. A protester's disagreement with the agency's judgment concerning the agency's needs and how to accommodate them does not show that the agency's judgment is unreasonable. Dynamic Access Sys., B-295356, Feb. 8, 2005, 2005 CPD ¶ 34 at 4. Further, where, as here, a requirement relates to national defense or human safety, an agency has the discretion to define solicitation requirements to achieve not just reasonable results, but the highest possible reliability and/or effectiveness. AAR Airlift Group, Inc., B-409770, July 29, 2014, 2014 CPD ¶ 231 at 3; Vertol Sys. Co., Inc., B-293644.6 et al., July 29, 2004, 2004 CPD ¶ 146 at 3; Caswell Int'l Corp., B-278103, Dec. 29, 1997, 98-1 CPD ¶ 6 at 2.

Here, we find that the record supports the reasonableness of the agency's position that the challenged specifications are necessary to meet the agency's needs. The first specification challenged by Alliant concerns the seeker power switch requirement, which provides as follows:

In addition, a switch is provided in the Control Section (CS) to allow it to control the application of power to the Guidance Section (GS). This switch allows the missile to conduct alignment and remain in continuous communication with the aircraft while limiting the GS on-time in the presence of 3-phase power to the missile during longer missions.

AR, Tab 33-1, AS-5186 Rev C.

Based on the record before us, we find the agency's explanation of the need for the seeker power switch to be compelling. In this regard, the agency reports that the capability to remove seeker power without removing power to the control section was generated by operational considerations. According to the agency, powering down the HARM missile can serve as an additional safety measure before coming into proximity with friendly aircraft, such as during refueling, [Redacted]. In addition, the agency reports that crews may also want to reduce the power-on time for the seeker to reduce wear and tear on it. [Redacted]. Declaration of Air Force Lead Engineer for HARM HCSM at 6-8; COS at 20-21; Agency Legal Memorandum at 31-32.

Although Alliant suggests that other factors render the seeker power switch unnecessary to ensure safety, we see no basis to object to the agency's desire for

the highest degree of safety when the health and safety of the pilots and the success of military missions are at stake. Further, while Alliant questions the agency position that powering down the seeker when not needed could save wear and tear on the seeker, arguing instead that more frequently (“Repeatedly”) powering up the seeker is more likely to result in additional wear and tear, Alliant Comments, Sept. 3, 2014, at 41, its unsupported claim does not show that the preference for a seeker power switch on the part of those charged with maintaining the missile in the theaters of operations is unreasonable. Finally, we note that Alliant has already demonstrated compliance with this requirement during its limited production contract, incorporating it into its proposed HCSM design, such that it is unclear how the requirement can now result in any material competitive prejudice to Alliant. Declaration of Air Force Lead Engineer for HARM HCSM at 7. In sum, Alliant has furnished no basis to question the seeker power switch requirement.

Nor has Alliant furnished any basis to question the current requirement for reprogrammable Digital Terrain Elevation Data (DTED), a requirement that the protester also challenges. In this regard, [Redacted]. Id.

Alliant asserts that [Redacted]. As explained by the agency, however, [Redacted]. Thus, we find that the record clearly supports the agency position that [Redacted]. In these circumstances, we find no basis to question the agency’s position that [Redacted].

## 2. Unequal Access to Information

Alliant further argues that Raytheon had an unequal access to information OCI. Specifically, Alliant asserts that only Raytheon had access to information regarding the interface between the HARM HCSM and the Air Force’s F-16 aircraft as a result of Raytheon’s work under its Aircraft Launcher Interface Computer (ALIC) contract (for the launcher that Raytheon builds to connect the HARM missile to the F-16 aircraft). The ALIC, originally developed by a portion of Texas Instruments that is now part of Raytheon, acts as an interface between the computers in the HARM and the computers in the F-16 C/J aircraft. Texas Instruments and Raytheon developed the ALIC software and documentation. The document sought by Alliant, the HARM ALIC F-16 Interface Control Document (ICD), defines the interface between the ALIC computer software and the computer software for the F-16 C/J aircraft. Agency Legal Memorandum at 34, 36; see AR, Tab 35-01, HARM ALIC F-16 ICD.

The software on the computers in the F-16 aircraft is the Operational Flight Program (OFP). The OFP software and related documentation are covered under a special license agreement between Lockheed Martin, the current manufacturer of the F-16, and the government. In this regard, the agency determined that content in the HARM ALIC F-16 ICD is likewise subject to this special license agreement between Lockheed Martin and the government. COS at 22; Supplemental Agency Legal

Memorandum at 15. Under the terms of the special license agreement, the government has government purpose rights to the OFP and related documentation, except that the government may not release the OFP documents to outside parties for certain prohibited purposes related to the F-16, including weapons integration. AR, Tab 35-02, OFP Document Data Statement, Mar. 1, 2007, at 1; Agency Legal Memorandum at 36-37; Second Supplemental Agency Legal Memorandum at 6. Since the F-16 special license agreement prohibited the government from disclosing documentation concerning the F-16 OFP software to outside parties such as Alliant for purposes of weapons integration, the agency's HCSM program office contacted Lockheed Martin through the Air Force F-16 program office to ask for permission to release various documents which describe the interface between the ALIC software and the F-16 aircraft software. Lockheed Martin, however, refused to grant permission for the requested document release by the government. See AR, Tab 35-06, Agency E-Mail, Sept. 2009; COS at 22; Agency Legal Memorandum at 37. The Air Force then suggested that Alliant obtain access to any desired documents using an associate contractor agreement directly with Lockheed Martin, similar to what the government understood previously existed between Alliant and Lockheed Martin during Alliant's prior HCSM efforts. AR, Tab 35-07, Agency E-Mail, Sept. 25, 2009; see Agency Legal Memorandum at 37; COS at 22. Alliant states that it was unable to obtain the document from Lockheed Martin, Alliant Comments at Sept. 3, 2014, at 46, and claims that this indicates that Raytheon has an unequal access to information OCI.

An unequal access to information OCI exists where a firm has access to nonpublic information as part of its performance of a government contract and where that information may provide the firm a competitive advantage in a later competition. FAR §§ 9.505(b), 9.505-4; The GEO Group, Inc., B-405012, July 26, 2011, 2011 CPD ¶ 153 at 5. The concern regarding this category of OCI is that a firm may gain a competitive advantage based on its possession of proprietary information furnished by the government or source selection information that is relevant to the contract but is not available to all competitors, and such information would assist that contractor in obtaining the contract. See FAR § 9.505(b); Phoenix Management, Inc., B-406142.3, May 17, 2012, 2013 CPD ¶ 154 at 3 n.6; The GEO Group, Inc., *supra*, at 6.

Here, we find reasonable the agency's conclusion that the above facts do not demonstrate the existence of an OCI resulting from Raytheon's unequal access to information. Again, the FAR requires that contracting officials avoid, neutralize, or mitigate potential significant conflicts of interest so as to prevent an unfair competitive advantage. FAR §§ 9.504(a), 9.505. The information in question here is not Alliant proprietary information, but instead information arising out of development work by other companies, including Raytheon. It is well settled, however, that while an offeror may possess unique information, advantages, and capabilities due to its prior experience under a government contract, including performance as the incumbent contractor, the government is not required to



equalize competition to compensate for such an advantage, unless there is evidence of preferential treatment or other improper action. See FAR § 9.505-2(a)(3); Onsite Health Inc., B-408032, B-408032.2, May 30, 2013, 2013 CPD ¶ 138 at 9. The existence of an advantage, in and of itself, does not constitute preferential treatment by the agency, nor is such a normally occurring advantage necessarily unfair. Id. Indeed, the FAR specifically states that, while a “development contractor,” such as Raytheon, “has a competitive advantage, it is an unavoidable one that is not considered unfair; hence no prohibition should be imposed.” FAR § 9.505-2(a)(3). Finally, we note that the Air Force requested permission to release interface information, albeit unsuccessfully, and Alliant has made no showing that the agency withheld from Alliant necessary information that it had the right to release. In these circumstances, we find that Alliant’s protest furnishes no basis to question the agency’s conclusion that Raytheon’s participation in the competition would not give rise to an OCI.

## FMS

As discussed, the optional Lot 4 maximum quantity included allowance for potential Foreign Military Sale (FMS) sales of HCSM hardware. Alliant challenges the agency’s FMS approach here of providing for FMS orders of HCSM hardware, where allegedly Raytheon will have an advantage, but making no allowance for orders of necessary FMS software, integration and testing, where Alliant asserts it has an advantage. According to the protester:

The additional work is required because [Redacted]. The FMS software configuration is not defined in the RFP and will change based on country-specific requirements.

Alliant Comments, Sept. 3, 2014, at 16-17. Alliant asserts that the solicitation’s hardware-only approach necessarily will result in subsequent improper, out-of-scope modifications to the awarded contract for the required services. Id. at 17 (“post award scope changes are required for the integration of the HCSM with the . . . FMS aircraft”). The protester concludes that “the solution is not to include the FMS quantities in this RFP.” Id.

As the agency notes, however, Alliant has identified no requirement that any services necessary to the integration of the HCSM with a particular country’s aircraft must be procured under the HCSM hardware contract rather than under a separate contract. In effect, Alliant anticipates improper action in the future that might never arise. However, protests that merely anticipate improper agency action are speculative and premature. See Safety-Kleen Corp., B-274176, B-274176.2, Nov. 25, 1996, 96-2 CPD ¶ 200 at 5-6 (protest that anticipates improper out-of-scope contract modification is premature); Sony Corp. of America, B-224373.2, Mar. 10, 1987, 87-1 CPD ¶ 267 at 7. Thus, Alliant’s FMS argument furnishes no basis on which to question the solicitation provisions.

## Re-verification or Fielding Costs

Alliant objects to the RFP provision for inclusion in the evaluated price of the estimated cost to the government of verifying the conformance with specifications of an HCSM differing from the verified design already in production, that is the Lot 1 production contract being performed by Raytheon. In this regard, the solicitation provided that “[t]he TEP [Total Evaluated Price] will be adjusted for certain duplicative re-verification or fielding costs the Government will incur due to companies offering an HCSM unit other than the WCU-33/B, which is currently in production.” RFP § M.3.2.5 (amend. 0007). In particular, the TEP will be increased to “include Government estimated costs listed in attachment A associated with required tasks the Government will have to perform.” Id. (The TEP was not to include the cost of any re-verification work which the offeror itself would perform. Id.)

Alliant asserts that it is unfair, creating “an unlevel playing field,” to adjust Alliant’s offer and not Raytheon’s for such re-verification costs. Alliant Comments, Sept. 3, 2014, at 49. As noted by the agency, however, this provision by its terms does not only apply to Alliant; if Raytheon were to propose design changes requiring the government to repeat verification tasks previously performed for HCSM Lot 1, the cost of such re-verification tasks would be included in the evaluated price of Raytheon’s offer. Agency Legal Memorandum at 15.

Furthermore, cost or price to the government must be included in every RFP as an evaluation factor, and agencies must consider cost or price to the government in evaluating competitive proposals. 10 U.S.C. § 2305(a)(3)(A)(ii). It is up to the agency to decide upon the appropriate method for evaluation of cost or price in a given procurement, although the agency must use an evaluation method that provides a basis for a reasonable assessment of the cost of performance under the competing proposals. Lockheed Martin Sys. Integration-Owego; Sikorsky Aircraft Co., B-299145.5, B-299145.6, Aug. 30, 2007, 2007 CPD ¶ 155 at 7. Here, Alliant does not dispute that award of a contract for an HCSM differing from the verified design already in production would result in the need to perform certain re-verification tasks. Further, Alliant does not cite, nor are we aware of, any authority precluding the agency from providing in the solicitation for evaluating specific categories of costs associated with offerors’ proposed performance approaches.<sup>1</sup>

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<sup>1</sup> Alliant argues that the unfairness of the agency’s approach is further demonstrated by the fact that the solicitation does not include any provision for increasing Raytheon’s evaluated price by the amount of a possible royalty payment to Italy. In this regard, as discussed, Raytheon’s HCSM design is traceable in part to development work that took place under a tri-national Precision Navigation  
(continued...)

In sum, none of the asserted solicitation deficiencies furnish a basis for questioning the agency's procurement approach, and nothing in the record supports Alliant's claim that the solicitation amounts to an improper, de-facto sole source acquisition from Raytheon.

The protest is denied.

Susan A. Poling  
General Counsel

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(...continued)

Upgrade (PNU) development program led by the U.S. Navy, with participation by Italy and Germany. The PNU Memorandum of Agreement (MOA) requires the agreement of all parties before there can be sales to other nations of equipment developed under the project. Further, the MOA provides that sales and other transfers to a third party "may attract a levy," but that a party may reduce or waive the assessment of its share of such levy. AR, Tab 45-01, PNU Memorandum, Article XIII, at 000035; see Agency Legal Memorandum at 11-12. The agency reports that Germany has given its approval for a potential FMS transaction involving Raytheon's HCSM product without requesting assessment of any levy. AR, Tab 45-10; see Agency Legal Memorandum at 12. The agency further reports that while the Navy has requested approval from Italy for FMS sales of the Raytheon HCSM, Italy has not provided a definitive answer on whether it would consent to the particular sales suggested, whether any levy would be required, or what the amount of such a levy might be. Agency Legal Memorandum at 12; see AR, Tab 45-15, Italian Response, Mar. 21, 2014. In these circumstances, where there is no certainty that any royalty payment would be imposed, nor any certainty as to amount of such a royalty payment, we see no basis to question the agency's decision not to include such a cost in the evaluated price.