No. 15-5086

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

RAYTHEON COMPANY,

Plaintiff-Appellant,

v.

UNITED STATES,
LOCKHEED MARTIN CORPORATION, and
NORTHROP GRUMMAN SYSTEMS CORPORATION,

Defendants-Appellees.

Appeal from the United States Court of Federal Claims
in No. 1:15-cv-00077-MMS, Judge Margaret M. Sweeney.

BRIEF OF DEFENDANT-APPELLEE NORTHROP GRUMMAN SYSTEMS CORPORATION

NONCONFIDENTIAL VERSION

July 15, 2015

Deneen J. Melander
Richard A. Sauber
Jennifer S. Windom
Michael E. Kenneally
Peter B. Siegal
Robbins, Russell, Englert, Orseck, Untereiner & Sauber LLP
1801 K Street, NW, Suite 411L
Washington, D.C. 20006
(202) 775-4500

Counsel for Northrop Grumman Systems Corporation

CERTIFICATE OF INTEREST

Pursuant to Federal Circuit Rule 47.4, counsel for defendant-appellee Northrop Grumman Systems Corporation certifies the following:

1. The full name of every party or amicus curiae represented by me is:

Northrop Grumman Systems Corporation.

2. The name of the real party in interest (if the parties named in the caption are not the real parties in interest) represented by me is:

None.

3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of the party or amicus curiae represented by me are:

Northrop Grumman Systems Corporation is a wholly owned subsidiary of Northrop Grumman Corporation. As of December 31, 2014, State Street Corporation, a publicly held corporation, owns more than 10% of Northrop Grumman Corporation stock.

4. The names of all law firms and the partners or associates that appeared for the party or amicus curiae now represented by me in the trial court or agency or are expected to appear in this Court are:

Robbins, Russell, Englert, Orseck, Untereiner & Sauber LLP; Deneen J. Melander; Richard A. Sauber; Jennifer S. Windom; Michael E. Kenneally; Peter B. Siegal.

Dated: July 15, 2015

/s/ Deneen J. Melander
Deneen J. Melander

Counsel for Northrop Grumman Systems Corporation

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The material redacted from pages 2, 4-5, 8-9, 11, 13-15, 17, 19-21, 25-28, 30, 35, 37, 39, 43, 48-54, 56-57, and 59 is confidential and proprietary information about the proposals and competition strategies of Plaintiff-Appellant Raytheon Company, Defendant-Appellee Northrop Grumman Systems Corporation, and Defendant-Appellee Lockheed Martin Corporation during the Air Force's 3DELRR procurement. All such material is protected from public disclosure by a protective order entered by the Court of Federal Claims.

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STATEMENT OF RELATED CASES

Counsel for Defendant-Appellee Northrop Grumman Systems Corporation ("Northrop Grumman") is unaware of any other appeal in or from this action that was previously before this Court or any appellate court. Counsel is unaware of any case pending in any court that will directly affect or be directly affected by this Court's decision in this appeal.

STATEMENT OF THE ISSUES[1]

The issue on appeal is whether the Court of Federal Claims erred in concluding, under the highly deferential "arbitrary and capricious" standard for reviewing agency action, that there existed a rational basis for the Air Force's decision to take corrective action to remedy serious and prejudicial procurement flaws, where the Government Accountability Office ("GAO") also determined that such corrective action was warranted.

STATEMENT OF THE CASE

This case arises out of the Air Force's decision to take corrective action to remedy a procurement in which Northrop Grumman was provided materially different instructions [redacted] regarding a decisive cost/price issue. Raytheon contends that the Air Force's "decision to reopen the procurement lacks a rational basis because it implements a GAO recommendation that is itself irrational" (RTN Br. at 3), but this contention fails in several respects. First, the GAO did not issue a formal "recommendation" in this case. The parties engaged in a voluntary, non-binding outcome prediction session near the end of the GAO protests, during

[1] Pursuant to Circuit Rule 28(b), Northrop Grumman addresses in its Statement of the Issues, Statement of the Case, and Statement of the Facts only those assertions by Raytheon with which it specifically disagrees.

which the GAO attorney stated that she was likely to sustain both Northrop Grumman's and Lockheed Martin's protests.[2] Following that outcome prediction session, the Air Force voluntarily decided to take corrective action and reopen discussions with all offerors. It is the lower court's decision upholding that corrective action decision that is the subject of this appeal. *See Raytheon Co. v. United States*, 121 Fed. Cl. 135 (2015).[3]

Second, neither the GAO's outcome prediction nor the Air Force's subsequent corrective action was "irrational," as Raytheon contends. The GAO attorney did not, as Raytheon claims, "find[] that an offeror, which failed to seek clarification of the Agency's clear misstatement of law that the

[2] Contrary to Raytheon's contention, Northrop Grumman and Lockheed Martin did not protest the Air Force's initial award "on virtually every conceivable basis." RTN Br. at 3. The two offerors protested the award on specific, enumerated grounds, each supported by extensive and detailed citations to the record. Moreover, the GAO attorney specifically stated in the outcome prediction that there was merit to an additional protest ground raised by Northrop Grumman regarding the agency's price realism assessment, but she determined that the issue was moot in light of her prediction that Northrop Grumman's protest would be sustained on misleading and unequal discussion grounds. A2212; A2214.

[3] After the Court of Federal Claims rejected Raytheon's protest, Raytheon moved to stay the court's judgment pending appeal. The lower court denied that motion on a number of grounds, including that Raytheon had failed to demonstrate a "substantial case on the merits[] with respect to the Air Force's decision to take corrective action to remedy its misleading and unequal cost/price discussions." *See* A50098.

offeror is charged to know, could obtain relief by later claiming that the Agency engaged in misleading or unequal discussions." RTN Br. at 4. Rather, following extensive briefing by the parties and a full-day evidentiary hearing, the GAO attorney found that Northrop Grumman had been instructed in an Air Force evaluation notice ("EN") that certain types of cost reductions would be deemed unallowable by the Air Force in its price realism evaluation and that, if Northrop Grumman did not agree to treat such reductions as an unallowable cost, its proposal might be deemed unrealistic. A2211. The GAO attorney further found that, after discussions with Raytheon, the Air Force reversed its position regarding the allowability of future Independent Research and Development ("IR&D") cost reductions in its evaluation, but failed to inform Northrop Grumman of the change, even while notifying [redacted]. A2216.[4] The GAO attorney opined that these events constituted misleading and unequal discussions warranting agency corrective action. A2218. The Air Force and

[4] FAR 31.001 defines IR&D as "the cost of effort which is neither sponsored by a grant, nor required in performing a contract, and which falls within any of the following four areas: (a) basic research, (b) applied research, (c) development, and (d) systems and other concept formulation studies." IR&D costs may be recovered by contractors through indirect costs charged to government contracts. *See* 48 C.F.R. § 9904.420 ("CAS 420").

the Court of Federal Claims each agreed. A2239; A42-45. As the lower court explained, "the Air Force misled Northrop into believing that it would not accept IR&D cost reductions" as realistic and "advis[ed] only Raytheon [redacted] that it would accept IR&D cost reductions notwithstanding the language of its ENs." A42.

Also contrary to Raytheon's claims, the GAO did not "fail[] to require proof of prejudice" from Northrop Grumman or "fail[] to apply the proper legal standard" in finding prejudice. RTN Br. at 4. The agency's failure to properly instruct Northrop Grumman on its changed cost/price evaluation standard was a fundamental error that directly affected the outcome of the award. Northrop Grumman introduced substantial evidence at the GAO demonstrating that it had been prejudiced by the agency's misleading and unequal discussions, including evidence that the only factor separating Raytheon's winning proposal from Northrop Grumman's proposal was price, and that the price difference between those two proposals [redacted]. A44-45. But for the agency's misleading and unequal discussions, Northrop Grumman had a substantial chance of award. *Id.*

Finally, Raytheon contends that the GAO "overstepped its role as a protest tribunal" because it "second-guessed" the Air Force's technical evaluation. RTN Br. at 3-4. Again, the record demonstrates otherwise. The GAO and lower court each determined that the Air Force failed to comply with solicitation requirements in evaluating the maturity of Raytheon's design. A2211; A37-39. Expert or not, the Air Force was not entitled to deviate from the evaluation standards set forth in the solicitation. A determination that an agency failed to comply with solicitation requirements is not the same as "second-guessing" a technical judgment.[5]

STATEMENT OF THE FACTS

Raytheon omits (without challenging) key factual findings made by the court below, while advancing other facts neither found by the court nor supported by the record.

[5] Northrop Grumman supports the Air Force's decision to take corrective action to remedy the flaws in its technical evaluation, but leaves it to counsel for the Air Force and Lockheed Martin to defend that issue on appeal. The court below determined that the cost/price and technical evaluation errors were each independently sufficient to support the Air Force's corrective action decision. A45.

A. The Three-Dimensional Expeditionary Long-Range Radar ("3DELRR") Solicitation

The 3DELRR request for proposals ("RFP") anticipated the award of a contract to "*develop* three 3DELRR systems." A6 (emphasis added). Raytheon acknowledges that the RFP provided detailed instructions regarding the types of cost reductions that offerors could propose and the information required to substantiate such cost reductions. RTN Br. at 8. In addition, as the court found (and as Raytheon ignores), the RFP explicitly stated that the Air Force would evaluate whether the offerors' cost/price proposals – which included descriptions of any proposed cost reductions – were reasonable and realistic. A7. In particular, the RFP warned offerors that "[u]nrealistically low proposed costs or prices estimates, initially or subsequently, may be grounds for eliminating a proposal from competition either on the basis that the Offeror does not understand the requirement or the Offeror has made an unrealistic proposal." A398. Although Raytheon intimates that the RFP ensured that *any* proposed IR&D would be deemed realistic so long as it complied with the Federal Acquisition Regulation ("FAR") (*see* RTN Br. at 8, 9, 24, 40), the RFP contained no such guarantee. To the contrary, the Air Force's stated intention to evaluate proposals for price realism conveyed that low prices would be subject to scrutiny.

B. Proposals and Discussions Regarding Cost Reductions

Raytheon contends that Northrop Grumman's proposal [redacted] Rather, as the Air Force understood, and as Northrop Grumman's proposal made clear, [redacted] Thus, the lower court properly found that [redacted][6]

[6] Raytheon challenges on appeal (RTN Br. at 59 n.15) the lower court's finding that Northrop Grumman's proposals [redacted] but that finding was correct and, in any event, was not essential to the lower court's denial of Raytheon's protest.

Raytheon, on the other hand, initially proposed [redacted] IR&D cost reductions. A9. This [redacted] IR&D investment caused the Air Force concern. The 3DELRR contracting officer ("CO") observed that [redacted] Raytheon's proposed IR&D was [redacted]. A1837-38. In addition to questioning whether Raytheon's proposed IR&D was allowable under the FAR (*id.*), the CO also questioned whether permitting Raytheon to propose IR&D as a cost reduction, which could be recovered through indirect rates (and therefore paid by the government), might create an uneven playing field in the procurement. A50837. Finally, the Air Force harbored concerns that Raytheon's proposed IR&D might never even be realized because it depended on future contingencies. *See* A50839-40 (draft evaluation notice to Raytheon). Internal Air Force e-mails further reveal that the agency was concerned about the realism of *all* IR&D – even IR&D permissible under the FAR. *See, e.g.*, A50855-56 (proposing H-Clause to ensure "that any investment is truly a savings not a subsequent cost to the Gov . . . by forcing the IR&D to be categorized as unallowable," and highlighting potential performance risks associated with "future IR&D").

During discussions with offerors, the Air Force issued ENs regarding proposed IR&D to both Northrop Grumman and Raytheon. Those ENs stated, in relevant part:

> The Government is concerned with the reasonableness and realism of any affordability initiative offered. It is imperative the Offeror substantiate and the Government fully understand any claimed initiative which the Offeror desires to incorporate into its proposed cost/price.
>
> . . . .
>
> In accordance with (IAW) FAR 31.205-18 and [10 U.S.C. § 2320], any cost claimed or considered to be IR&D or a capital investment shall not be allowable as indirect charges for work implicitly required for performance (necessary to perform the contract) or explicitly required to be done by the terms of the contract. Any such costs should be considered as direct charges to the 3DELRR contract. Further, unless properly segregated and agreed to as unallowable costs IAW FAR Part 31, any such costs may be deemed unrealistic.
>
> Any cost reduction efforts specifically expended for or anticipation of the 3DELRR requirements should be considered to be generated in performance of Government funded contract requirements . . . .
>
> In addition, any methodology proposing savings, which could be considered contingent on future events may be considered speculative and unrealistic as regards savings on the efforts proposed for purposes of the cost/price used in the Best Value Assessment.

A11 (quoting EN NG-K-011 ("EN 011") and EN RAY-K-016 ("EN 016")).[7] In addition to imposing a conservative evaluation standard for proposed IR&D cost reductions, EN 011 and EN 016 required Northrop Grumman and Raytheon to accept an additional contract clause, called an "H-Clause," "[t]o ensure the proposed savings, incorporated into [the contractors'] proposed price, are determined reasonable and realistic." *Id.* The proposed H-Clause was yet another indication that the Air Force was concerned about the risks of [redacted] proposed IR&D.[8]

The same day the Air Force issued EN 011, it also sent to Northrop Grumman a separate EN "requesting information . . . to substantiate Northrop's plan to fund contract performance during three specified fiscal years." A40 (describing EN NG-CP-003 ("EN 003")). In response to EN 003, Northrop Grumman made clear that its "performance of the EMD contract would not require the allocation of IR&D funding." *Id.*

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[7] In its brief, Raytheon omits the language concerning "future events," as well as the language indicating the Air Force's concerns in connection with its price realism evaluation of cost reductions proposed by offerors. *See* RTN Br. at 14-15.

[8] In addition, the Air Force sent Northrop Grumman EN NG-K-010 ("EN 010"), seeking confirmation that Northrop Grumman's [redacted] *See* A50845.

Meanwhile, Raytheon responded to EN 016 by "stat[ing] its disagreement with the Air Force's position on the allowability of IR&D costs, asserting that the Federal Circuit had held in *ATK Thiokol, Inc.* that all IR&D costs were allowable unless they were for work explicitly required by the contract . . . [and] that it was in full compliance with the applicable rules regarding the allowability of IR&D costs." A40-41.[9] Raytheon now contends that it "responded by noting that the Agency, although it had stated that IR&D would be treated 'in accordance with' the FAR, had misstated the law." RTN Br. at 15. But although Raytheon did respond that it "assume[d]" the Air Force would adhere to the FAR's standards, it never told the Air Force that it believed the agency had committed itself to accepting as realistic *all* IR&D that complied with the FAR, through EN 016's "in accordance with (IAW) FAR 31.205-18" language or otherwise. A1218.

After receiving Raytheon's response to EN 016, the Air Force "changed its position and concluded that IR&D costs for work implicitly

[9] Neither the GAO nor the lower court ever determined that Raytheon's proposed IR&D complied with the standards articulated in *ATK Thiokol*. Northrop Grumman challenged the award to Raytheon at the GAO on this issue as well, but those protest grounds were mooted by the Air Force's corrective action. A2253-58; A2525-29.

required for contract performance were allowable as indirect charges." A41. Indeed, at the GAO hearing, the CO admitted that the IR&D evaluation approach set forth in EN 011 and EN 016 was "not the way that we would apply IR&D with my knowledge now," but did communicate the agency's approach "[a]t the time" those ENs were drafted. A1871. As the CO explained, the Air Force's "understanding changed" during the procurement. A1837. But, as the lower court found, and as Raytheon does not dispute, the Air Force "advis[ed] only Raytheon [redacted] that it had changed its position." A42. It "never advised Northrop." *Id.*

After discussions, the Air Force invited all three offerors to submit a Final Proposal Revision ("FPR"). Raytheon's [redacted] FPR [redacted] had been evaluated as realistic. A50862; A50866. [redacted]

[redacted] Northrop Grumman remained unaware that the Air Force had decided that it would not evaluate proposed IR&D cost reductions as potentially unrealistic, and its final proposal complied with the instructions it received. A14; A41; A1446.

C. Northrop Grumman's Protest of the Award to Raytheon

In addition to protesting the unfairness of the Air Force's misleading and unequal discussions, Northrop Grumman demonstrated that those discussions had prejudiced its ability to be awarded the contract. As recounted by the court below, Northrop Grumman made clear at the GAO that it "could have proposed the types and quantities of IR&D [redacted]" because of its substantial assets and revenues, because of its proven history of "invest[ing] significant dollars in radar technology," and because of "many commonalities" between the 3DELRR system and [redacted] which Northrop Grumman was already developing [redacted]. A17 (quoting Northrop Grumman's GAO filings); *see also* A51246 n.11. Northrop Grumman argued that it would have made a similar IR&D investment, had it known the agency's changed approach, because the

government reimburses a large proportion of such investments. A2294 (citing expert declaration at A2315). Finally, Northrop Grumman pointed out that [redacted] IR&D [redacted] indicating that the IR&D investment that Northrop Grumman likely would have proposed could easily have resulted in Northrop Grumman being awarded the contract. A2292-94 (citing SSA Final Decision Briefing at A1432; A1439; A1446).

At the outcome prediction session, the GAO attorney affirmatively determined that Northrop Grumman had been prejudiced by the Air Force's misleading and unequal discussions: As Raytheon admits in its complaint, the GAO attorney found that "Northrop had not disclaimed any possibility of relying on future IR&D in the event the Agency took a different view," and she concluded that the "'arguments and statements' in Northrop's filings 'sufficiently demonstrated prejudice.'" A72.[10]

[10] Raytheon challenged Northrop Grumman's competitive prejudice showing in its final written submission at the GAO, giving Northrop Grumman little opportunity to respond, let alone offer additional evidence. A51041-42. In

D. Raytheon's Protest of the Agency's Corrective Action

Raytheon selectively quotes from the lower court's opinion (RTN Br. at 21-22), but review of the full, 45-page opinion demonstrates that the court's decision was well-reasoned and correct. For example, Raytheon notes that the court observed that Northrop Grumman had made a "strategic decision" not to rely on IR&D, suggesting that Northrop Grumman gamed the system, crying foul only once it learned it had lost the award. *Id.* at 21. But the court's opinion makes clear that Northrop Grumman's decision to forgo proposing IR&D cost reductions was a *product* of the agency's misleading and unequal discussions. *See, e.g.*, A45 ("However, the Air Force rendered that strategic decision irrelevant when it failed to advise Northrop of its changed position regarding the allowability of IR&D costs."); A42 ("Through its silence, the Air Force misled Northrop into

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any event, because of Raytheon's insistence that the entire IR&D issue be under GAO protective order, counsel for Northrop Grumman was unable to obtain additional confirming details from Northrop Grumman personnel during the protests. A51150-51. In the court below, Northrop Grumman moved to supplement the record with an executive declaration demonstrating how the company could have proposed IR&D cost reductions to reduce its proposal price, had it not been misled during the procurement. Northrop Grumman asserted – and the court ultimately agreed – that supplementation was unnecessary, and that the evidence already in the record was sufficient to establish prejudice. A28; A44-45.

believing that it would not accept IR&D cost reductions."). The court's *actual* finding – that Northrop Grumman adhered in good faith to the rules the Air Force said would apply – was precisely the opposite of what Raytheon's selective quotation suggests.

Raytheon also claims that the lower court "rejected Raytheon's argument that a misstatement of law is not a sufficient basis to reopen a competition." *See* RTN Br. at 21. In fact, the court held that Raytheon's "misstatement of law" argument was irrelevant because, where an agency does not simply state the law, but states an evaluation standard that it then fails to follow, an offeror's "understanding of the relevant law is of no moment." A43. Indeed, the court reiterated that finding in its written decision denying Raytheon's motion to stay the judgment pending appeal. A50097 ("[R]egardless of what Northrop knew or did not know about the law concerning the allowability of IR&D costs, it did not know how the Air Force actually planned to treat IR&D costs – information that the Air Force provided to Raytheon [redacted]."). The lower court's opinion speaks for itself, and this Court should not credit Raytheon's characterization of the decision.

SUMMARY OF THE ARGUMENT

As the court held below – first on the merits and then again in denying Raytheon's motion to stay pending appeal – the record amply supports the Air Force's decision to take corrective action to correct a significant and prejudicial flaw in its discussions with offerors about its cost/price evaluation standards. During discussions, the Air Force informed Northrop Grumman and Raytheon that proposing IR&D investments for work necessary to perform the 3DELRR contract would create a risk that their proposals would be deemed "unrealistic." A1210. In essence, the Air Force warned that proposing IR&D for future required development work could cost them the award.

Subsequently, after receiving pushback from Raytheon, the Air Force changed course entirely. The agency decided that it no longer had concerns about IR&D cost reductions for work necessary to perform the contract. A41. At such point, the Air Force should have informed all offerors of its new position, giving each time to incorporate IR&D cost reductions into their final proposals under the Air Force's new evaluation rules. It did not. In fact, it never informed Northrop Grumman that it was abandoning its

earlier IR&D instructions. But far worse than that, the Air Force *did* signal its changed position to Raytheon [redacted]

The unfairness was manifest. *See, e.g.*, *AshBritt, Inc. v. United States*, 87 Fed. Cl. 344, 369 (2009) ("It is well established that an agency may not opt to discuss the identical aspect of a proposal with some offerors but not others."); *Gentex Corp. v. United States*, 58 Fed. Cl. 634, 653 (2003). Raytheon [redacted] went on to propose [redacted] IR&D cost reductions. A14. Raytheon then was awarded the contract [redacted] Because of the instructions it received, Northrop Grumman [redacted] *See id*. As the lower court rightly concluded, under these circumstances, the Air Force's decision to take corrective action was eminently rational. A45.

Now, Raytheon argues that, as a matter of law, (1) misleading and unequal discussions with offerors are permissible so long as they touch on a legal issue; (2) an agency may not take corrective action after a GAO outcome prediction unless the GAO has made formal written findings as to

prejudice; and (3) to demonstrate prejudice, a protester is required to introduce specific evidence detailing precisely how it would rework its proposal, had the procurement not been flawed. The Court should reject these arguments.

First, as the lower court explained, the Air Force's serious error was not in stating an incorrect view of the law to Northrop Grumman, but rather in providing [redacted] the agency's changed evaluation rules, while leaving Northrop Grumman in the dark. This was inherently unfair because it ensured that Northrop Grumman would submit its final proposal under a complete misapprehension of the Air Force's evaluation criteria. In any event, as the lower court also correctly held, the FAR's categorical prohibition on misleading and unequal discussions does not create an exception for discussions touching upon legal issues. *See* FAR 15.306(e)(1). Try as it may, Raytheon cannot fashion such an exception from common law contract precedent.

Second, as the lower court found, Northrop Grumman introduced sufficient evidence for the GAO reasonably to conclude that Northrop Grumman had been prejudiced by the Air Force's actions. A45. Indeed, the IR&D cost reductions proposed by Raytheon [redacted]

[redacted] More fundamentally, however, the rationality of the Air Force's corrective action does not stand or fall on the strength of the GAO's prejudice determination. As did the lower court, this Court should reject Raytheon's attempts to impose procedural prejudice requirements on the GAO and protesters that do not exist under the law. A50098. The Air Force was free to take corrective action after determining that a serious procurement error occurred. The decision below should be affirmed.

ARGUMENT

I. Standard of Review

Raytheon's brief fails even to mention the standard of review on appeal, which is telling. This Court "review[s] the Court of Federal Claims' legal determinations de novo and its factual findings for clear error." *Palladian Partners, Inc. v. United States*, 783 F.3d 1243, 1252 (Fed. Cir. 2015). This Court will deem a factual finding as clearly erroneous only if, upon review of the entire record, the court is left with the "definite and firm conviction" that the finding was a mistake. *Gaylord v. United States*, 777 F.3d 1363, 1367 (Fed. Cir. 2015) (quoting *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948)) (internal quotation marks omitted).

As the protester, Raytheon bears the "heavy burden" of demonstrating that the Air Force's decision to take corrective action lacked any rational basis. *Impresa Construzioni Geom. Domenico Garufi v. United States*, 238 F.3d 1324, 1333 (Fed. Cir. 2001). The Administrative Procedure Act's "arbitrary and capricious" standard guided the court's inquiry below. *See* A23 (citing 28 U.S.C. § 1491(b)(4) and 5 U.S.C. § 706). That standard, of course, is "highly deferential." *Advanced Data Concepts, Inc. v. United States*, 216 F.3d 1054, 1058 (Fed. Cir. 2000).

Raytheon's burden is not lessened simply because its protest involves an agency decision to take corrective action. *Cf. FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 514 (2009) (there is "no basis in the Administrative Procedure Act . . . for a requirement that all agency change be subjected to more searching review"). To the contrary, in such circumstances, Raytheon continues to bear a "heavy burden," *Centech Grp. v. United States*, 554 F.3d 1029, 1037 (Fed. Cir. 2009), and this Court's review remains "a deferential one," *Turner Constr. Co. v. United States*, 645 F.3d 1377, 1384 (Fed. Cir. 2011). It is well established that "[c]ontracting officers are entitled to broad discretion in the procurement process, including in their decisions to take corrective action." *Jacobs Tech. Inc. v. United*

States, 100 Fed. Cl. 186, 190 (2011) (citation omitted); *accord ManTech Telecomms. & Info. Sys. Corp. v. United States*, 49 Fed. Cl. 57, 65 (2001). In particular, "[c]ontracting officers are afforded broad discretion to take corrective action if they determine that such action is necessary to ensure fair and impartial competition." *Ceres Gulf, Inc. v. United States*, 94 Fed. Cl. 303, 318 (2010) (internal quotation marks omitted).

II. The Record Supports the Lower Court's Determination That the Air Force Conducted Misleading and Unequal Discussions

A. The Air Force's Conclusion That It Had Engaged in Misleading and Unequal Discussions Was Rational

The lower court determined that the Air Force's voluntary decision to take corrective action to remedy its misleading and unequal discussions was rational. A45. That conclusion is well supported by the record and should be affirmed.

The relevant facts are straightforward. The Air Force committed in the RFP to perform a price realism analysis and warned offerors that unrealistically low proposed prices could be grounds for eliminating a proposal from competition. A398. During discussions, the Air Force sent Northrop Grumman EN 011 stating, in relevant part:

> [A]ny cost claimed or considered to be IR&D or a capital investment shall not be allowable as indirect charges for work

> implicitly required for performance (necessary to perform the contract) or explicitly required to be done by the terms of the contract. Any such costs should be considered as direct charges to the 3DELRR contract. Further, unless properly segregated and agreed to as unallowable costs IAW FAR Part 31, any such costs may be deemed unrealistic.
>
> . . .
>
> In addition, any methodology proposing savings, which could be considered contingent on future events may be considered speculative and unrealistic as regards savings on the efforts proposed for purposes of the cost/price used in the Best Value Assessment.

A1210; *see also* A11.

After receiving a similar EN, Raytheon told the Air Force that it believed the agency's standard for evaluating IR&D was inconsistent with this Court's decision in *ATK Thiokol, Inc. v. United States*, 598 F.3d 1329 (Fed. Cir. 2010). A1218; *see also* A11-12. Raytheon contended that the Air Force should permit as allowable indirect costs IR&D cost reductions for work implicitly required or necessary to perform the contract. A1215; A1218; *see also* A11-12.[11]

[11] Until it arrived in this Court, Raytheon had never contended that the FAR *required* the Air Force to adopt this IR&D approach in the procurement. To the contrary, Raytheon conceded that the Air Force had discretion to impose price realism and reasonableness evaluation standards more demanding than what was required under the law. A238-39; *see also infra* p. 33 n.13.

In reaction to Raytheon's response, the Air Force reversed course and adopted Raytheon's preferred standard for evaluating proposed IR&D. *See* A13-14. Contrary to the instructions provided to Northrop Grumman in EN 011, the Air Force decided that work "implicitly required for performance (necessary to perform the contract)" *would be* considered an allowable indirect cost and *would not be* deemed unrealistic. A1868-72; *see also* A41. Also contrary to EN 011's instructions, the Air Force decided that IR&D dependent upon future contingencies *would not be* evaluated as "speculative and unrealistic." A41; A1209-10.

The Air Force never communicated its changed IR&D evaluation approach to Northrop Grumman. A41; *see also* RTN Br. at 47-48. The Air Force, however, did assure *Raytheon* that the agency was no longer concerned about the future contingencies of Raytheon's proposed IR&D. A41; *see* A50861. And the Air Force also made clear to Raytheon that, [redacted] on future IR&D for work implicitly required or deemed necessary for contract performance, Raytheon's proposal no longer risked being evaluated as unrealistic. *See* A12-14; A19; A41; A50862-63. As a result, Raytheon [redacted] while Northrop Grumman submitted a final

proposal consistent with the EN instructions it had received [redacted] [12] *See* A1516-17. The Air Force then evaluated Raytheon's proposed IR&D in a manner consistent with its changed approach – and, as Raytheon evidently concedes (RTN Br. at 24), *inconsistent* with the instructions sent to Northrop Grumman. A41. [redacted] Raytheon was awarded the contract.

Based on this sequence of events, the Air Force's decision to reopen discussions with all offerors was eminently reasonable. As the lower court recognized (A41-42), it is a fundamental procurement principle that agencies may not mislead offerors about evaluation standards – especially not by changing those standards mid-procurement and by failing to notify offerors. *See, e.g.*, *AshBritt, Inc. v. United States*, 87 Fed. Cl. 344, 372-73 (2009) (price discussions were misleading where agency changed price evaluation

[12] Lockheed Martin never received anything like EN 011 [redacted]

standard without advising offerors); *Gentex*, 58 Fed. Cl. at 653 ("[W]here an agency fails to resolve an ambiguity during discussions which should have been reasonably detected and which materially prejudices an offeror, the agency has failed in its obligation to conduct meaningful discussions.") (internal quotation marks omitted); *Vitro Servs. Corp.*, B-233040, 89-1 CPD ¶ 136, at 4 (Comp. Gen. Feb. 9, 1989) ("[W]here an agency inadvertently misleads a firm during discussions, with the result that the firm may not have competed on an equal basis, the proper course of action for the agency to take is to reopen discussions with all firms.").

Still less may agencies do what the Air Force did here – change evaluation standards [redacted]. As the lower court explained (A42), the FAR explicitly prohibits agencies from "engag[ing] in conduct that . . . [f]avors one offeror over another." FAR 15.306(e)(1). It is no answer to argue, as Raytheon does, that the Air Force's decision not to inform Northrop Grumman was a "tailor[ing]" of discussions to the individual offerors' proposals. RTN Br. at 47-48. While it is true that "an agency has considerable discretion in conducting discussions with offerors, that discretion is not a license to mislead an offeror when the Government knows than an offeror's interpretation [of procurement rules] is contrary, in

a material way, to its own interpretation and that of a successful offeror." *Gentex*, 58 Fed. Cl. at 653.

The rules against misleading and unequal treatment are fundamental to the integrity of the procurement system. Such rules protect offerors – by ensuring that procurements are "conducted on as level and fair a playing field as possible" – and the government – by ensuring a maximal "level of competition" on equal terms. *U.S. Foodservice, Inc. v. United States*, 100 Fed. Cl. 659, 686 (2011). Discussions are, after all, designed to "maximize the Government's ability to obtain best value" (FAR 15.306(d)(2)), and leaving Northrop Grumman out of the same discussions that the Air Force had with Raytheon undermined that objective. *See* A44-45 (finding that Northrop Grumman likely would have submitted a more attractive bid had it not been misled). Given the facts of this case, the Air Force acted rationally in taking corrective action to restore fairness to the procurement.

B. Raytheon's Arguments to the Contrary Are Unpersuasive

Raytheon does not dispute the lower court's findings that the Air Force provided IR&D cost reduction instructions to Northrop Grumman that differed from those ultimately provided [redacted] proposed cost reductions in accordance with the instructions [redacted]

received. Instead, Raytheon contends that, notwithstanding these facts, the Air Force was prohibited *as a matter of law* from voluntarily curing its misleading and unequal treatment. But Raytheon's argument ignores critical facts found by the lower court and misinterprets the applicable law. The Court should reject Raytheon's position.

1. Raytheon's "Misstatement of Law" Argument Is Beside the Point

On Raytheon's telling, the Air Force misstated the law to Northrop Grumman about what types of IR&D could lawfully be proposed under the FAR. Because offerors are expected to know the law and seek immediate clarification when an agency says something objectionable during procurements, according to Raytheon, the Air Force's effort to remedy its own misstatement through corrective action was irrational. This argument is flawed at every turn.

First and foremost, Raytheon ignores the critical facts supporting the decision below. As the lower court emphasized, the Air Force did not simply communicate a mistake of law to the offerors. In the court's own words:

> [U]nder the circumstances that actually exist in this case, the Air Force did not treat all of the offerors equally; once it determined that its interpretation of the law was mistaken, it

> suggested to some, but not all, of the offerors that its position had changed. Therefore, regardless of what Northrop knew or did not know about the law concerning the allowability of IR&D costs, it did not know how the Air Force actually planned to treat IR&D costs – information that the Air Force provided to Raytheon [redacted]

A50097. Raytheon's narrative omits *both* the agency's misstatement concerning its own cost/price evaluation standard *and* the agency's subsequent unequal treatment of Northrop Grumman. It is for these reasons that the lower court correctly concluded that "Northrop's understanding of the relevant law" was "of no moment." A43. Northrop Grumman was entitled to rely on the Air Force's representations regarding the standards that it intended to apply in evaluating offerors' proposals. Having unambiguously stated one standard to Northrop Grumman, the agency was obligated to clarify that its evaluation standard had changed, *particularly* where [redacted] At the very least, the agency had discretion to remedy this mistake, once brought to its attention. Thus, under the particular facts of this procurement, Raytheon cannot shift the blame for the Air Force's conduct onto Northrop Grumman.

2. Northrop Grumman Was Not Obligated to Dispute EN 011's Instructions Given the Air Force's Many Indications That It Had Deliberately Imposed a Conservative Approach to IR&D Cost Reductions

Raytheon nevertheless contends that this Court should disregard the lower court's factual finding that Northrop Grumman was "misled" and, as a matter of law, deem that Northrop Grumman was not misled, because Northrop Grumman purportedly had some obligation to complain that EN 011 "directly contradicted" this Court's decision in *ATK Thiokol*. *See* RTN Br. at 24. No such obligation, however, existed either in fact or as a matter of law. First, EN 011 did not, as Raytheon incorrectly asserts, merely express an interpretation of law. Instead, as discussed above, EN 011 set forth the standard by which the Air Force intended to evaluate proposed cost reductions. And Raytheon conceded below that the Air Force was permitted to insist on more restrictive evaluation standards for proposed IR&D than what *ATK Thiokol* may have otherwise generally allowed. *See* A238-39 ("Agencies certainly have discretion when conducting procurements to impose particular evaluation and contracting standards more strict than those encompassed in the FAR or the statutes."). Thus, even if EN 011, in fact, espoused an interpretation of IR&D more restrictive than permitted under

the law, by Raytheon's own admission, the EN would not have been obviously objectionable.

In any event, Northrop Grumman was not attempting to somehow game the system by ignoring an "obvious" error. As the lower court correctly found, Northrop Grumman in fact was misled about the Air Force's approach to IR&D cost reductions. A42. Raytheon identifies no evidence calling into question the lower court's finding that Northrop Grumman was misled in this way. Nor can it do so, given the substantial record demonstrating that Northrop Grumman was justified in believing that the Air Force had intentionally adopted in this procurement a conservative approach for evaluating proposed IR&D cost reductions.

First, contrary to Raytheon's unduly narrow interpretation, EN 011 was not merely a recitation of the law. Rather, it stated the Air Force's concern about price realism and the agency's intended approach to evaluating IR&D cost reductions given that concern. Raytheon cherry-picks the phrase "[i]n accordance with (IAW) FAR 31.205-18" and ignores the EN's remaining language. In particular, Raytheon overlooks: (1) EN 011's introductory paragraph, which stated that "[t]he Government [wa]s concerned with the reasonableness and realism of any affordability initiative

offered," A11; A1209; (2) a later paragraph, which stated that "any methodology proposing savings, which could be considered contingent on future events may be considered speculative and unrealistic," A11; A1210; and (3) the final sentence in the key paragraph, which provided that, "unless properly segregated and agreed to as unallowable costs IAW FAR Part 31, any such costs may be deemed unrealistic," A11; A1210. Read in its entirety, EN 011 made clear that the agency intended to apply a conservative IR&D cost reduction approach in conducting its price realism evaluation.

But EN 011 went beyond merely articulating the agency's interpretation of IR&D allowability; it specifically requested that offerors "agree[]" to that interpretation. A1210. Had the Air Force merely proposed to apply an unvarnished, universally-held, post-*ATK Thiokol* standard for IR&D allowability, as Raytheon contends, there would have been no need to request such an agreement and a specific H-Clause memorializing that agreement. *See id.* The Air Force sought agreement because it wanted to ensure that offerors consented to its narrow evaluation standards.[13]

[13] Raytheon argues for the first time in a footnote in its reply in support of its motion to stay (Dkt. 63 at 4 n.2) that, based on DFARS 231.205-18(c), the Air Force lacked authority to adopt a restrictive approach to IR&D. This argument is entirely misguided. That provision addresses an agency's authority to limit IR&D allowability on an agency-wide basis through

Raytheon's myopic reading of EN 011 also ignores that the EN invoked not just FAR 31.205-18, but also 10 U.S.C. § 2320, which addresses the intellectual property (technical data) rights that the government may obtain from contractors. Under that provision, the Air Force's intellectual property rights would have been severely restricted if a contractor had proposed indirect IR&D as a cost reduction for work necessary to perform the 3DELRR contract. It was therefore in the Air Force's interest to construe IR&D as narrowly as possible in this procurement. By referencing Section 2320, and further stating that "[a]ny cost reduction efforts specifically expended for or anticipation of the 3DELRR requirements should be considered to be generated in performance of Government funded contract requirements," EN 011 made clear that the Air Force desired to

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supplementation of the regulations, but places no limits on an agency's ability to impose restrictions on IR&D allowability in a single procurement. *See generally* DFARS 201.304 (describing process of agency supplementation of FAR or DFARS). The FAR expressly provides that cost allowability is determined not just by the terms of the FAR, but also by the specific terms of the contract at issue (FAR 31.201-2(a)), and the DFARS does not affect this FAR provision. In any event, Raytheon has waived this argument on appeal. *See, e.g.*, *San Carlos Apache Tribe v. United States*, 639 F.3d 1346, 1354-55 (Fed. Cir. 2011); *SmithKline Beecham Corp. v. Apotex Corp.*, 439 F.3d 1312, 1319 (Fed. Cir. 2006).

maximize its data rights and also required the offeror's assent to this arrangement. *See* A1210.

Raytheon overlooks additional record evidence making clear the extent of the Air Force's demonstrated concerns about IR&D-dependent proposals and confirming that Northrop Grumman was misled. Apart from EN 011's focus on reimbursement and the implications for the government's data rights, the Air Force also sent Northrop Grumman EN 010, which sought confirmation that Northrop Grumman's [redacted] *See* A50845. In addition, EN 003 requested information about [redacted] IR&D investments and the effect on [redacted] and ultimately prompted Northrop Grumman to reassure the Air Force that its proposal did not rely on such investments. A10; A1204.

Raytheon likewise ignores published Defense Contract Audit Agency ("DCAA") guidance relating to government contractors' use of IR&D, which further supports the lower court's finding that Northrop Grumman was misled into believing that the Air Force would not evaluate as unrealistic IR&D cost reductions for work implicitly required for contract

performance. A41. That guidance – which post-dated the *ATK Thiokol* decision – tracked closely the language of EN 011:

> In accordance with the IR&D definition at FAR 31.205-18(a), any efforts that are "sponsored by a grant or required in the performance of a contract" are not IR&D. Auditors must ensure that contractors *do not include costs in the IR&D cost pools for developmental effort that are specifically required in the performance of a contract or those efforts that are not explicitly stated in the contract, but are necessary to perform the contract*.

DCAA, *Contract Audit Manual* 7-1502(d) (2014), *available at* A2336-37 (emphasis added); *see also id*. 7-1503(b), *available at* A2337 ("[T]here is a continuing audit risk that research and development performed directly for a contract may be inappropriately charged to IR&D accounts. This audit risk is more prevalent when research and development effort is required under fixed price contracts.").[14] In addition, leading commentators had observed that *ATK Thiokol* "neither contemplated nor addressed a situation" in which the "contractor signs either a commercial or Government contract to *develop* a new product agreeing to allocate the cost of some of the development work

[14] Although DCAA guidance is not part of the FAR, the FAR refers contractors to DCAA publications for guidance on cost accounting issues, including issues regarding IR&D. *See* FAR 31.002 (referencing DCAA Pamphlet No. 7641.90, *available at* http://www.dcaa.mil/DCAAM_7641.90.pdf, which references the above-quoted guidance at paragraph 2.a.2).

to IR&D." *Postscript II: Independent Research and Development Costs*, Nash & Cibinic Report, July 2010, 24 No. 7 at ¶ 31, Addendum (emphasis added).

For these reasons, among others, Raytheon can derive no support from *Statistica, Inc. v. Christopher*, 102 F.3d 1577 (Fed. Cir. 1996), which held that, in certain circumstances, offerors have a duty to seek clarification of agency statements. In *Statistica*, the protester admitted that it "didn't understand what the Government was doing" when the agency amended its solicitation, and yet nonetheless failed to seek clarification before submitting its final offer. *Id.* at 1582. Here, by contrast, the Air Force's statements in EN 011 were unambiguous, and were corroborated by other agency statements and the federal government's published audit manual guidance. Nor did *Statistica* involve unequal treatment favoring certain offerors over others: the agency there gave the same instructions to both relevant offerors. *Id.* at 1579. Here, of course, [redacted]

Statistica also is inapposite because it imposed a duty to seek clarification of ambiguities in a *solicitation*. *Id.* at 1582-83. Raytheon's citations to *COMINT Sys. Corp. v. United States*, 700 F.3d 1377, 1382 (Fed.

Cir. 2012), and *Blue & Gold Fleet, L.P. v. United States*, 492 F.3d 1308, 1313 (Fed. Cir. 2007) are inapt for the same reason. Here, the Air Force did not err in its solicitation but later, during discussions and evaluation of proposals. None of the cases cited by Raytheon imposes a "duty to seek clarification" of issues that arise solely during discussions.

Moreover, although Raytheon attempts to fashion a "duty to seek clarification" out of the waiver rules applicable to protests brought in the Court of Federal Claims, such waiver rules did not apply to Northrop Grumman's protest at the GAO. To the contrary, GAO regulations provided that Northrop Grumman was *not permitted* to protest discussion or evaluation flaws until after the contract award and post-award debriefing. *See* 4 C.F.R. § 21.2(a)(2); *see also Boeing Co.*, B-311344 *et al.*, 2008 CPD ¶ 114, at 28 & n.41 (Comp. Gen. June 18, 2008). As the lower court found, given this regulation, the record is "unequivocal" that Northrop Grumman brought its protest in a timely fashion. A44. Thus, contrary to Raytheon's assertions, Northrop Grumman did not have a duty to protest upon receipt of EN 011.

Whether or not Northrop Grumman agreed with EN 011's conservative approach to the evaluation of IR&D cost reductions, Northrop

Grumman was justified in believing that the EN's instructions reflected a deliberate choice by the agency. More than that, Northrop Grumman was entitled to count on the agency's even-handedness in enforcing its own instructions. Northrop Grumman could not possibly have anticipated that the Air Force would abandon its stated position [redacted][15]

3. In Any Event, the FAR Does Not Countenance Misleading and Unequal Discussions Regarding Legal Issues

Even if this procurement involved a mere misstatement of law, however, Raytheon's argument still would fail. Raytheon argues that, as a matter of law, "an agency's misstatement of the law can be neither

[15] Raytheon complains that upholding the Air Force's corrective action would "place[] the government at risk of answering for costs that a contractor incurs upon following a legally incorrect course." RTN Br. at 49. That is not so. Had the Air Force either applied the evaluation standards it described in EN 011 *or* informed Northrop Grumman [redacted] of its changed approach, Northrop Grumman would not have had this ground for protest. Raytheon has offered no evidence – and the court below found none – that the mere issuance of a replacement EN to Northrop Grumman would have revealed Raytheon's pricing strategy. In any event, even if the Air Force's initial decision to leave its unequal treatment uncorrected stemmed from a concern about potentially revealing Raytheon's pricing strategy, the unequal treatment was unlawful all the same, and the Air Force certainly acted within its reasonable discretion in seeking to correct it.

misleading nor unequal" based on a supposed background "presumption that contractors will know the law." RTN Br. at 43. But the FAR's prohibition on unequal treatment of offerors is broad and without exception: "Government personnel involved in the acquisition shall not engage in conduct that . . . [f]avors one offeror over another[.]" FAR 15.306(e)(1). As the lower court explained, nothing in this provision excuses unequal or misleading discussions when such discussions touch upon a legal issue. A42. On the contrary, the provision categorically forbids any unequal treatment. It is with good reason, then, that Raytheon's misstatement of law argument has already been rejected in two forums: it is incompatible with the governing regulation.

Raytheon's position is also unsupported by any relevant case law. *Cf. Ashbritt*, 87 Fed. Cl. at 372 (supposition that misled offeror could have ignored agency's advice "does not erase" misleading or unequal discussions). Below, Raytheon acknowledged that it could not find a single procurement decision holding that unequal treatment is permissible when discussions involve an alleged mistake of law. *See* A176. Indeed, to the extent there is authority addressing Raytheon's peculiar claim that an agency is free to mislead offerors about legal matters, that authority goes *against*

Raytheon. *See, e.g.*, *AMEC Earth & Envt'l, Inc*., B-401961 *et al.*, 2010 CPD ¶ 151, at 7-8 (Comp. Gen. Dec. 22, 2009) (finding misleading discussions where agency knew protester's mistaken belief that worksite was designated as "wetland" under the law, did not inform protester of mistake, and evaluated other proposals as though site were not a "wetland").

The procurement cases that Raytheon cites in this Court fare no better. Most of those cases – even those that Raytheon quotes at length – involved disputes over how to interpret and enforce existing contracts between the government and private parties. They do not support Raytheon's claim that its proposed rule governs offeror discussions during competitive procurements, particularly where the government engaged in different discussions with different offerors. *See, e.g.*, *Gen. Builders Supply Co. v. United States*, 409 F.2d 246, 249-50 (Ct. Cl. 1969) (contractor could not impose unilateral understanding of disputed "term of art" on government, particularly where government's understanding of term was well-known to anyone versed in relevant law); *see also Gen. Eng'g & Mach. Works v. O'Keefe*, 991 F.2d 775, 779-80 (Fed. Cir. 1993) (discussing contractors' presumed knowledge of the law in context of *Christian* doctrine); *Mills v. United States*, 410 F.2d 1255, 1257-58 (Ct. Cl. 1969) (stating, in dictum,

that even if plaintiffs could demonstrate a "misrepresentation of law," such misrepresentation did not constitute duress).

Raytheon's reliance on *Toyo Menka Kaisha, Ltd. v. United States*, 597 F.2d 1371, 1377 (Ct. Cl. 1979) particularly is misplaced. There, as Raytheon notes, the court invalidated a contract "because the contracting officer had no authority to make an award to an offeror whose bid deviated so substantially from the solicitation that it materially changed the terms of the government's offer." RTN Br. at 39. But Raytheon omits the court's explanation for its holding:

> The requirement that a bid be responsive is designed to avoid unfairness to other contractors who submitted a sealed bid on the understanding that they must comply with all of the specifications and conditions in the invitation for bids, and who could have made a better proposal if they imposed conditions upon or variances from the contractual terms the government had specified.

597 F.2d at 1377. Observing that the hallmark of competitive procurements is equal knowledge of evaluation standards, the court went on to explain that "the requirement of responsiveness is designed to avoid a method of awarding government contracts that would be similar to negotiating agreements but which would lack the safeguards present in either that system or in true competitive bidding." *Id.*; *see also Prestex Inc. v. United*

States, 320 F.2d 367, 372 (Ct. Cl. 1963) (discussing unfairness arising when bidders are held to varying standards). Rather than supporting Raytheon's position, then, *Toyo Menka Kaisha* provides additional support for the Air Force's corrective action and the decision below.

Raytheon can, of course, point to a number of cases in which courts have held that an agency had no obligation to inform offerors of relevant, but obvious, law or facts. *See, e.g.*, *Res. Conservation Grp. v. United States*, 96 Fed. Cl. 457, 466 (2011) (no obligation to reiterate rule published in CFR); *440 East 62nd St. Co.*, B-276058 *et al.*, 98-1 CPD ¶ 73 at n.9 (Comp. Gen. Dec. 11, 1997) (no obligation to reiterate proposal weakness of which bidder was indisputably aware). But those cases say nothing about whether an agency should – or at a minimum, has discretion to – correct its own affirmative misstatement regarding its own evaluation standards – particularly where the agency has made its *actual* interpretation [redacted]

[redacted]

4. Raytheon's Common Law Contract Cases Are Inapposite

Finding no support in the governing regulation's text – or, indeed, in any case interpreting that regulation – Raytheon argues that its position is supported by the common law of contracts. RTN Br. at 37-40. But the

lower court rightly rejected Raytheon's common-law contract cases as inapposite because arms' length negotiations are not analogous to government procurements. A43; *see also* A50096-97. In this highly regulated area, the government is held to different standards than a typical self-interested party bargaining in the marketplace.

With the aim of "maximiz[ing] the Government's ability to obtain best value," *see* FAR 15.306(d)(2), the FAR imposes significant and unique constraints on the government. Unlike a private entity, the government must consider each offeror's proposal and "assess their relative qualities solely on the factors and subfactors specified in the solicitation," *id.* 15.305(a), must document "[t]he relative strengths, deficiencies, significant weaknesses, and risks" of each proposal, *id.*, and must ultimately base its award decisions on "evaluation factors and significant subfactors that are tailored to the acquisition," *id.* 15.304(a). The government is further required to consider, "in every source selection," "[p]rice or cost to the Government," "[t]he quality of the product or service" being offered, and each contractor's "past performance." *Id.* 15.304(c). If the government enters into discussions with offerors, "the contracting officer must . . . indicate to, or discuss with, each offeror still being considered for award, deficiencies, significant weaknesses,

and adverse past performance information to which the offeror has not yet had an opportunity to respond," *id.* 15.306(d)(3), with the aim of maximizing value for the government, *id.* 15.002.

It may well be, as Raytheon contends, that the *interpretation* of contracts between the government and private parties is governed by common law contract principles.[16] But the FAR makes clear that the ground rules that govern competitions for federal agency contracts are not. *See, e.g.*, FAR 15.002 (competitive procurement process is "designed to foster an impartial and comprehensive evaluation of offerors' proposals, *leading to selection of the proposal representing the best value to the Government*") (emphasis added). Therefore, whatever "sharp distinction" might exist

[16] This principle – and only this principle – is what is established by the cases that Raytheon cites (RTN Br. at 37) for the proposition that "[c]ontracts between the government and private contractors are subject to the general law of contracts." *See, e.g.*, *Turner Constr. Co. v. United States*, 367 F.3d 1319, 1321 (Fed. Cir. 2004) ("The *interpretation of* contracts is reviewed as a matter of law. Contracts between the government and private contractors are subject to the general law of contracts.") (emphasis added) (citation omitted); *Mobil Oil Exploration & Producing Se., Inc. v. United States*, 530 U.S. 604, 607 (2000) ("When the United States *enters into contract relations*, its rights and duties *therein* are governed by the law applicable to contracts between private individuals.") (emphases added) (internal quotation marks omitted). Raytheon is unable to invoke any authority for its argument that, where "the general law of contracts" conflicts with the FAR, the FAR gives way.

between "FAR-based competitive procurements and the rest of government contract law" (RTN Br. at 43), is not an artifact of the rules governing misleading discussions, but a result of the detailed legal regime governing competitive procurements.

What is more, the cases cited by Raytheon are not even helpful to Raytheon under the facts of this case. The common law of contracts prohibits affirmative misrepresentations about the law by a party with greater bargaining power, as the Air Force had over the offerors here. *See, e.g.*, *C & L Constr. Co. v. United States*, 6 Cl. Ct. 791, 797 (1984), *aff'd without opinion*, 790 F.2d 93 (Fed. Cir. 1986). Though Raytheon quotes *C & L Construction Co.* for the proposition that "misrepresentations regarding matters of law cannot provide a reason for disturbing a contract" (RTN Br. at 37), that case goes on to recognize that "in some instances, mutual mistake of law may be a basis for reformation, especially when affirmative government action is involved." 6 Cl. Ct. at 797. And it cites two other decisions articulating the same principle. *Id.* (citing *Blackhawk Hotels Co.*, ASBCA No. 13333, 68-2 BCA ¶ 7265, and *Rust Eng'g Co.*, B-

180071, 74-1 CPD ¶ 101 (Comp. Gen. Feb. 25, 1974)).[17] Such authority belies any claim that the "duty to know the law" is so foundational that it must be incorporated, *sub silentio*, into FAR 15.306(e)(1)'s otherwise absolute text.

III. The Court's Prejudice Findings Are Factually and Legally Sound

Raytheon also challenges the lower court's finding that Northrop Grumman was prejudiced by the Air Force's misleading and unequal

[17] In any event, there is ample authority holding that a mistake of law can justify rescission of a contract even where there has been no affirmative government action. *See, e.g.*, Restatement (Second) of Contracts § 152 (1981) (unless one party "bears the risk" of mistake, mistake as to a "basic assumption" on which a contract rests is grounds for reformation or rescission); *id.* § 151 (defining "mistake" as "a belief that is not in accord with the facts") and cmt. b ("The rules stated in this chapter do not draw the distinction that is sometimes made between 'fact' and 'law.' They treat the law in existence at the time of the making of the contract as part of the total state of facts at that time."); 27 *Williston on Contracts* § 70:124 (4th ed. 2014) ("[M]istakes of fact and law weigh in equally on equity's scales of justice, making relief available where the intention of the parties has been thwarted by a mutual mistake of law."); *id.* § 70:125 ("To justify rescission, a mistake of law must have related to a question, the answer to which was assumed as part of the fundamental basis of the transaction."); 7 Joseph M. Perillo, *Corbin on Contracts* § 28.49 (rev. ed. 2002) ("Today, the rule denying relief for mistake of law has little vitality. It has been eroded by so many qualifications and exceptions, varying from jurisdiction to jurisdiction. It is common to find cases where the issue is not even raised."); 2 E. Allan Farnsworth, *Contracts* § 9.2 (2d ed. 1998) ("[T]he modern view is that the existing law is part of the state of facts at the time of agreement. Therefore, most courts will grant relief for such a mistake, as they would for any other mistake of fact.").

discussions. But its challenge misconstrues the administrative record, Northrop Grumman's burden, the function of GAO outcome prediction, and the requirements for agency corrective action. Northrop Grumman's competitive prejudice is clearly demonstrated by the record, was explicitly recognized by the GAO attorney during outcome prediction, and was confirmed by the lower court's findings of fact. In any event, the rationality of the Air Force's decision to take corrective action – and therefore the soundness of the lower court's decision – does not rise or fall on the GAO attorney's precise articulation of her prejudice finding. Finally, even if Raytheon's arguments were entirely correct (which they are not), Raytheon would still not be entitled to the relief it seeks. Raytheon has failed to identify any reversible error relating to prejudice, and the decision below should be affirmed for this reason as well.

A. As the Lower Court Found, Northrop Grumman Sufficiently Demonstrated Competitive Prejudice at the GAO

In its decision, the lower court recognized that: (1) all three offerors received acceptable technical compliance and risk ratings; (2) the difference between Northrop Grumman's and Raytheon's final proposed prices was [redacted]; (3) Raytheon [redacted]

[redacted]; and (4) Northrop Grumman is a large government contractor with similar extensive financial resources. A45. Raytheon cannot reasonably dispute a single one of these factual findings, let alone demonstrate that any is clearly erroneous.

Based on these undisputed facts, the court below determined that "it was entirely reasonable for the GAO attorney to surmise that Northrop possessed the financial means to propose IR&D cost reductions [redacted] making it possible for Northrop to overcome the [redacted] differential in proposed prices." *Id.* Accordingly, the court found that the GAO attorney's determination at outcome prediction that Northrop Grumman "had a substantial chance of receiving the contract in the absence of the Air Force's misleading and unequal discussions" was "rational." *Id.* These findings, too, are entitled to deference. As this Court has held, "[p]rejudice is a question of fact," *Bannum, Inc. v. United States*, 404 F.3d 1346, 1353 (Fed. Cir. 2005), and reversal is warranted only if the Court is "left with a definite and firm conviction that a clear error of judgment or a mistake has been committed," *Centech Grp.*, 554 F.3d at 1037.

No such error or mistake was made here. As the lower court recognized (A17), Northrop Grumman offered sufficient evidence at the GAO to show that it had been prejudiced by the Air Force's misleading and unequal discussions regarding IR&D. First, Northrop Grumman put to rest any notion that it had made a calculated business decision to forego proposing implicitly required IR&D or IR&D dependent on future contingencies, showing that its decision not to rely on such IR&D cost reductions was driven entirely by its understanding of the solicitation requirements and EN 011. A2370. It also demonstrated that [redacted] differences in proposing IR&D were directly tied to the materially different instructions [redacted] received. *See, e.g.*, A2369-72. Northrop Grumman pointed out that the [redacted]

In addition, Northrop Grumman demonstrated that it had the ability to propose IR&D in amounts sufficient to overcome the price differential with Raytheon's winning proposal. In particular, Northrop Grumman

demonstrated that it had an established history of investing in related technologies and that, as the Air Force acknowledged, Northrop Grumman had previously invested over [redacted] in technology related to the 3DELRR program. A2295 (citing excerpts of Northrop Grumman's initial proposal at A2340-44); A1738-39. Northrop Grumman emphasized that its size and assets would have permitted it to propose IR&D reductions of the sort proposed [redacted] A2295 (citing Air Force's responsibility determination for Northrop Grumman); A51132. And Northrop Grumman identified a particular program – [redacted] – that shared commonalities with the 3DELRR system and thus were likely candidates for IR&D. A2295 (citing excerpts of Northrop Grumman's initial proposal at A2340-44).

Northrop Grumman repeatedly affirmed at the GAO that it would have submitted a radically different proposal had it been informed during the procurement of the Air Force's changed approach to evaluating IR&D. A17; A2275; A2295; A2369-70; A2537. It would have been incentivized to propose IR&D, of course, because the government reimburses a large proportion of contractors' IR&D investments. Raytheon cannot reasonably

dispute this fact, especially given that [redacted] Far from being "premised on speculation" (RTN Br. at 54), then, the GAO's and lower court's findings of prejudice were well supported by the agency record.

B. The GAO Explicitly and Reasonably Concluded That Northrop Grumman Had Been Prejudiced

With these facts established in the record, it is not at all surprising that the GAO attorney swiftly and easily disposed of Raytheon's prejudice challenge during the protests. Although Raytheon now contends that the GAO attorney was "silen[t] on prejudice" during outcome prediction (RTN Br. at 52), it knows full well that is not the case. Indeed, Raytheon admitted in its complaint that the GAO attorney *did* address prejudice during outcome prediction:

> She acknowledged the arguments of the Air Force and Raytheon that Northrop could not establish it was prejudiced by the EN. In response, the GAO attorney said that Northrop had not disclaimed any possibility of relying on future IR&D in the event the Agency took a different view. Accordingly, the GAO attorney found that the "arguments and statements" in Northrop's filings "sufficiently demonstrated prejudice."

A72. Raytheon cannot escape its own complaint's admissions. *See, e.g.*, *Reliable Contracting Grp., LLC v. Dep't of Veterans Affairs*, 779 F.3d 1329,

1334 (Fed. Cir. 2015) (admissions in complaints "have the effect of withdrawing a fact from issue and dispensing wholly with the need for proof of the fact") (internal quotation marks omitted); *E.C. McAfee A/C Bristol Metal Indus. of Can. Ltd. v. United States*, 832 F.2d 152, 154 n.* (Fed. Cir. 1987) ("[P]leadings are judicial admissions and a party may invoke the language of the opponent's pleading to render the facts contained therein indisputable.").

Nor can Raytheon mount any serious challenge to the premises underlying the GAO attorney's conclusion. Raytheon observes that "Raytheon [redacted] relied on [redacted] IR&D [redacted]." RTN Br. at 55. True, but irrelevant. The fact remains that [redacted] And there is no indication anywhere in the record that Northrop Grumman – an offeror with the same resources [redacted], a history of IR&D investment, and another ongoing [redacted] program sharing commonalities with 3DELRR – was

incapable of proposing [redacted] IR&D cost reductions, had it understood the Air Force's changed position.[18]

C. The Court Correctly Determined That the GAO's Prejudice Finding Was Well Supported

Confronted with the GAO attorney's clear statement on prejudice, and the extensive evidence supporting that finding, Raytheon attempts to recast its challenges to the lower court's decision as claims of legal error. These challenges fare no better.

First, Raytheon's invocation of the *Chenery* doctrine is unavailing. *See SEC v. Chenery Corp.*, 332 U.S. 194 (1947). Raytheon argues that the lower court violated *Chenery* by supplying a rationale for the GAO's decision on which the GAO itself did not rely. RTN Br. at 51. But the doctrine does not even apply here, for several reasons. First, the lower court's charge was to review the *Air Force's* corrective action decision and, as explained below, the propriety of that decision does not hinge on the GAO attorney's particular expression of her reasoning during an informal,

[18] In arguing otherwise, Raytheon [redacted]

outcome prediction phone call. Second, prejudice is not "a determination or judgment which [the GAO] alone is authorized to make." *Chenery*, 332 U.S. at 196; *accord Fleshman v. West*, 138 F.3d 1429, 1433 (Fed. Cir. 1998).[19] *Chenery* has no application where (as here) an administrative agency and reviewing court are each tasked with assessing whether the challenged agency error was prejudicial. *See Newhouse v. Nicholson*, 497 F.3d 1298, 1301-02 (Fed. Cir. 2007).

In any event, while the lower court may have used different words or explained in more detail the administrative record so familiar to the GAO attorney, both the court and the GAO relied on the same rationale: The arguments and evidence advanced by Northrop Grumman during the protests demonstrated that it would have been possible for Northrop Grumman to rely on future IR&D to reduce its proposed price. *See* A72; A45. And the court below was obliged to uphold the GAO's (and ultimately the Air Force's) prejudice determination because clearly "the agency's path [could] reasonably be discerned." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State*

[19] In fact, there is *no* determination that is the GAO's alone to make, given that the GAO has authority only to issue *recommendations*, and not to issue a binding order requiring Air Force action. *See* 4 C.F.R. § 21.8; *see also* A25.

Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983); *see also In re Huston*, 308 F.3d 1267, 1280-81 (Fed. Cir. 2002).

Raytheon also argues that the lower court and the GAO held Northrop Grumman to the wrong legal standard on prejudice. RTN Br. at 52, 54. Raytheon is wrong on both counts. Although the court did state that the agency record demonstrated that it was "*possible* for Northrop to overcome the [redacted] differential in proposed prices" (emphasis added), it made explicit that it adjudged that possibility as amounting to a "substantial chance" of award. A45. And Raytheon offered no evidence to support its speculative claim that the GAO applied the wrong legal standard, even though, as protester, it clearly held the evidentiary burden on that point. *See Centech Grp.*, 554 F.3d at 1037. This Court should not draw any adverse inference here against the GAO; indeed, the presumption of governmental regularity dictates that any possible doubt goes against Raytheon. *See, e.g.*, *Lachance v. White*, 174 F.3d 1378, 1381 (Fed. Cir. 1999) (court's "presumption [is] that public officers perform their duties correctly, fairly, in good faith, and in accordance with the law and governing regulations . . .

unless there is irrefragable proof to the contrary.") (internal quotation marks omitted).[20]

In fact, as the lower court noted, it is Raytheon who persists in attempting to hold Northrop Grumman to a prejudice standard that lacks support under the law. A50097-98. Raytheon contends that Northrop Grumman was required to show "that the [IR&D-based] reductions would have changed its competitive position [redacted]" (RTN Br. at 55), but this Court has repeatedly rejected such a formulation. *See Bannum*, 404 F.3d at 1358 ("substantial chance" standard "is more lenient than showing . . . that but for the errors [the party] would have won the contract"); *CACI, Inc.-Fed. v.*

[20] Raytheon cites *Amazon Web Servs., Inc. v. United States*, 113 Fed. Cl. 102, 113 (2013) to suggest that a GAO outcome prediction is irrational if the record lacks affirmative evidence demonstrating that GAO applied the proper standard. *See* RTN Br. at 52. Setting aside the fact that this case is not binding precedent, *see AINS Inc. v. United States*, 365 F.3d 1333, 1336 n.1 (Fed. Cir. 2004), *abrogated on other grounds by Slattery v. United States*, 635 F.3d 1298 (Fed. Cir. 2011), and is an outlier for scrutinizing the GAO's prejudice determination in the first place, *see infra* pp. 60-64, its facts bear no resemblance to this case. In *Amazon*, the GAO sustained the protest because of two procurement defects, neither of which was prejudicial: for the first, the GAO did not even mention the prejudice requirement, let alone find prejudice; for the second, the GAO ignored the fact that the defect "equally affect[ed] all offerors." 113 Fed. Cl. at 111-12. Here, by contrast, the GAO attorney expressly found prejudice [redacted]

United States, 719 F.2d 1567, 1574 (Fed. Cir. 1983) (rejecting argument that required showing by protester "that, but for th[e] violation [of law], it would have been the successful offeror").[21] Before the GAO, Northrop Grumman was required to show no more than a substantial chance of award. *See, e.g.*, *Hi-Way Paving, Inc.*, B-410662, 2015 CPD ¶ 50, at 9 (Comp. Gen. Jan. 21, 2015).

Contrary to Raytheon's claims (RTN Br. at 57-58), Northrop Grumman was not required to articulate the precise IR&D investments it would have made in the counterfactual world in which the Air Force had treated it fairly. Nor does Raytheon cite any authority imposing such a requirement.[22] In fact, GAO precedent has firmly rejected any standard as

[21] *J.C.N. Construction, Inc. v. United States*, 107 Fed. Cl. 503, 518 (2012), does not hold otherwise; even if satisfying a "but for" standard is *sufficient* to establish prejudice, it is not *necessary*.

[22] *Hughes Missile Systems Co.* does not endorse Raytheon's proposed standard. B-272418 *et al.*, 96-2 CPD ¶ 221, 1996 WL 708611 (Comp. Gen. Oct. 30, 1996). There, the protester contended that it would have reduced its cost by replacing one warhead with a less expensive one, but never identified the new warhead it would have used. *Id.* at *11. However, that was the least of the protester's problems. The GAO also found that any change in warhead type may have reduced the protester's technical rating. *Id.* Moreover, price was only a small consideration in the evaluation and there was "no reasonable possibility that any improvement in Hughes's position with respect to the affordability criterion, which accounted for only 25 percent of the evaluation, would be sufficient to offset its evaluated

stringent as that proposed by Raytheon. *See, e.g.*, *KPMG LLP*, B-406409 *et al.*, 2012 CPD ¶ 175, at 11 (Comp. Gen. May 21, 2012) ("[W]e need not establish with certainty what the protester's approach would have been if the discussions had been meaningful; rather, a protester's reasonable assertion of a claim that it could have improved its competitive position is sufficient to demonstrate prejudice."); *Int'l Res. Grp.*, B-286663, 2001 CPD ¶ 35, at 9 (Comp. Gen. Jan. 31, 2001) ("[W]here we find an impropriety in the conduct of discussions, we will resolve any doubts concerning the prejudicial effect of the agency's actions in favor of the protester . . . ."); *Diverco, Inc.*, B-259734, 95-1 CPD ¶ 209, at 3-4 (Comp. Gen. Apr. 21, 1995) ("Where, as here, an impropriety in the conduct of discussions is found, it must be clear from the record that the protester was *not* prejudiced in order to deny the protest.") (emphasis added). In any case, Northrop Grumman *did* introduce evidence regarding its potential IR&D investments, pointing to the ongoing [redacted] project that could be leveraged for IR&D-related cost

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disadvantages under evaluation criteria worth 75 percent of the evaluation." *Id.* at *12. *Hughes Missile* is therefore nothing like this case, where Northrop Grumman stood a substantial chance of eliminating the decisive price difference separating its proposal from Raytheon's.

reductions. *See* A2295 (citing excerpts of Northrop Grumman's initial proposal at A2340-44).

D. The GAO's Prejudice Finding Is Immaterial in Any Event

Raytheon also assumes that the lower court was required, as a matter of law, to evaluate the GAO attorney's prejudice finding in assessing whether the Air Force's corrective action decision was rational. *See, e.g.*, RTN Br. at 51. Although the court below arguably accepted this assumption, it is not at all clear that the assumption is correct. Indeed, Court of Federal Claims precedent is divided on the issue.[23] This Court should decide that GAO prejudice findings – at least in the context of this informal

[23] *Compare Jacobs Tech.*, 100 Fed. Cl. at 197 ("[T]he Court determines that Jacobs' issues with regard to prejudice are not within the scope of the Court's review of GAO's decision. Although prejudice is essential to a decision to sustain a bid protest, it has no bearing on GAO's determination of whether the agency violated a procurement statute or regulation, and the resulting recommendation. In fact, even if GAO denied the protest (e.g., for lack of prejudice), the agency could still decide to take corrective action."), *and Navarro Research & Eng'g, Inc. v. United States*, 106 Fed. Cl. 386, 416 n.24 (2012) ("[W]hether the GAO protestor was prejudiced by the alleged procurement errors is irrelevant to the only issue properly before the court in this type of bid protest: whether the GAO decision sustaining the protest was rational."), *with Amazon*, 113 Fed. Cl. at 113 ("[T]he GAO made no mention of prejudice to IBM at all. Such a 'fail[ure] to consider an important aspect of the problem' is, by itself, sufficient to render the GAO's decision arbitrary and capricious.").

outcome prediction – do not determine the reasonableness of an agency's corrective action decision.

To begin with, Court of Federal Claims jurisdiction over corrective actions does not extend to reviewing GAO prejudice findings, let alone GAO outcome predictions. The relevant statute grants the court power to review only delineated acts by *procuring agencies. See* 28 U.S.C. § 1491(b)(1); *see also id.* § 1491(b)(4) (directing court to "review the agency's decision"). "Interpreted together, the language of § 1491(b)(1) and (b)(4) plainly apply to agency procurement decisions and not to the GAO in its review of bid protests." *Advance Constr. Servs., Inc. v. United States*, 51 Fed. Cl. 362, 365 (2002); *see also Centech Grp., Inc. v. United States*, 78 Fed. Cl. 496, 507 (2007) ("Section 1491(b) gives this Court jurisdiction to review an agency procurement decision, not the GAO's review of that agency procurement decision.").

To be sure, "the rationality of [a] GAO decision" on the *merits* is relevant to the rationality of the agency decision when the agency takes corrective action to remedy a procurement error identified by the GAO. *Turner Constr. Co.*, 645 F.3d at 1383. In such cases, "[t]he GAO decision constitutes the very reason(s) for the agency action." *Grunley Walsh Int'l*,

LLC v. United States, 78 Fed. Cl. 35, 44 (2007). But ultimately – and consistent with Section 1491(b) – the court is still "reviewing [the] *agency's* decision" and determining whether the "*agency's* decision lacks a rational basis." *Turner Constr. Co.*, 645 F.3d at 1383 (emphases added). This Court has never suggested that, in conducting this review, courts may also scrutinize ancillary GAO findings (let alone outcome prediction statements), like prejudice, that do not bear on the question of whether an error occurred during the procurement. *See, e.g.*, *id.* at 1385 (reviewing GAO's conclusion that contracting officer impermissibly ignored offeror's organizational conflict of interest); *Centech Grp.*, 554 F.3d at 1040 (reviewing GAO's conclusion that contracting officer improperly awarded contract to offeror whose proposal was unacceptable under RFP); *Honeywell, Inc. v. United States*, 870 F.2d 644, 646, 648-49 (Fed. Cir. 1989) (reviewing GAO's conclusion that contracting officer improperly rejected responsive proposal). In fact, this Court has suggested just the opposite. *See Statistica*, 102 F.3d at 1581 (in prejudice context, emphasizing that "GAO decisions do not bind us, *nor ours them*.") (emphasis added).

If Raytheon's argument is credited, no agency could ever take corrective action after a GAO outcome prediction session if the GAO failed

to issue a fulsome, written decision of its prejudice findings – *even where it was obvious that the protester had been prejudiced*. *But see* 4 C.F.R. § 21.10(e) (expressly authorizing GAO to "use flexible alternative procedures to promptly and fairly resolve a protest, including alternative dispute resolution"). Such a rule would elevate procedural perfection over an agency's right to be substantively correct, and it would do so even though agencies are not required by any statute, regulation, or case law to consider prejudice before taking corrective action. *See* FAR 33.102(b) (permitting agency corrective action where, as here, an "award does not comply with the requirements of law or regulation").

Indeed, the Air Force would have been free to take corrective action in this procurement even if the GAO had *denied* Northrop Grumman's protest for lack of prejudice. *See, e.g.*, *Jacobs Tech.*, 100 Fed. Cl. at 197. Agencies are "afforded broad discretion to take corrective action if they determine that 'such action is necessary to ensure fair and impartial competition.'" *Ceres Gulf*, 94 Fed. Cl. at 318 (quoting *Ravens Grp., Inc. v. United States*, 78 Fed. Cl. 390, 399 (2007)); *cf. Vanguard Recovery Assistance v. United States*, 101 Fed. Cl. 765, 788 (2011) (disparate treatment of bidders "goes against the standard of equality and fair-play that

is a necessary underpinning of the federal government's procurement process") (internal quotation marks omitted). Accordingly, even if Raytheon were correct that *both* the lower court *and* the GAO erred in finding prejudice, this Court should still affirm the decision upholding the Air Force's corrective action.

E. Even If the Court Credits Raytheon's Arguments on Prejudice, the Proper Remedy Would Be a Remand to the Air Force, Not an Injunction of Corrective Action

When an essential agency finding is not supported by the record, "the [agency] decision must be vacated and the matter remanded to [it] for further consideration." *Camp v. Pitts*, 411 U.S. 138, 143 (1973) (per curiam) (citing *SEC v. Chenery Corp.*, 318 U.S. 80 (1943)). Therefore, even if the Court credits entirely Raytheon's arguments on prejudice and concludes that the lower court reversibly erred on that issue, it should direct the Court of Federal Claims to remand the issue back to the Air Force for further consideration. It should not, as Raytheon requests (RTN Br. at 60; A131), enjoin *any* possible future corrective action and reinstate the original contract award to Raytheon. There is no justification for such sweeping relief.

Raytheon's requested relief would be especially inappropriate here because, after the Air Force announced its corrective action decision, Northrop Grumman produced additional detailed evidence of the prejudice it suffered from the agency's misleading and unequal discussions. Below, Northrop Grumman sought to supplement the record with a declaration from a company executive intimately familiar with Northrop Grumman's 3DELRR proposal and related efforts, which explained with specificity how Northrop Grumman would have leveraged existing and future IR&D programs to reduce its proposed price by more than enough to close the price differential with Raytheon, had Northrop Grumman not been misled by the agency's instructions. A51140-45. While the court denied Northrop Grumman's motion to supplement the record (A28), that conclusion was based, at least in part, on a finding that "Northrop successfully established prejudice without the GAO considering the additional information." *Id.* If this Court were to take a different view, remand would be appropriate for the Air Force to consider the declaration.

CONCLUSION

For the foregoing reasons, the Air Force's decision to take corrective action to remedy its misleading and unequal discussions was eminently reasonable, and this Court should affirm the judgment below.

Dated: July 15, 2015

Respectfully submitted,

/s/ Deneen J. Melander

Deneen J. Melander
Richard A. Sauber
Jennifer S. Windom
Michael E. Kenneally
Peter B. Siegal
Robbins, Russell, Englert, Orseck, Untereiner & Sauber LLP
1801 K Street, N.W., Suite 411
Washington, D.C. 20006
Tel: (202) 775-4500
Fax: (202) 775-4510
dmelander@robbinsrussell.com

Counsel for Northrop Grumman Systems Corporation

CERTIFICATE OF SERVICE

I hereby certify that on July 15, 2015, I caused the foregoing nonconfidential brief to be served by CM/ECF on the following counsel:

Mark D. Colley
Arnold & Porter LLP
555 Twelfth Street, N.W.
Washington, D.C. 20004
(202) 942-5720
mark.colley@aporter.com

Counsel for Plaintiff-Appellant Raytheon Company

Marcia G. Madsen
Mayer Brown LLP
1999 K Street, N.W.
Washington, D.C. 20006
(202) 263-3274
mgmadsen@mayerbrown.com

Counsel for Defendant-Appellee Lockheed Martin Corporation

Steven Michael Mager
Senior Trial Counsel
Commercial Litigation Branch
Civil Division
United States Department of Justice
P.O. Box 480
Ben Franklin Station
Washington, D.C. 20044
(202) 616-2377
steven.mager@usdoj.gov

Counsel for Defendant-Appellee United States

Dated: July 15, 2015

/s/ Deneen J. Melander
Deneen J. Melander

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitations set forth in Fed. R. App. P. 32(a)(7)(B) because this brief contains 13,824 words, excluding those parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and Fed. Cir. R. 32(b). I further certify that this brief complies with the typeface requirements of Fed. R. App. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface, 14-point Times New Roman, using Microsoft Word.

Dated: July 15, 2015

/s/ Deneen J. Melander
Deneen J. Melander