IN THE UNITED STATES COURT OF FEDERAL CLAIMS
BID PROTEST

RAYTHEON COMPANY,	*	
	*	
Plaintiff,	*	
	*	
v.	*	
	*	
THE UNITED STATES,	*	
	*	No. 15-77C
Defendant,	*	Judge Margaret M. Sweeney
	*	
and	*	[redacted]
	*	
LOCKHEED MARTIN CORPORATION and NORTHROP GRUMMAN SYSTEMS CORPORATION,	*	**REDACTED VERSION**
	*	
Defendant-Intervenors.	*	
	*	

DEFENDANT-INTERVENOR NORTHROP GRUMMAN'S CROSS-MOTION FOR JUDGMENT ON THE ADMINISTRATIVE RECORD AND OPPOSITION TO PLAINTIFF'S MOTION FOR JUDGMENT ON THE ADMINISTRATIVE RECORD

Dated: March 20, 2015

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Pursuant to COFC Rule 52.1, Defendant-Intervenor Northrop Grumman Systems Corporation ("Northrop Grumman") respectfully cross-moves for judgment on the administrative record and submits this memorandum in support of such cross-motion and in opposition to Raytheon's Motion for Judgment on the Administrative Record (Dkt. 48).

INTRODUCTION

This procurement by the United States Air Force was fundamentally flawed in several respects and, above all, in a way that threatens bedrock procurement principles: The Air Force gave offerors materially different instructions regarding how the agency would evaluate and score their proposals. Faced with this evident unfairness, and with a strong indication that the Government Accountability Office ("GAO") agreed that the provision of materially different instructions was impermissible, the Air Force voluntarily decided to reopen discussions so that proposals might be submitted in a setting in which all offerors were competing by the same set of rules. The Air Force's decision to take corrective action was eminently reasonable and completely consistent with the basic tenets of the procurement system.

The Air Force's decision came near the conclusion of GAO protests in which Northrop Grumman and Lockheed Martin demonstrated numerous flaws in the Air Force's award of the Three-Dimensional Expeditionary Long-Range Radar ("3DELRR") contract to Raytheon. During the protest hearing, the Air Force Contracting Officer ("CO") acknowledged that the agency had changed its view – contained in an EN issued to Raytheon and Northrop Grumman – as to how it would assess proposed Independent Research & Development ("IR&D") cost reductions, but had communicated that change only to Raytheon and not to Northrop Grumman. In light of that testimony and other record support, the GAO indicated in a non-binding outcome prediction session that it was likely to sustain the protests. The Air Force then voluntarily

[redacted]

decided to reopen discussions with all three offerors and to evaluate new technical and cost/price proposals.

Though the Air Force made its decision based on a number of factors, discussed in detail below, it is difficult to imagine a more compelling reason to take corrective action than the recognition that offerors received fundamentally different instructions regarding a material and central aspect of the agency's evaluation criteria. The way in which the Air Force analyzed and evaluated proposed IR&D cost reductions proved to be central to the agency's initial decision to award the contract to Raytheon. The inherent and obvious unfairness in providing offerors different instructions was, as the GAO and ultimately the Air Force both correctly perceived, fatal to the fairness of the procurement.

Raytheon argues, as it must in order to maintain this action, that the Air Force's decision to take corrective action was arbitrary and capricious. But the record demonstrates that there was a basic and undeniable unfairness in the way this procurement was conducted such that corrective action was warranted, necessary, and eminently reasonable, and should be upheld.

QUESTION PRESENTED

Northrop Grumman disagrees with Raytheon's framing of the Question Presented, which unduly focuses on the GAO's outcome prediction session. *See* Pl. Br. at 2. A more accurate Question Presented is: Whether Raytheon has established by a preponderance of the evidence that the Air Force's voluntary decision to take corrective action to remedy procurement flaws lacked a rational basis, given the serious and prejudicial nature of the agency's errors and the broad discretion afforded to the agency to take corrective action to ensure a fair and impartial competition.

[redacted]

STATEMENT OF THE CASE

Because Raytheon's presentation of the facts is inadequate, pursuant to COFC Rule 5.4(a)(3), Northrop Grumman sets forth additional relevant facts below.

I. The 3DELRR Solicitation

On November 15, 2013, the Air Force issued the 3DELRR solicitation (the "RFP" or the "Solicitation") for Engineering and Manufacturing Development ("EMD"), with options for Low Rate Initial Production ("LRIP"), Interim Contractor Support ("ICS") and Defense Exportability Features ("DEF"). Tab 1102 at AR 39002; Tab 1132 at AR 40187-96. The RFP limited proposals to a $534 million ceiling price for the entire effort, less the DEF option. Tab 1110 at AR 39176. The RFP stated that an award would be made based on a "modified best value" approach. Under this approach, the Air Force would award the 3DELRR contract to the offeror with the lowest Best Value Assessment ("BVA") who was deemed responsible and whose proposal was evaluated as "acceptable" with respect to both technical compliance and technical risk, as well as with respect to small business participation. Tab 1110 at AR 39176, 39180.

Under the RFP, each offeror's BVA was to be determined by calculating that offeror's Total Evaluated Price ("TEP") and then subtracting a set amount (up to a maximum of $155 million), based on the degree to which the offeror's proposed system exceeded the "Firm Track Range" threshold requirement. Tab 1110 at AR 39177-78. The TEP itself was to be calculated by combining the proposed prices for the fixed-price incentive line items (*e.g.*, EMD) at the ceiling price (120% of the proposed target cost); the firm fixed-price line items at the proposed price; the ICS options at the Government's Estimate of Most Probable Cost plus the proposed fixed-fee amount; two other cost-plus fixed-fee line items at $5 million each; and the cost of additional "Government Furnished Property" requested by the offeror. *Id.* at AR 39184-85.

[redacted]

A. Relevant Cost/Price Criteria

The RFP stated that cost/price proposals would be evaluated to determine if they were both "reasonable and realistic." Tab 1110 at AR 39183. The RFP warned offerors that "Unrealistically 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." *Id.*

Section L of the RFP permitted offerors to propose "[c]ost [r]eductions" in the form of "[m]anagement [r]eductions" or through "[c]ommonality with [o]ther [p]rograms." Tab 1109 at AR 39154. Any proposed reductions were required to be described in detail and supported by a complete rationale. *Id.* In addition, any cost reductions attributed to "commonality" with other programs had to be explained by identifying the specific program with which there was commonality, the reasons why there was commonality, and the allowability and allocability of the reduction per the Federal Acquisition Regulations ("FAR") and the offeror's CAS disclosure statement. *Id.* at AR 39155. Any cost reductions attributed to "company-funded efforts" had to be explained by identifying "the specific efforts, the planned start and end dates, the applicability to the current solicitation, the source of company funding and how [the offeror] plan[s] to account for or allocate these costs in accordance with generally accepted accounting principles, and [the offeror's] CAS Disclosure Statement." *Id.* The RFP made clear that the Air Force would evaluate any cost reduction by "using one or more of the techniques defined in FAR 15.404-1 in order to determine if it is reasonable and realistic." Tab 1110 at AR 39183.

B. Relevant Technical Criteria

The RFP stated that the Air Force would evaluate whether each proposal "substantiates" the offeror's ability to design, develop, and test a radar meeting all of the RFP's threshold

[redacted]

requirements, the modularity of the proposed design, the Technology Readiness Level ("TRL") of the design solution, and whether the offeror presented a comprehensive and executable schedule that could be achieved without undue risk. *Id.* at AR 39181. With respect to the TRL of the design solution, the RFP required: "Substantiation of at least a Technology Readiness Level 6 (TRL 6) for all Critical Technology Elements (CTEs) of the design solution that have changed since the Pre-EMD Preliminary Design Review (PDR)." *Id.*

II. Proposal Submissions and Agency Discussions with Offerors

A. Initial Proposals and Discussions Regarding IR&D

Three offerors – Northrop Grumman, Lockheed Martin, and Raytheon – submitted timely initial proposals on December 20, 2013. The Air Force determined that none of these initial proposals was technically acceptable, and stated that it had significant concerns regarding each of the cost/price proposals. Tab 1543 at AR 51931. The Air Force particularly noted the [redacted] proposed by the three offerors.

For instance, while each of the offerors' initial TEPs were [redacted] the RFP's $534 million ceiling price, the Air Force noted that [redacted]. Northrop Grumman's initial TEP was [redacted], and Raytheon's initial TEP was [redacted]; Lockheed Martin's initial TEP was [redacted]. Tab 1542 at AR 51835. [redacted] Northrop Grumman's initial proposal [redacted]. *Id.* at AR 51839. Raytheon's initial proposal included a [redacted] of cost reductions, including [redacted] future IR&D [redacted]. *Id.* at AR 51837-38.

Although Northrop Grumman's initial proposal [redacted]

[redacted]

[redacted] it did *not* propose that IR&D be treated as a specific cost reduction and the Air Force recognized this. The Air Force understood and evaluated Northrop Grumman's [redacted] as merely [redacted]. Tab 1523 at AR 51747 (CO statement that "Northrop Grumman did not propose any reductions through IR&D, [redacted]"). Raytheon's initial proposal, on the other hand, included a chart identifying [redacted] cost reductions for "future" IR&D. Tab 1391 at AR 48694-95; *see also* Tab 1523 at AR 51747 (CO statement that "Raytheon's chart with their cost reduction initiatives did show that the cost is reduced through future IR&[D].")

The Air Force expressed significant concerns regarding the [redacted] IR&D proposed by Raytheon, observing that the agency had never [redacted] IR&D proposed by any offeror in any procurement. Tab 3559 at AR 76504-05. The Air Force noted that it was not clear whether Raytheon's proposed IR&D would be allowable under the FAR. *Id.* It also questioned whether permitting Raytheon to propose as cost reductions IR&D, which could be recovered through indirect rates (and therefore paid by the government), might create an uneven playing field in the procurement. Tab 1471 at AR 50725. Finally, the Air Force harbored concerns that Raytheon's proposed IR&D might never even be realized because it depended on future contingencies. Tab 1521 at AR 51744 (draft evaluation notice to Raytheon).

The Air Force sent the offerors evaluation notices ("ENs") in March 2014, addressing the perceived weaknesses in their initial proposals, including questions related to IR&D and proposed cost reductions. *See* Tabs 1557-60. The Air Force sent ENs to Northrop Grumman and Raytheon stating:

> The Government is concerned with the reasonableness and realism of any affordability initiative offered. It is imperative the Offeror substantiate and the

[redacted]

> Government fully understand any claimed initiative which the Offeror desires to incorporate into its proposed cost/price. . . .
>
> *Unrealistically 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.*
>
> In accordance with (IAW) FAR 31.205-18 and 10 USC 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. . . .
>
> 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.

Tab 1619 at AR 52558-59 (EN NG-K-011); Tab 1683 at AR 52813-14 (EN RAY-K-016) (italics in original).

Simultaneously, the Air Force sent other ENs to Northrop Grumman and Raytheon requesting substantiation for proposed future contingencies, as well as explanations as to whether proposed cost reductions would be paid ultimately by the government through indirect rates. For example, in EN NG-K-010, the Air Force asked Northrop Grumman to explain whether its [redacted] Tab 1618 at AR 52552. Similarly, in EN NG-CP-003, after reiterating that proposals would be evaluated to determine whether they were "unrealistically low," the Air Force requested that Northrop Grumman substantiate its proposed investment [redacted] by providing evidence of its future commitment through "supporting information, [redacted]," and requested that the company

[redacted]

explain how it would "[redacted]" Tab 1599 at AR 52482. The Air Force also asked Raytheon in ENs to explain "the impact to [redacted]" (Tab 1677 at AR 52798), and whether Raytheon would guarantee that, in such a situation, the company would [redacted] that would "never be billed to the government" (Tab 1680 at AR 52804).[1]

Northrop Grumman attempted to alleviate the Air Force's concerns regarding the use of IR&D to meet contract requirements (explicit or implicit), the risk of future contingencies, and the recovery by Northrop Grumman of proposed government cost savings through indirect rates by affirming that [redacted] "execution of this contract does not require the allocation of internal [redacted] IR&D funding," and that any cost over the ceiling price would be excluded from the indirect overhead rate pools. Tab 1599 at AR 52483; Tab 1618 at AR 52555. Because Raytheon's proposed cost reductions were [redacted] future IR&D, it provided a different response. Raytheon asserted that its proposed IR&D complied with the FAR, and accused the Air Force of applying a standard for IR&D allowance that had been "rejected by the United States Court of Appeals for the Federal Circuit in ATK Thiokol Inc. v. United States, 598 F.3d 1329 (Fed. Cir. 2010)," which Raytheon claimed "held that research and development costs are allowable as IR&D costs unless specifically required by the contract." Tab 1683 at AR 52817. To address the risk of "future IR&D Investment," Raytheon proposed a specific contract clause (called an "H-clause") that would commit the company to perform the proposed IR&D projects in the amounts set forth in its proposal and in accordance with the proposed contract schedule. *Id.* at AR 52818-19; Tab

[1] Lockheed Martin did not receive similar ENs [redacted]. *See* Tab 1224 at AR 42067.

[redacted]

1677 at AR 52799. Raytheon also made clear that cost overruns associated with IR&D [redacted] would "be applied to the Contractor's indirect cost pool." Tab 1680 at AR 52805-06; *see also* Tab 1683 at AR 52818.

In connection with Raytheon's EN response, the Air Force reviewed the *ATK Thiokol* decision and contacted the Defense Contract Management Agency ("DCMA") for guidance. The Air Force then affirmatively decided to *change* its approach for evaluating IR&D from what had been communicated previously in the ENs to Northrop Grumman and Raytheon. Tab 3559 at AR 76504-06, 76538-39. In particular, the agency decided that it would now apply a two-part test in evaluating any proposed IR&D by verifying that the proposed IR&D (1) was not an "explicit requirement of the 3DELRR contract"; and (2) "had commonality among [the offeror's] portfolio with other programs." Tab 3559 at AR 76500-01. The Air Force determined that work that was "implicitly required for performance (necessary to perform the contract)" would now be deemed *allowable* under the agency's realism evaluation. *Id.* at AR 76536. It also changed its evaluation approach with respect to the risk of future contingencies and recovery of costs through indirect rates. *Id.* at AR 76538-39. The Air Force decided not to make any distinction between past, current, or future IR&D. *Id*. at AR 76507. The agency determined that it now viewed the risk of future IR&D as captured by an offeror's commitment to perform the contract below the ceiling price, and it discounted the fact that much of the proposed IR&D would be paid by the government through indirect rates. *Id.* at AR 76511-14.

The Air Force first communicated these material changes to Raytheon in EN RAY-K-016a. Tab 2294 at AR 59412. Because the Air Force now believed the risk as to the realization of future IR&D was alleviated by the contract's fixed price ceiling, it deleted the H-clause proposed by Raytheon. *Compare* Tab 1683 at AR 52818-19 *with* Tab 2294 at AR 59412-13. In

[redacted]

addition, Raytheon sought and received confirmation that the Air Force was no longer concerned about this risk, asking "As this revised EN/Clause is silent on IRAD, [redacted] have all related Gov't questions been answered?" Tab 2367 at AR 59844. The Air Force resolved the EN without addressing these issues further, effectively responding "yes." Tab 2294 at AR 59416.

Meanwhile, the Air Force sent an EN to Lockheed Martin informing the company [redacted] Tab 2423 at AR 59958. In response, Lockheed Martin [redacted]

B. Final Proposal Revisions

On June 20, 2014, the Air Force sent letters to all three offerors, informing them of their evaluation ratings and inviting them to submit Final Proposal Revisions ("FPRs"). Raytheon's and Lockheed Martin's FPR letters stated that their proposals [redacted] had been evaluated as realistic. Tab 2969 at AR 65227; Tab 2970 at AR 65231.[2]

[2] The fact that Raytheon proposed IR&D work necessary for performance of the contract is evidenced by the fact that [redacted] Tab 2081 at AR 58363-66. [redacted] the specific areas of work that each contractor proposes to perform to meet contract requirements. [redacted]

[redacted]

In addition, [redacted], the Air Force noted that [redacted].

Now knowing that future IR&D (for even implicitly required development work) could be proposed and recovered through indirect cost rates without risking their proposals being deemed unrealistic, [redacted] Raytheon [redacted] proposed [redacted] The Air Force evaluated Raytheon's FPR as including [redacted] in IR&D cost reductions [redacted]. Tab 3272 at AR 72962, 72969.

The Air Force, however, did not inform Northrop Grumman that, contrary to the Air Force's ENs, IR&D for implicitly required development work proposed without committing to treat the cost as unallowable or not recoverable through indirect cost rates, and IR&D dependent on future contingencies, could be proposed without risk to its proposal being deemed unrealistic. Northrop Grumman, therefore, did *not* propose such IR&D and the Air Force evaluated its FPR as providing *no* cost reductions through IR&D. *Id.* at AR 72976.

III. Contract Award and the GAO Protests

The Air Force awarded the 3DELRR contract to Raytheon as the offeror with the lowest BVA. Tab 3302 at AR 73322. Northrop Grumman and Lockheed Martin filed timely protests at the GAO challenging the award. These protests raised numerous challenges, most of which are not at issue here. *See, e.g.*, Tab 3503; Tab 3513a; Tab 3526; Tab 3530; Tab 3536.[3]

[redacted] *see also* Tab 3306 at AR 73595, 73606 (Air Force evaluation noting that [redacted] Raytheon [redacted] accounted for [redacted] "required for 3DELRR contract execution" as IR&D).

[3] Those challenges included that the Air Force had (1) improperly permitted Raytheon [redacted] to propose IR&D to perform specified 3DELRR requirements in violation of the FAR; (2) erroneously credited Raytheon [redacted] with dollar-for-dollar

[redacted]

On January 13, 2015, the GAO offered the parties the opportunity to participate in an alternative dispute resolution ("ADR") outcome prediction session. Tab 3588 at AR 76751-52. The GAO made clear that participation in the ADR session was voluntary, that it was not a "formal adjudication by GAO of the merits of the protest," and that the outcome would be non-binding. *Id.* The GAO also acknowledged that any action taken by the Air Force in response to the ADR session would be "voluntary." If no action was taken, the GAO simply would continue with its formal adjudication process and issue a written decision on the merits. *Id.*

The Air Force agreed to participate in the ADR session, which the GAO held telephonically on January 15, 2015. Tab 3591 at AR 76759. After reminding all participants that the outcome prediction was not an official GAO decision and that the ADR session was non-binding (Tab 3583 at AR 76728; Tab 3584 at AR 76732), the GAO attorney conducting the session stated that, in her opinion, she would sustain the protests on the grounds that (1) the Air Force lacked information and thus failed to evaluate the technical maturity of Raytheon's Critical Technology Element ("CTE") 1 consistent with the RFP's requirements; and (2) the Air Force conducted misleading and unequal discussions regarding the allowability of future IR&D projects in connection with its evaluation of proposed cost reductions. Tab 3579 at AR 76720;

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reductions based on [redacted] proposed IR&D; (3) improperly substituted an evaluation of Raytheon's [redacted] responsibility for the required price realism evaluation; (4) erred in the technical evaluation of Firm Track Range; (5) failed to properly evaluate technical aspects of Raytheon's proposed software; (6) unjustifiably permitted Raytheon to skirt mandatory page limits in its final proposal; (7) failed to adequately document its evaluation in a number of respects separate from IR&D; (8) failed to reasonably employ its MATLAB model; (9) failed to properly evaluate Raytheon's proposed [redacted]; and (10) inadequately justified its determination that Raytheon's 3DELRR System could effectively [redacted]. Though these matters became moot once the Air Force agreed to reopen discussions, each of these infirmities provides an independent reason justifying corrective action.

[redacted]

Tab 3582 at AR 76727.[4]

Regarding the technical maturity of Raytheon's CTE 1, the GAO opined that Raytheon's CTE 1 was defined as the [redacted] "Gallium Nitride (GaN) High Power Amplifier (HPA) [redacted] as contended by the Air Force and Raytheon. Tab 3582 at AR 76726. The RFP required that any changes to CTEs from the pre-EMD contract be substantiated to prove that the CTE still qualified at a TRL 6 maturity level. Tab 3579 at AR 76720. Raytheon had changed its CTE 1 by [redacted] but did not provide any substantiating data in its proposal demonstrating that this different [redacted] still met the TRL 6 requirement. *Id.* Absent this data, the GAO attorney said that it was unreasonable and inconsistent with the RFP for the Air Force to have concluded that Raytheon's CTE 1 [redacted] met the RFP's TRL 6 requirement. *Id.*

In response to Northrop Grumman's challenges, the GAO attorney noted that [redacted] Raytheon had proposed future IR&D. *Id.* She concluded that the Air Force's EN had caused Northrop Grumman to believe that future IR&D of the sort proposed by Raytheon would be deemed unallowable for purposes of the Air Force's realism evaluation, and that if Northrop Grumman did not agree to treat such IR&D as an unallowable cost, its proposal might be deemed unrealistic. Tab 3579 at AR 76720. She further concluded that, after discussions with Raytheon, the Air Force reversed its position as to the allowability of future IR&D, but failed to inform Northrop Grumman. Tab

[4] During the GAO protests, Northrop Grumman used the term "future IR&D" to distinguish between the type of IR&D [redacted] (past and existing IR&D that was not necessary for contract performance) and the type of IR&D proposed by Raytheon (IR&D to be performed in the future that was necessary for contract performance). *E.g.*, Tab 3552 at AR76246-50.

[redacted]

3581 at AR 76725. She believed that this had constituted misleading and unequal discussions. Tab 3582 at AR 76727. The GAO attorney further stated that she did not agree with Raytheon and the Air Force that Northrop Grumman never intended to propose future IR&D, at least in part because the record "did not show that Northrop disclaimed any possibility of relying on future IR&D in the event the Agency took a different view." Cplt. ¶ 244. Finally, the GAO attorney stated that, while the issue was moot given her prediction on misleading and unequal discussions, she also believed that the Air Force had not properly considered and documented its evaluation of the risk associated with future IR&D. Tab 3580 at AR 76723. She recommended that the Air Force evaluate the risk to contract performance in the event that the [redacted] proposed future IR&D did not materialize. Tab 3579 at AR 76721; Tab 3582 at AR 76727.

Subsequently, Air Force personnel met and decided to take corrective action. Tab 3585 at AR 76735. The Air Force informed the GAO of its decision on January 16, 2015, and the GAO dismissed the protests as moot on January 21, 2015. Tab 3586 at AR 76736-37. On January 26, 2015, the Air Force issued a memorandum describing in detail its rationale for taking corrective action. Tab 3577 at AR 76714-16. Raytheon now challenges the Air Force's decision to take corrective action.

STANDARD OF REVIEW

In bid protest cases, this Court reviews challenged agency action under the standards set forth in the Administrative Procedure Act. The Court may set aside agency action only if such action was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *see also* 28 U.S.C. § 1491(b)(4). In making that determination, the Court need consider only "whether the decision was based on a consideration of the relevant factors" or "whether there has been a clear error of judgment." *Citizens to Preserve Overton*

[redacted]

Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971). Although the Court's inquiry into the facts must be "careful," the ultimate standard of review is "narrow." *Id.* "The court is *not* empowered to substitute its judgment for that of the agency." *Id.* (emphasis added). Furthermore, "[b]y its very definition, this standard recognizes the possibility of a zone of acceptable results in a particular case." *NetStar-1 Gov't Consulting, Inc. v. United States*, 101 Fed. Cl. 511, 518 (2011), *aff'd*, 473 F. App'x 902 (Fed. Cir. 2012); *see also Honeywell, Inc. v. United States*, 870 F.2d 644, 648 (Fed. Cir. 1989) ("If the court finds a reasonable basis for the agency's action, the court should stay its hand even though it might, as an original proposition, have reached a different conclusion . . . .") (internal quotation marks omitted).

The protester bears a "heavy burden" of establishing error by a preponderance of the evidence. *Sierra Nevada Corp. v. United States*, 107 Fed. Cl. 735, 750 (2012) (internal quotation marks omitted). That is true even where, as here, the protester was originally awarded the contract and now protests the agency's corrective action. *See, e.g., Sotera Def. Solutions, Inc. v. United States*, 118 Fed. Cl. 237, 250 (2014); *Sierra Nevada*, 107 Fed. Cl. at 750. Moreover, "[t]he protestor's burden is greater in negotiated procurement, as here, than in other types of bid protests because the contracting officer is entrusted with a relatively high degree of discretion." *Glenn Def. Marine (ASIA), PTE Ltd. v. United States*, 720 F.3d 901, 907-08 (Fed. Cir. 2013) (internal quotation marks omitted); *see also Sotera*, 118 Fed. Cl. at 250.

Where the decision under review is the agency's decision to take corrective action, that decision is entitled to as much deference as any other agency action. *See, e.g., Sierra Nevada*, 107 Fed. Cl. at 750; *Sys. Application & Techs., Inc., v. United States*, 100 Fed. Cl. 687, 716 (2011) ("As with all procurement decisions, an agency has broad discretion to take necessary corrective action."), *aff'd*, 691 F.3d 1374 (Fed. Cir. 2012). "Contracting officers are afforded

[redacted]

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). Indeed, an agency is not required even to "identify a particular error in the procurement process as a precondition to proposing corrective action." *Id.* (internal quotation marks omitted). To warrant corrective action, all that is necessary is a "reasonable concern that there were errors in the procurement, even if the protest could be denied." *Data Monitor Sys., Inc. v. United States*, 74 Fed. Cl. 66, 74 (2006) (internal quotation marks omitted). Thus, contrary to Raytheon's suggestion otherwise (*see* Pl. Br. at 8-9), the fact that the Air Force's proposed corrective action represents a rejection of the arguments presented by its attorneys at the GAO does *not* support any heightened scrutiny in this Court. *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").

Raytheon is also incorrect in asserting that "the decision under judicial review is GAO's, not the Agency's." Pl. Br. at 7. On the contrary, in fact, "it is the agency's decision, not the decision of the GAO that is the subject of judicial review." *Advance Constr. Servs., Inc. v. United States*, 51 Fed. Cl. 362, 365 (2002) (quotation marks omitted). Although it is true that agencies often follow GAO recommendations in recognition of the GAO's expertise in procurement matters (*see Honeywell, Inc.*, 870 F.2d at 647-48), agencies know full well that they too are experts and must make their own decisions whether to implement GAO recommendations. *See, e.g., SP Sys., Inc. v. United States*, 86 Fed. Cl. 1, 14 (2009) ("If, in its own expertise, the procurement agency determines that the GAO's recommendation is misguided, it has a responsibility to make up its own mind . . . .") (quotation marks omitted).

[redacted]

In any event, the GAO issued no formal recommendation here; it merely announced a non-binding, non-final prediction as to the outcome of the protests. This Court may evaluate the merits of the GAO's outcome prediction only to the extent that the Air Force's decision to take corrective action relied on the GAO's determination that there were significant flaws in the procurement. *Turner Constr. Co. v. United States*, 645 F.3d 1377, 1383 (Fed. Cir. 2011); *Centech Grp., Inc. v. United States*, 554 F.3d 1029, 1039 (Fed. Cir. 2009); *Honeywell*, 870 F.2d at 648; *cf. SP Sys.*, 86 Fed. Cl. at 14 (when agency's corrective action relies in part on GAO decision but also on agency's subsequent analysis, court must consider *both* "the GAO decision and that subsequent analysis together"). It is long settled, however, that this Court does not have appellate jurisdiction over the GAO. *E.g.*, *Centech Grp., Inc. v. United States*, 78 Fed. Cl. 496, 507 (2007). Therefore, while this Court may consider the merits of the GAO's prediction – that is, whether the GAO correctly identified substantive procurement flaws – the Court's jurisdiction generally does *not* extend to review and correction of supposed procedural flaws in a GAO decision. *See, e.g.*, *Navarro Research & Eng'g, Inc. v. United States*, 106 Fed. Cl. 386, 416 n.24 (2012); *Jacobs Tech., Inc. v. United States*, 100 Fed. Cl. 186, 197 (2011); *Centech Grp.*, 78 Fed. Cl. at 506.

In this case, the Air Force chose to take corrective action following an informal GAO outcome prediction session, which (as the parties were repeatedly reminded) was neither binding nor even final. Tab 3584 at AR 76732; Tab 3588 at AR 76751. All that the instant procedural posture implies, then, is that *two* experts have concluded that the procurement suffered flaws serious enough to justify a reopening of the competition. In such circumstances, it should be the rare, truly egregious error that permits this Court to declare nonetheless that the agency's decision to take corrective action was arbitrary, capricious, or an abuse of discretion.

[redacted]

ARGUMENT

The Air Force's decision to take corrective action was appropriate for at least four separate reasons: First, the Air Force materially and prejudicially misled and conducted unequal discussions with Northrop Grumman during the procurement by providing information about the manner in which the agency would evaluate the price realism of proposed IR&D cost reductions that was inconsistent with the information provided to the other offerors and with the Air Force's evaluation. Second, the Air Force failed to properly document its evaluation of proposals. Third, the Air Force improperly overlooked significant price and performance risks inherent to Raytheon's [redacted] proposal. And finally, as Lockheed Martin has argued, the Air Force clearly erred in evaluating the technical readiness level of Raytheon's proposal.

Each of these errors was timely raised, and each prejudiced Northrop Grumman. The Court should grant judgment in favor of Northrop Grumman and deny Raytheon's Motion for Judgment on the Administrative Record.

I. The Air Force's Decision to Reopen Discussions to Remedy Flaws in Its Cost/Price Evaluation Was Not Arbitrary, Capricious, or an Abuse of Discretion

After extensive briefing, a full-day evidentiary hearing, and an outcome prediction session in which the GAO opined that the 3DELRR procurement was marked by significant and prejudicial errors, the Air Force reasonably concluded that it had conducted misleading and unequal discussions with Northrop Grumman regarding the standard that would govern the agency's price-realism analysis of proposed IR&D for cost reductions. *See* Tab 3577 at AR 76716. That determination should be upheld. First, the record indisputably demonstrates misleading and unequal discussions. Second, the Air Force reasonably determined that its evaluation required more robust documentation. And third, as the GAO noted in its outcome prediction (though Raytheon's motion contains not a word about it), the Air Force failed to

[redacted]

properly evaluate and document its consideration of the risks presented by Raytheon's proposed future IR&D. Because the Air Force's decision to reopen discussions was a reasonable exercise of the agency's discretion, the Court should grant judgment in favor of Northrop Grumman.

A. The Air Force Engaged in Misleading and Unequal Discussions with Northrop Grumman Regarding the Standard by Which IR&D Would Be Evaluated

It is a fundamental principle of procurement law that, where an agency changes the rules of a procurement, it must advise offerors of those changes. *See, e.g.*, *AshBritt, Inc. v. United States*, 87 Fed. Cl. 344, 372-73 (2009) ("The Agency's Price Discussions Were Misleading Because It Changed The [Independent Government Estimate] Against Which Price Proposals Had Been Measured Without Advising Offerors"); *see also East West, Inc. v. United States*, No. 11-455C, 2012 WL 4465228, at *1 (Fed. Cl. Sept. 26, 2012); *Gentex Corp. v. United States*, 58 Fed. Cl. 634, 653 (2003) ("[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." (quoting *Am. Mgmt. Sys., Inc.*, 84-2 CPD ¶ 199 at 2, 1984 WL 46537 (Comp. Gen. 1984)) (internal quotation marks omitted)); *KPMG LLP*, B-406409 et al., May 21, 2012, 2012 CPD ¶ 175 at 10-11; *PCCP Constructors JV*; *Bechtel Infrastructure Corp.*, B-405036 et al., Aug. 4, 2011, 2011 CPD ¶ 156 at 13-15.

In this case, the CO testified that the Air Force told Northrop Grumman the standard by which IR&D proposed for cost reductions would be evaluated, changed that standard, and never informed Northrop Grumman of the change. The Air Force then credited Raytheon with a [redacted] price reduction that would have been improper under the rules communicated to Northrop Grumman. The Air Force's decision to take corrective action on this basis was clearly rational and should not be disturbed.

[redacted]

1. The Air Force's Determination That It Engaged in Misleading and Unequal Discussions Is Grounded in Substantial Record Support

The material facts on this issue are few and straightforward. First, the Air Force committed in its RFP to perform a price realism analysis and warned offerors that unrealistically low proposed prices could be grounds for eliminating a proposal from competition. Tab 1110 at AR 39183. Second, during discussions, the Air Force sent Northrop Grumman an EN stating that in connection with the agency's price evaluation:

> [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.

See Tab 1619 (EN NG-K-011) at AR 52559. EN NG-K-011 further stated that "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." *Id.*

Third, after receiving a similar EN, Raytheon told the Air Force that it believed the agency's standard for evaluating IR&D was not supported by recent case law. *See* Tab 1683 at AR 52817. Raytheon contended that IR&D did *not* exclude work that was implicitly required or necessary to perform a contract, and it represented to the Air Force that none of the IR&D in its proposal was for work "specifically" required by the contract. *Id.* at AR 52814, 52817.

Fourth, as a consequence of Raytheon's response, the Air Force reversed course and applied a new standard for evaluating proposed IR&D. Contrary to the language in the EN sent to Northrop Grumman, the Air Force determined that work "implicitly required for performance (necessary to perform the contract)" *would be* considered an allowable indirect cost and *would not* be deemed unrealistic. Tab 3559 at AR 76535-39. Also contrary to the language in EN NG-

[redacted]

K-011, the Air Force decided that IR&D dependent upon future contingencies would not be evaluated as "speculative and unrealistic." *Id.*; *see also* Tab 1619 at 52558-59. The Air Force then proceeded to evaluate Raytheon's proposed IR&D in a manner consistent with this changed approach – and, as Raytheon concedes, *inconsistent* with the EN NG-K-011 sent to Northrop Grumman. *Id.*; *see, e.g.*, Tab 3306 at AR 73606.

It is undisputed that the Air Force never communicated to Northrop Grumman its new evaluation approach. *See* Tab 3577 at AR 76715 ("The Government did not clarify or correct the issue of IR&D through further discussions . . . ."). The Air Force did, however, notify *Raytheon* that the agency was no longer concerned regarding the future contingencies of Raytheon's proposed IR&D. *See* Tab 2294 at AR 59416 (approving Raytheon's proposed "Special H Clause" requiring no promise to fund future IR&D investments). And the Air Force also made clear to Raytheon that, despite the company's [redacted], Raytheon's proposal no longer risked being deemed unrealistic. *See* Tab 2969 at AR 65227-28. As a result, Raytheon eventually proposed IR&D to reduce its final offer price by an evaluated [redacted], while Northrop Grumman, entirely in the dark, submitted a final proposal consistent with the EN instructions it had received, containing no future IR&D for the fulfillment of either implicit or explicit contract requirements. *See* Tab 3306 at AR 73617-18. As the offeror with the lowest BVA, which was largely dependent upon its proposed price, Raytheon was awarded the contract.[5]

Based on this sequence of events, the Air Force reasonably decided to reopen discussions

[5] Lockheed Martin, which never received anything like EN NG-K-011, [redacted] However, the Air Force had notified Lockheed Martin, through its letter requesting an FPR, that [redacted]

[redacted]

with all offerors to restore the fairness in the procurement. Northrop Grumman was entitled to a procurement in which it was neither misled nor treated unequally with respect to the Air Force's evaluation of IR&D in connection with the agency's price realism analysis. *See AshBritt, Inc.*, 87 Fed. Cl. at 369 (citing FAR § 15.306(e)(1)). And given that the price differential [redacted], it was eminently reasonable for the Air Force to conclude that Northrop Grumman had been prejudiced by the Air Force's misleading and unequal discussions.

2. Raytheon's Arguments to the Contrary Are Not Compelling

In opposition to Northrop Grumman's contention of misleading and unequal discussions, Raytheon argues: (1) the Air Force corrected EN NG-K-011 by sending Northrop Grumman an additional, allegedly contradictory EN (Pl. Br. at 24-25); (2) the Air Force's corrective action relies on an "invented dichotomy" between past IR&D and future IR&D (Pl. Br. at 26, 28-29); (3) the Air Force "did not change the rules of the procurement," despite the CO's admission at the GAO hearing that it did (Pl. Br. at 26-27); and (4) the regulations mandating that all offerors be treated equally contain an implied exception for misleading or unequal discussions of law (Pl. Br. at 30-33). None of these arguments is compelling.

a. The Air Force Did Not Remedy Its Misleading and Unequal Discussions During the Procurement

The Air Force admits that it did not "clarify or correct the issue of IR&D through further discussions with Northrop Grumman." Tab 3577 at AR 76715. Raytheon, nevertheless, claims that EN NG-CP-003 remedied the misleading aspects of EN NG-K-011. To prevail on this argument, Raytheon must demonstrate that EN NG-CP-003 so clearly refuted EN NG-K-011 that it was irrational for the Air Force to have concluded otherwise. *Cf. Advanced Data Concepts, Inc. v. United States*, 216 F.3d 1054, 1057-58 (Fed. Cir. 2000) ("The arbitrary and capricious

[redacted]

standard applicable here is highly deferential. This standard requires a reviewing court to sustain an agency action evincing rational reasoning and consideration of relevant factors.").

Raytheon cannot fill this tall order. EN NG-K-011 made plain that, unless an offeror vowed not to seek reimbursement through indirect costs for proposed IR&D that was either implicitly or explicitly required by the 3DELRR contract, and unless an offeror's proposed IR&D was not dependent on future contingencies, that offeror's proposal risked being deemed unrealistic. *See, e.g.*, Tab 1619 at AR 52559; Tab 3571 at AR 76677 ("Nor can the Air Force plausibly deny that, before it informed Raytheon of its changed view, the Air Force warned both Raytheon and Northrop Grumman that proposing improper IR&D (*i.e.*, IR&D for work necessary to complete contract requirements as an allowable and indirect cost, instead of an unallowable, direct charge to the 3DELRR contract) could result in a determination that proposed costs are unrealistic."). EN NG-CP-003 makes no mention of EN NG-K-011 or IR&D involving implicitly required work. And far from revoking EN NG-K-011's warning that certain types of IR&D (that were not treated as an unallowable cost) risked being deemed unrealistic, EN NG-CP-003 actually *strengthened* EN NG-K-011's warning by expressly demanding that Northrop Grumman provide "supporting information" in order to "mitigate execution risk associated with [its] funding profile." Tab 1599 at AR 52482.

In any event, EN NG-CP-003 was issued simultaneously with EN NG-K-011, and both ENs were issued *before* the Air Force changed its evaluation approach. Tab 3559 at AR 76535-39. The Air Force issued EN NG-CP-003 because of concerns regarding Northrop Grumman's [redacted]. Tab 1507 at AR 51559. EN NG-CP-003 did not and was not intended to address the allowability of IR&D in connection with the Air Force's cost/price evaluation. Nor does EN NG-CP-003 evidence a lack of concern on the agency's part,

[redacted]

or a revocation – express or implied, intended or inadvertent – of EN NG-K-011's warning regarding the risks accompanying proposed IR&D.

b. The GAO's Use of the Term "Future IR&D" in its Outcome Prediction Was Not Irrational

Raytheon also argues that the Air Force's decision to reopen discussions is irrational because it rests on an "invented dichotomy" between past/current and future IR&D. This argument fails, as well. The Air Force explained in its corrective action memorandum that it was reopening discussions because it had conducted misleading discussions with respect to the allowability of IR&D for work implicitly required by the contract. Tab 3577 at AR 76715-16. Raytheon's argument ignores this reasonable justification, instead preferring to misinterpret statements made by the GAO attorney during the non-binding outcome prediction session. Yet even if the Air Force's decision rested entirely on the GAO's choice of language or Raytheon's misinterpretation of that language, Raytheon's argument would still fail.

As used by the GAO in its outcome prediction, the term "future IR&D" was intended to distinguish between the IR&D [redacted] and that proposed by Raytheon. It was *not* intended to discount or ignore the fact that the Air Force conducted misleading and unequal discussions with respect to its evaluation of implicit IR&D. In any event, these are not mutually exclusive concepts. EN NG-K-011 defined "implicit[]" requirements as those "necessary to perform the contract." Tab 1619 at AR 52559. By definition, past IR&D work is completed and, thus, not "necessary to perform the contract." But future IR&D being proposed to replace work necessary for contract completion – such as Raytheon's proposed future IR&D – is by its very nature implicitly required IR&D. Thus, Raytheon's claim that "future IR&D" is distinct from "implicit IR&D" ignores the usage of those terms during the protests and the fact that "future IR&D" and "implicit IR&D" are essentially the

[redacted]

same when it comes to Raytheon's proposed IR&D.

But even if Raytheon's misinterpretation of "future IR&D" were accepted as true, its contention that "there were no discussions with Northrop or any other offeror regarding the 'allowability of future IR&D' costs" (Pl. Br. at 28) is erroneous. The RFP expressly instructed offerors that, if they were going to propose company-funded efforts as a direct cost reduction, they also needed to identify "the planned start and end dates" of those efforts. Tab 1109 at AR 39155. Likely because of this requirement, Raytheon's own proposal distinguished between "Completed" and "Future" IR&D investments and [redacted] Tab 1391 at AR 48694-96. Similarly, in a follow-up EN, the Air Force asked Raytheon what portion of its proposed IR&D "[redacted]." Tab 1662 at AR 52758 ("Please explain the cost impact to the govt if Raytheon [redacted]"); *see also* Tab 1683 at AR 52814 ("[P]lease properly substantiate that [redacted] reductions *are either previously accounted for indirect costs* [i.e., [redacted]] or are or will be direct costs to the 3DELRR contract [i.e., not to be [redacted]] . . . ."") (emphasis added). And in EN RAY-K-016 and EN NG-K-011, the Air Force warned both Raytheon and Northrop Grumman that cost reductions stemming from future IR&D could adversely affect a proposal's cost/price evaluation:

> [A]ny 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.

Tab 1619 at AR 52559; Tab 1683 at AR 52814 (emphasis added). Indeed, in direct response to these ENs and to alleviate the Air Force's concerns regarding future contingencies, Raytheon proposed an H-clause promising to fund its proposed future IR&D. Tab 1662 at AR 52758; Tab 2294 at AR 59416.

[redacted]

All of this evidence directly refutes Raytheon's contention that "the Agency made no distinction and imposed no limitations whether IR&D expenditures are past, current or future." Pl. Br. at 25. The Air Force did so, though it ultimately failed to act on its recognition of the risks of future IR&D. *See infra* at 34-37. This evidence more than suffices to demonstrate the rationality of concluding that the Air Force, by instructing Northrop Grumman in EN NG-K-011 that future IR&D could be deemed unrealistic but ultimately changing its evaluation approach, engaged in misleading and unequal discussions.

c. Raytheon's Argument That the Air Force Did Not Change the Rules Regarding IR&D Is Belied by the Record

Raytheon also argues that the Air Force "did not change the rules" after issuing EN NG-K-011 because the governing principle throughout the procurement was that "IR&D was allowable when proposed in accordance with FAR and CAS." Pl. Br. at 26-27. This argument is a diversion. Raytheon cherry-picks a few words from the misleading EN while ignoring the remainder. Yet it identifies no authority to support its position that the EN should be interpreted based on the reading of a few words rather than the document as a whole.

In any event, even if one assumes that the Air Force's ultimate price evaluation complied with FAR and CAS, the basis for the Air Force's corrective action was that it conducted misleading and unequal discussions with Northrop Grumman regarding what was necessary to comply with the rules of this procurement. At the GAO hearing, the Air Force's CO was asked to review the ENs sent to Raytheon and Northrop Grumman, including the language relating to implicit requirements and to future contingencies. Upon completing this review, she testified that the approach described in EN NG-K-011 was "not the way that we would apply IR&D with my knowledge now," though it was an accurate statement of the Air Force's understanding "[a]t the time" it was drafted. Tab 3559 at AR 76537-39. She further testified that the Air Force's

[redacted]

"understanding changed upon receipt of Raytheon's EN Response." *Id.* at AR 76504. Raytheon's argument that the Air Force did not change the rules by which it evaluated IR&D cannot overcome this concession.

d. Raytheon's Argument About Misstatements of Law Is Inaccurate and Irrelevant

Raytheon further argues that there cannot be misleading or unequal discussions about the law. Pl. Br. at 30-33. This argument fails for several reasons.

First, the Air Force's decision to take corrective action was *not* premised on a finding that EN NG-K-011 had misled Northrop Grumman about the law. The EN's plain language makes clear that its purpose was to advise offerors of the Air Force's approach to evaluating proposed cost reductions in its price realism analysis. The EN's introductory paragraph states: "The Government is concerned with the reasonableness and realism of any affordability initiative offered." Tab 1619 at AR 52558. The EN then warns offerors that any IR&D proposed for implicitly required work should be segregated and committed to be treated as unallowable or it may be "deemed unrealistic," and that any proposed cost reduction (including IR&D) contingent on future events may be deemed "speculative and unrealistic." *Id.* at AR 52559. On its face, the EN states the Air Force's intended approach to evaluating IR&D where the reasonableness and realism of IR&D proposed for cost reductions were an express concern, not the legality of any proposed IR&D.

The Air Force had broad discretion to fashion the procurement and its price-realism analysis in accordance with the agency's needs – even if that meant discounting IR&D that was otherwise potentially legally permissible. *Cf. Savantage Fin. Servs., Inc. v. United States*, 595 F.3d 1282, 1286 (Fed. Cir. 2010) ("[D]etermining an agency's minimum needs is a matter within the broad discretion of agency officials . . . and is not for the court to second guess.") (internal

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quotation marks and alteration omitted); *Afghan Am. Army Servs. Corp. v. United States*, 90 Fed. Cl. 341, 357 (2009) ("[T]he nature and extent of a price realism analysis, as well as an assessment of potential risk associated with a proposed price, are generally within the sound exercise of the agency's discretion.") (internal quotation marks omitted). Given the Air Force's broad discretion and its legitimate concerns about the proposed use of IR&D as a cost reduction measure, it was reasonable for the agency to adopt the conservative evaluation approach reflected in EN NG-K-011.

But even if Raytheon could demonstrate that EN NG-K-011's misleading statements were "mere" statements of law (which it cannot), such a showing still would not suffice. Federal regulations unambiguously provide that *any* misleading, unequal discussions are grounds for agency corrective action: "Government personnel involved in [an] acquisition shall not engage in conduct that . . . [f]avors one offeror over another." FAR § 15.306(e)(1); *see also AshBritt, Inc.*, 87 Fed. Cl. at 369. The regulations make no exceptions, and Raytheon points to no authority from which an exception to the FAR's absolute language could be drawn.

The cases cited by Raytheon are entirely inapposite. Raytheon acknowledges that its proposed rule derives not from the bid-protest context, but from far-flung contract cases. Each of those cases considers the question – wholly irrelevant here – as to what standard should apply when *a party to a contract* attempts to reform or rescind that contract on grounds of legal mistake. *See* Pl. Br. at 31-32 (collecting cases). Despite Raytheon's attempt to turn a series of common-law contract cases into an unwritten (and heretofore unrecognized) exception to the FAR, the unambiguous language of section 15.306(e)(1) controls this Court's analysis.[6]

[6] Even if the Court were to entertain Raytheon's foray into contract law (and it should not), the cases cited by Raytheon hold that a "mistake" resulting from a counterparty's affirmative representation can be cause for rescission. *See, e.g., C&L Constr. Co. v. United States*, 6 Cl. Ct.

[redacted]

Finally, even if EN NG-K-011 communicated only a legal proposition (as opposed to the Air Force's evaluation approach, which Raytheon overlooks), Raytheon's assertions as to the purported "correct" law are not universally agreed upon. In fact, published Department of Defense guidance runs counter to Raytheon's interpretation in its EN response. In particular, the Defense Contract Audit Agency's ("DCAA") guidance on allowable IR&D (updated *after* the *ATK Thiokol* decision came down) states:

> 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*.

Contract Audit Manual § 7-1502(d), *available at* Tab 3536 at AR 75833-36 (emphasis added); *see also id.* § 7-1503(b), *available at* Tab 3536 at AR 75835 ("[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."). This language is tracked closely by EN NG-K-011, which excludes from IR&D "work implicitly required for performance (necessary to perform the contract) or explicitly required to be done by the terms of the contract." Tab 1619 at AR 52559.

It was not unreasonable for Northrop Grumman to believe, upon receiving EN NG-K-011, that the Air Force, for purposes of proposal evaluation in this procurement, chose to define

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791, 797 (1984) (discussing cases that dealt "with a situation in which the government affirmatively stated that a law which would increase the contractor's costs, if applicable, did not apply," and observing that "the plaintiffs were allowed to reform their respective contracts based on mutual mistake of law" when "these assurances were incorrect"), *aff'd*, 790 F.2d 93 (Fed. Cir. 1986); *see also* 27 *Williston on Contracts* § 70:31 (4th ed. 2014) ("Justifiable reliance on a material misrepresentation, although innocently made, may well lead to rescission. . . . Honest misrepresentation is sufficient; though the representation may have been made innocently, it would be unjust to allow the misrepresenting party to retain the fruits of even an inadvertent mistake.").

[redacted]

its approach based on a conservative construction of *ATK Thiokol*. By changing its evaluation approach to a less restrictive review of IR&D, without informing Northrop Grumman of that change, the Air Force conducted misleading and unequal discussions with Northrop Grumman. Northrop Grumman should not be charged with knowing that the Air Force would change its view of IR&D and stated evaluation approach, departing from the language of EN NG-K-011 that reasonably was understood to reflect the Air Force's intent.

B. The Air Force Failed to Properly Document Even Its Own Interpretation of IR&D in Its Price Realism Analysis [redacted]

The Air Force also grounded its corrective action decision in the need for "more robust documentation" to support the contract award. Tab 3577 at AR 76716. One example of this shortcoming, as demonstrated during the protests, was the Air Force's failure to document its review as to whether Raytheon's proposed IR&D cost reductions met the Air Force's changed standard for IR&D. Thus, even setting aside the Air Force's well-supported conclusion that it had engaged in misleading and unequal discussions, the agency's decision to take corrective action also should be upheld because its evaluation of Raytheon's price proposal was inadequately documented and, as a result, improperly justified. *See BayFirst Solutions, LLC v. United States*, 102 Fed. Cl. 677, 685 (2012) ("[T]his court may not affirm an improperly justified evaluation rating simply because a rational basis for that evaluation rating might otherwise exist."); *see also OMV Med., Inc. v. United States*, 219 F.3d 1337, 1344 (Fed. Cir. 2000).[7]

[7] The Air Force's corrective action memo and the full GAO record make clear that, as discussed here in Part I.B and below in Part I.C, the agency's failure to adequately document its evaluation provided an independent basis for taking corrective action. The Court may therefore affirm the Air Force's corrective action on this ground as well. *Cf. IBM Corp. v. United States*, 119 Fed. Cl. 145, 153-54 (2014). If the Court, however, declines to uphold the corrective action on the basis of misleading and unequal discussions *and* also determines that the Air Force's decision to take corrective action did *not* rely on this additional ground, the proper remedy would be to remand for the agency to clarify its rationale. *See, e.g., Florida Power & Light Co. v. Lorion*,

[redacted]

The Air Force maintained before the GAO that, following its reversal in approach, it applied a "two-part test" whereby IR&D cost reductions would be permissible only as to projects that were both (1) attributable to multiple procurements, *and* (2) not explicitly required by the 3DELRR contract. *See* Tab 3559 at AR 76500-01; Tab 3548 at AR 76160. Yet the evidence before the GAO revealed that the Air Force neither performed nor documented *any* review of whether Raytheon's proposed IR&D covered projects that the contract explicitly required.

The CO testified at the GAO that the Air Force's technical evaluation team had reviewed Raytheon's proposal to determine whether its proposed IR&D projects were "explicitly" required by the contract, but the documentary record lacks any indication that such work in fact was done. For example, although the Air Force shared Raytheon's cost proposal with the agency's DCMA advisor, the CO admitted that she never asked him to "go through those specific projects that were listed in Raytheon's proposal" to verify that they were not directly or explicitly required under the contract. *See* Tab 3559 at AR 76522. In addition, although Raytheon's "Cost/Price Factor Chief Consensus Worksheets" memorialize the team's "confirm[ation] that RAY could accurately apply all proposed IRAD projects to [redacted] programs," nowhere do they state that the team considered whether the proposed IR&D projects would address specific requirements of the contract. *See* Tab 3256h at AR 72446.

When confronted at the hearing with the absence of any contemporaneous evidence, the CO suggested that the proof that the Air Force performed the necessary analysis might be found in the Price Competition Memo ("PCM"):

> Q. [The Cost/Price Consensus] goes on to say that the 3DELRR technical team confirmed that RAY could accurately apply all proposed IRAD projects to

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470 U.S. 729, 744 (1985). In all events, it would be improper for the Court not to consider these additional challenges, but nevertheless enjoin the Air Force from taking corrective action because of them.

[redacted]

> [redacted] programs. It does not say in here that the technical team also examined whether or not proposed IRAD was a direct requirement of the RFP?
>
> A. That language can be found in our price competition memorandum. . . . It states both things, the [redacted] and that the technical team also assessed where these projects could be considered direct requirements.

Tab 3559 at AR 76548-49. But the PCM says no such thing. Instead, it merely states:

> Through discussions via EN's, the Government determined that the IRAD work can be qualified and accounted for as a direct cost reduction. [redacted] *programs.*

Tab 3280 at AR 73019-20 (emphasis added); *see also* Tab 3306 at AR 73595 [redacted]; Tab 3306 at AR 73606 ("The 3DELRR Technical Team evaluated that Raytheon could reasonably apply all proposed IRAD projects to [redacted] programs."). Moreover, even when responding to inquiries from the Assistant Secretary of Defense for Acquisitions regarding "the legality of accepting a proposal that has reduced its cost by submission of prospective IR&D" and "the risk to contract execution as a result of [Raytheon's] [redacted] proposal" – the time, if ever there was one, to give a complete accounting – the Air Force's evaluation team yet again failed to mention the second step of its analysis:

> The technical team reviewed the [redacted] IR&D projects proposed and assessed that proposed [redacted] could reasonably be applied to [redacted]

Tab 3352 at AR 73751-52. In short, despite the Air Force's insistence before GAO that the agency had both performed and documented a proper evaluation of Raytheon's IR&D under its new-found interpretation, the record offers no indication that the agency in fact ever determined whether Raytheon's proposed IR&D efforts were for work explicitly required by the contract.

Had the Air Force conducted such an analysis, it would have observed that [redacted] the projects that Raytheon proposed to accomplish through IR&D were, in fact, explicitly

[redacted]

required by the 3DELRR contract. For example, the Statement of Work ("SOW"), which the Air Force attested is one of the RFP's requirements documents (Tab 3559 at AR 76528:16-22), states that [redacted] Tab 1106 at AR 39058-59 (emphases added). Yet, during discussions, Raytheon told the Air Force that [redacted] Tab 1649 at AR 52714; *see also id.* at AR 52714-15 [redacted] There is no evidence that the Air Force ever questioned whether Raytheon's proposed use of IR&D [redacted] was proper given the SOW's specific requirement [redacted]. But if this does not count as an example of using IR&D to perform specific contract requirements, what does?

Where "the record does not contain any individual evaluator worksheets or notes that would indicate what . . . evaluators actually looked at or evaluated," this Court will uphold agency corrective action. *See, e.g.*, *CBY Design Builders v. United States*, 105 Fed. Cl. 303, 348-50 (2012) ("rational basis" for determination that agency "failed to meaningfully evaluate" relevant criteria). Here, the Air Force's corrective action is based, at least in part, on its need to better document its evaluation. Having failed to adequately document its evaluation in support of its original award (or, apparently, even to complete such tasks), the Air Force reasonably determined that corrective action was justified. *See id.* at 350 ("With no documents illuminating the evaluation process in this regard, and the inability of the agency's witness to shed light on the matter, the GAO could reasonably conclude that the evaluation of the foundation design was not meaningful . . . ."). This Court should defer to that determination.

[redacted]

C. The Air Force Failed to Consider the Risks Inherent in the Future IR&D Proposed [redacted]

Finally, the Court should uphold the Air Force's decision to reopen discussions because the agency's price realism analysis failed to properly account for and document the risks associated with [redacted] proposed reliance on future IR&D. In its outcome prediction, the GAO cited this as an area of concern that the Air Force should address when it reopened discussions (Tab 3582 at AR 76727 ("eval. the proposal risk. WRT future IR&D (not achieving if IR&D doesn't come thr[ough]/materialize)")), and the Air Force's corrective action memorandum reiterates the need for additional documentation on this issue (Tab 3577 at AR 76716).[8] The Air Force's failure in this regard provides yet another basis to uphold its decision to take corrective action.

The CO's testimony at the GAO hearing confirmed that, when the Air Force evaluated price realism, it did not consider the distinction between past/current IR&D and future IR&D as at all relevant: "In terms of CAS and FAR, they don't differentiate between past, future, current IR&D, and therefore in our price realism analysis, we did not differentiate between past or current IR&D either. The whole point of price realism is to understand, does the offeror have a technical understanding of the contractor requirements and whether that IR&D is past or future doesn't matter." Tab 3559 at AR 76507. The Air Force further testified that "[t]he RFP does not distinguish that" either. *Id.* at AR 76510.

But, as explained above, the RFP expressly informed offerors that, if they were going to

[8] *See also* Tab 3580 at AR 76723 ("NG's complaint of realism is moot due to [success on other grounds] . . . [n]eed to consider performance risk . . . [c]aution with respect to level of detail required"); Tab 3579 at AR 76721 ("GAO disagrees w/ Agency regarding realism assessment i.e. resp[onsibility] det[ermination] . . . RFP requires Agency to assess perf[ormance] risk in price realism"); Tab 3584 at AR 76733 (recording the GAO's concerns, during the outcome prediction session, about the "level of detail" and consideration of "perf[ormance] risk" in the Air Force's IR&D evaluation).

[redacted]

propose company-funded efforts as a direct cost reduction, they would need to identify "the planned start and end dates." Tab 1109 at AR 39155. Indeed, despite Raytheon's contention that this distinction was "invented" by Northrop Grumman (Pl. Br. at 29), even *Raytheon's* proposal distinguished between "Completed" and "Future" IR&D investments and associated those investments with [redacted]. Tab 1391 at AR 48694-96. Likewise, in a follow-up EN, the Air Force asked Raytheon what portion of its IR&D cost reduction "depends on the *future* investments" that Raytheon's proposal had identified. Tab 1662 (EN RAY-CP-018) at AR 52758 ("Please explain the cost impact to the govt if Raytheon decides not to invest in these future IR&D efforts.") (emphasis added). [redacted] And, as discussed, the Air Force warned both Raytheon and Northrop Grumman that cost reductions stemming from future IR&D could adversely affect a proposal's cost/price evaluation. *See supra* at 5-10, 19-22. Thus, when the RFP was issued and during the initial round of discussions, the Air Force told the offerors that it *did* matter whether IR&D cost reductions were based on already-completed efforts or on efforts yet to come.

There was good reason for the Air Force to adhere to its initial instructions and observe the distinction between completed and future IR&D. As the Air Force understood (and communicated at certain points during the procurement), future IR&D investments are no sure thing. *See supra* at 5-10. That uncertainty puts contract performance at risk. As Northrop Grumman explained at the GAO, a promise to perform future IR&D investments depends on contingencies somewhat outside the promisor's control. *See* Tab 3536 at AR 75759-63. IR&D is budgeted not years in advance, but one year at a time. If future IR&D does not occur or does

[redacted]

not occur on schedule, 3DELRR developments [redacted] on IR&D funding [redacted] could be greatly disrupted. *Id.* at 75797-75800.

Yet, as the procurement progressed, the Air Force's concern regarding the risk of future IR&D seems to have vanished. In testimony at the GAO, the CO offered only one reason: "The IR&D whether it occurs or doesn't occur is not an issue. That IR&D was used in the price realism analysis to understand Raytheon's [redacted] proposal and their technical understanding of our contract requirements. Raytheon is not committed to do IR&D but we have contractually captured that reduction strategy, so to speak, in our CLIN pricing." Tab 3559 at AR 76555.

Even crediting this explanation, it is impermissible. When an agency commits to undertake a price realism analysis, the fixed-price nature of a contract provides no excuse for a non-existent or cursory analysis. *See, e.g.*, *Afghan Am.*, 90 Fed. Cl. at 359 ("The procedures called for in the RFP are binding regardless of the agency's view of the appropriateness of the standard.") (internal quotation marks and alteration omitted); *see also OMV Med., Inc.*, 219 F.3d at 1344 (courts must set aside price-realism analyses, even as to fixed-price contracts, that are "tainted by irrational assumptions or critical miscalculations"). And it is just as well established that, "[s]ince the risk of poor performance when a contractor is forced to provide services at little or no profit is a legitimate concern in evaluating proposals" (*see Afghan Am.*, 90 Fed. Cl. at 359 (quoting *Computer Sys. Int'l*, B-276955, et al., Aug. 13, 1997, 97-2 CPD ¶ 49, at *2) (internal quotation marks omitted)), an agency cannot justify its failure to properly evaluate performance risks simply by claiming that, by the time of its evaluation, it no longer cared about the impact of [redacted] on performance. *Cf. Afghan Am.*, 90 Fed. Cl. at 359 ("Because the price realism analysis is conducted to avoid poor performance due to underbidding, it is irrational to now state that the price realism analysis was not done properly . . . because the

[redacted]

agency did not actually care about potentially poor performance.").

Unfortunately, that is precisely what the Air Force did here: It committed to evaluate price realism, it stated in discussions that the performance risks attendant to future IR&D would be relevant to its evaluation, and then it decided that, in the fixed-price context, such concerns about future IR&D were irrelevant. This conduct rendered the procurement flawed, and the Air Force's efforts to remedy that flaw should be upheld.

II. Raytheon's Allegations of Procedural Flaws Lack Merit

A. Northrop Grumman's Challenges to the Procurement Were Timely

Raytheon seeks to impose two procedural road-blocks to the Air Force's proposed corrective action, but neither is successful. First, Raytheon argues that the GAO failed to consider the timeliness of Northrop Grumman's protest. According to Raytheon, Northrop Grumman's challenge to the procurement "rests entirely on EN-011" and, because it received the "plainly contradictory" EN NG-CP-003 on the same day, that created a patent ambiguity to which Northrop Grumman was required to object at that time. Pl. Br. at 33-34. This argument fails for several reasons.

For starters, Northrop Grumman's protest was *not* premised on any ambiguity in or with the language of EN NG-K-011. That language, on its face, is clear. And the problem was not that language itself but the Air Force's subsequent, 180-degree reversal on adhering to that language – namely, whether offerors' proposals would be evaluated as unrealistic unless they agreed to treat certain types of IR&D as unallowable – and the uneven playing field that resulted when the Air Force communicated that reversal to Raytheon and Lockheed Martin but not to Northrop Grumman. *See supra* at 19-30. The unfairness of this failure was repeatedly emphasized in Northrop Grumman's briefing at the GAO, and indeed was also emphasized by the GAO in its outcome prediction session. *See* Tab 3571 at AR 76675-82; Tab 3584 at AR

[redacted]

76733 (contemporaneous notes recording the GAO's concerns, during the outcome prediction session, that the Air Force's position on the "allowability of IR&D [was] reversed" and yet the Air Force "never informed NG of [the] reversal," as well as additional concerns about the "level of detail" and consideration of "perf[ormance] risk" in the Air Force's IR&D evaluation). None of these errors was known or could have been known when Northrop Grumman received EN NG-CP-003 and EN NG-K-011.

Nor did Northrop Grumman's receipt of EN NG-CP-003 raise a "patent ambiguity." A patent ambiguity must be "obvious, gross, [and] glaring." *States Roofing Corp. v. Winter*, 587 F.3d 1364, 1372 (Fed. Cir. 2009) (quotation marks omitted). Nothing like that exists here. On the contrary, the two ENs are entirely consistent. In EN NG-K-011, the Air Force expressed concerns that [redacted]. *See supra* at 22-24. Given these concerns, it is not in the least surprising – let alone glaringly inconsistent – for the Air Force to inquire, through EN NG-CP-003, exactly how much [redacted] and what substantiation [redacted] Moreover, EN NG-CP-003 says nothing whatsoever about the allowability of IR&D for work implicitly required by the contract.

Aside from getting the facts wrong, Raytheon also gets the law wrong. It relies on *Blue & Gold Fleet L.P. v. United States*, 492 F.3d 1308 (Fed. Cir. 2007), and *Grumman Data Systems Corp. v. Dalton*, 88 F.3d 990 (Fed. Cir. 1996), but both cases are inapposite. Those cases addressed patent ambiguities in "the terms of the *solicitation*, rather than the evaluation process." *Blue & Gold*, 492 F.3d at 1312 (emphasis added); *see also Grumman Data Sys.*, 88 F.3d at 998. Again, however, Northrop Grumman did not object to a defect apparent on the face of the

[redacted]

Solicitation, but rather to the Air Force's post-Solicitation actions during the evaluation process and award decision.[9] Thus, Raytheon's cited authority is irrelevant. *See, e.g.*, *Caddell Constr. Co. v. United States*, 111 Fed. Cl. 49, 77 (2013) ("Because [the protester] is not challenging the terms of . . . the Solicitation, but rather [the agency's] evaluation of [the contract awardee's] pre-qualification submissions and [the agency's] award decision based on those submissions, the *Blue & Gold Fleet, L.P. v. United States* waiver rule . . . do[es] not apply.").

Indeed, the regulations governing GAO protests clearly demonstrate the timeliness of Northrop Grumman's protest. Generally speaking, where a protest is based on grounds other than alleged solicitation improprieties apparent prior to bid opening, the protest "shall be filed not later than 10 days after the basis of protest is known or should have been known." 4 C.F.R. § 21.2(a)(2). But where, as here, a debriefing was requested and required, offerors are *forbidden* from protesting non-solicitation errors before post-selection debriefings. *Id.* The GAO has thus explained that even where (unlike here) the protestor knew of an agency's improper evaluation methodology, the "Bid Protest Regulations require that these protest grounds be filed after the receipt of the required debriefing." *Boeing Co.*, B-311344 et al., June 18, 2008, 2008 CPD ¶ 114 at 19. Northrop Grumman clearly met this requirement. *See* Tab 3503 at AR 75387; Tab 3536 at AR 75787. And Northrop Grumman told the GAO as much, when Raytheon raised this same challenge during the protests. *See* Tab 3571 at AR 76689 n.5 (citing *Boeing Co.*, 2008 CPD ¶ 114, at 19 & n.41).

Finally, even if the Court were inclined to entertain Raytheon's contention that the GAO

[9] It is telling that the only Solicitation provision discussed in Raytheon's argument regarding timeliness is a provision requesting the "planned start and end dates" of company-funded cost reduction efforts. *See* Pl. Br. at 33 (quoting Tab 1109 at AR 39155). The Air Force's initial skepticism about future IR&D is entirely consistent with its desire to know the extent of offerors' reliance on future IR&D.

[redacted]

overlooked timeliness concerns, that *still* would not provide a sufficient reason for this Court to declare the *Air Force's* decision to take corrective action unlawful. *See, e.g.*, *Navarro Research*, 106 Fed. Cl. at 416 ("[W]hether a protest to GAO was timely filed is irrelevant to the separate issue of whether the GAO decision recommending corrective action was rational . . . ."); *Jacobs Tech.*, 100 Fed. Cl. at 197 ("[W]hether or not IBM's protest was timely is not relevant to GAO's finding that offerors were misled . . . ."); *Centech Grp.*, 78 Fed. Cl. at 506 (refusing to consider argument that "protests before GAO were untimely" because § 1491(b) only "gives this Court jurisdiction to review an agency procurement decision, not the GAO's review of that agency procurement decision"). Any flaws in the GAO's timeliness conclusion – assuming, contrary to the facts, that there were such flaws – would support overturning the Air Force's corrective action *only if* (1) the corrective action was based only on the GAO's outcome prediction; and (2) the GAO's prediction was *also* wrong on the merits of Northrop Grumman's substantive challenges to the procurement. *See, e.g.*, *Sys. Application*, 100 Fed. Cl. at 714 (corrective action unlawful where GAO irrationally ignored untimeliness *and* irrationally analyzed the source selection decision); *Amazon Web Servs., Inc. v. United States*, 113 Fed. Cl. 102, 114 (2013) (corrective action unlawful where GAO concluded protest *was un*timely *and* "completely ignored the blatant manner in which [the GAO protester] manipulated the situation to its advantage"). Because the GAO rightly predicted that the Air Force misled Northrop Grumman during discussions, and because the Air Force, with its broad discretion to remedy errors in a procurement, took into consideration the GAO's prediction on the merits, Raytheon's protest should be denied.

B. Raytheon's Challenge to Prejudice Misconstrues Northrop Grumman's Burden and the Administrative Record

Raytheon also argues that the GAO improperly concluded that Northrop Grumman was

[redacted]

prejudiced by the Air Force's misleading and unequal discussions concerning the evaluation of proposed IR&D. Once again, Raytheon incorrectly frames this Court's inquiry. The only issue is whether there was sufficient evidence of prejudice before the Air Force such that it was rational for the agency to voluntarily reopen discussions with all offerors. There clearly was.

1. Northrop Grumman Sufficiently Demonstrated Prejudice at the GAO

Northrop Grumman made a substantial showing at the GAO that it was prejudiced by the Air Force's misleading and unequal discussions and flawed evaluation of 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. During the protests, Raytheon and the Air Force argued that Northrop Grumman had decided not to propose such IR&D *before* receiving EN NG-K-011, and therefore the misleading EN could not in fact have affected its proposal. *See, e.g.*, Tab 3554 at AR 76466; Tab 3548 at AR 76159. Northrop Grumman explained, however, that its decision not to rely on such IR&D funding was driven entirely by its understanding of the solicitation requirements and EN NG-K-011. It also demonstrated that the offerors' differences in proposing IR&D were clearly tied to the materially different instructions they each received. *See, e.g.*, Tab 3552 at AR 76255-59. Raytheon and the Air Force could not rebut this contention at the GAO, and Raytheon cannot do so now. Indeed, Raytheon has essentially abandoned in this Court any argument that Northrop Grumman never *intended* to propose implicitly required or future IR&D.

Northrop Grumman also made an affirmative showing that it had the ability to propose implicit or contingent IR&D in amounts sufficient to overcome the price differential with Raytheon's proposal. [redacted]. Tab 3546 at AR 76029-30. In addition,

[redacted]

Northrop Grumman emphasized that its size and assets would have permitted it to propose IR&D reductions [redacted].[10] Further, Northrop Grumman identified a particular program [redacted] that shared commonalities with the 3DELRR system and thus were likely candidates for IR&D. Tab 3536 at AR 75793; *see also* Tab 3552 at AR 76255-56. 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. Tab 3536 at AR 75773, 75793.

Finally, Northrop Grumman demonstrated that, had the Air Force properly evaluated the IR&D reductions [redacted], the prices [redacted] would have [redacted] increased, [redacted] In particular, Northrop Grumman's cost/pricing consultant observed that, had the Air Force applied the same rules [redacted] proposed IR&D that Northrop Grumman was instructed to follow, it would not have treated those expenditures as cost savings, and the TEP and BVA [redacted] would have been [redacted] higher. *See* Tab 3536 at AR 75813-14 (Bingham Decl. ¶¶ 7-9) (calculating Raytheon TEP at [redacted] after adding proposed IR&D costs back into [redacted]). Northrop Grumman's consultant also pointed out that the Air Force had failed to consider the costs necessary to customize and tailor [redacted] IR&D to comply with the 3DELRR contract specifications, which also artificially deflated the true cost [redacted]. *Id.* at AR 75818 (Bingham Decl. ¶¶ 19-20). Finally, the consultant explained that the Air

[10] Again, the Air Force evaluated Raytheon as proposing [redacted] in IR&D [redacted]

[redacted]

Force's failure to quantify the actual amount of IR&D costs that would benefit the 3DELRR contract – as opposed to the likely hundreds of other contracts that make up [redacted] G&A bases – meant that the Air Force had erred by assuming that the 3DELRR contract would receive 100% of the benefit of the proposed IR&D, and therefore the costs [redacted] were understated for this reason as well. *Id.* at 75821-22 (Bingham Decl. ¶¶ 28-29). In short, absent the procurement flaws regarding IR&D, not only would Northrop Grumman have been able to close the price gap by reducing the price of its own proposal, it also would have benefited from an increase in the price [redacted], once adjusted to accurately reflect the true value of the [redacted] IR&D.

2. Raytheon's Arguments Against Prejudice Are Not Compelling

Raytheon does not dispute that the GAO found prejudice. Instead, Raytheon claims that this finding was irrational because GAO "applied the wrong legal standard" and "merely accepted at face value Northrop's speculative prejudice contention." Pl. Br. at 35-36. This criticism misses the mark entirely.

First, contrary to Raytheon's assertion, there is no evidence that the GAO applied an incorrect legal standard. Raytheon merely disagrees with the GAO's conclusion. Regardless, the reasonableness of the Air Force's corrective action does not rise or fall on the soundness of the GAO's prejudice determination. Indeed, the agency was free to take corrective action even if the GAO had *denied* Northrop Grumman's protest for *lack* of prejudice. *See, e.g.*, *Jacobs Tech*, 100 Fed. Cl. at 197. That is because 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

[redacted]

necessary underpinning of the federal government's procurement process") (quotation marks omitted). In this case, given the nature of the procurement flaws and the full record, the Air Force was reasonable in concurring with the GAO's prejudice finding and in deciding to reopen discussions with all offerors.[11]

Raytheon also quibbles with the quantity and detail of the evidence of prejudice that Northrop Grumman introduced at the GAO. Raytheon argues that Northrop Grumman needed to "identify the *specific* IR&D projects that it might have utilized to change its competitive position," and it faults Northrop Grumman for not introducing documents evidencing consideration of particular IR&D projects, or an executive declaration explaining how the company would have restructured its proposal to rely on future IR&D had there been no procurement flaws. Pl. Br. at 36-37; *see also id.* at 35 ("In this modified best value procurement, Northrop had to show that, but for the Agency's purportedly misleading discussions, it would have closed the [redacted] delta between its price and Raytheon's.").

But Raytheon misconstrues Northrop Grumman's burden. At most, Northrop Grumman was obligated to demonstrate only that, but for the procurement flaws, it had a "substantial chance" of receiving the contract award. *See Statistica, Inc. v. Christopher*, 102 F.3d 1577, 1582 (Fed. Cir. 1996); *accord Triad Logistics Servs. Corp.*, B-406416, Mar. 19, 2012, 2012 CPD ¶ 118, at 2; *see also* Pl. Br. at 35. The Federal Circuit has made clear that "[t]his test is more lenient than showing actual causation," and that a protester need *not* show that, but for the errors, it would have won the contract. *Bannum v. United States*, 404 F.3d 1446, 1358 (Fed. Cir. 2005);

[11] This is especially true given that the agency likely would have undertaken the same corrective action even if it had disagreed with every one of Northrop Grumman's protest grounds, since it deemed Lockheed Martin's protest to be meritorious. In this sense, Raytheon's arguments on prejudice are not only incorrect, but also irrelevant, unless the Court also finds that the Air Force acted irrationally in deciding to reopen discussions in response to Lockheed Martin's protest.

[redacted]

see also Elec. Data Sys., LLC, v. United States, 93 Fed. Cl. 416, 435 (2010). The administrative record was clearly sufficient to establish that, absent the Air Force's misleading and unequal discussions and flawed evaluation of IR&D, Northrop Grumman had a "substantial chance" of being awarded the 3DELRR contract.

The Air Force's decision to take corrective action did not depend (nor was it required to depend) on the details of how Northrop Grumman would have specifically re-worked its proposal to incorporate particular IR&D cost reductions, had the procurement not been flawed. Indeed, in cases involving misleading and unequal discussions with offerors, the GAO requires no more than "a protester's reasonable assertion of a claim that it could have improved its competitive position" to demonstrate prejudice. *See KPMG LLP*, B-406409 et al., at 11. The cases cited by Raytheon do not hold to the contrary. For example, in *Amazon*, the court concluded that the protester lacked *any* chance of winning the contract award, and lacked standing to even challenge the award. *See Amazon Web Servs.*, 113 Fed. Cl. at 106. There, the protestor had intentionally manipulated its pricing to create a bid protest issue, and the alleged procurement flaw affected all offerors equally, meaning that it necessarily could not have prejudiced any single offeror. *Id.* at 116 (noting that it was "implausible that there would be any effect on the outcome of the procurement"). Such a situation is very different from the misleading and unequal discussions present in this procurement which, by their nature, disadvantaged only Northrop Grumman.

Nor is this case like *Electronic Data Systems*, which Raytheon cites for the proposition that a significant price differential can preclude a finding of prejudice. Pl. Br. at 38 (citing *Elec. Data Sys.*, 93 Fed. Cl. at 435-36). In that case, the source selection documents made clear that "even under the best of scenarios," the protester "would not have received the contract," given

[redacted]

that the agency had "more than accounted" for the alleged procurement flaw by adjusting the competitor's price in its best value analysis. *Elec. Data Sys.*, 93 Fed. Cl. at 436. In any event, the *Electronic Data Systems* decision acknowledged that a significant price differential is *not* dispositive, and that courts "must consider all the surrounding circumstances in determining whether there was a substantial chance that a protester would have received an award." *Id.* at 438. Here, where the Air Force evaluated Raytheon as proposing [redacted] in IR&D [redacted] it was not unreasonable for the Air Force to conclude – based on the entirety of the circumstances – that Northrop Grumman could propose similar quantities of IR&D to overcome the [redacted] price differential (even assuming that price differential remained in re-competition).

Finally, Raytheon's attempt to hold Northrop Grumman to a higher standard for demonstrating prejudice is especially inappropriate here. As explained in Northrop Grumman's briefing on its motion to supplement the record (Dkts. 40 & 52), the GAO's protective order prohibited counsel from having detailed discussions with company personnel concerning the potential restructuring of Northrop Grumman's proposal to incorporate IR&D. Accordingly, Northrop Grumman was unable to introduce an executive declaration demonstrating specifically how it could have relied on future IR&D until *after* Raytheon agreed to a more limited scope of redactions in this litigation. Were the Court to consider Raytheon's arguments about prejudice, it should also consider the executive declaration offered by Northrop Grumman (Dkt. 40, Ex. A (Meaney Decl.)), which provides confirming details of the showing made at the GAO.[12]

[12] Northrop Grumman's motion to supplement the record (Dkt. 40) remains pending. Contrary to Raytheon's contention (Pl. Br. at 37 n.19), Northrop Grumman does not offer its executive declaration as a concession that its prejudice showing before the GAO was insufficient.

[redacted]

III. The Air Force's Decision to Reopen Discussions to Re-Evaluate Raytheon's Untested Design Change Was Not Arbitrary, Capricious, or an Abuse of Discretion

The Court also should uphold the corrective action because the Air Force's technical evaluation of Raytheon's proposal was flawed. Raytheon changed the design of one of its CTEs *after* it was assessed for technical maturity, and the Air Force improperly evaluated whether this new design still met requirements. The Air Force's decision to remedy this additional, significant – and entirely independent – procurement flaw was reasonable.

At the end of the pre-EMD contract, the Air Force issued a Technology Readiness Assessment Report summarizing its conclusions about the technical maturity of Raytheon's six CTEs. One of these – CTE 1 – was the [redacted] which the Air Force described as consisting of [redacted] Tab 1141 at AR 40630-31. In a diagram of CTE 1, the report showed [redacted]. *Id.* The Air Force evaluated this particular configuration as meeting TRL 6 maturity level requirements. *Id.* at AR 40637.

In its initial proposal for this EMD contract, Raytheon denied any changes to CTE 1 and asserted that the CTE 1 remained at the TRL 6 maturity level. Tab 1342 at AR 48096. Based on these representations, the Air Force again evaluated Raytheon's CTE 1 as meeting the RFP's TRL 6 maturity level requirements. Tab 1483 at AR 50946-47. During discussions, however, Raytheon confessed that in fact it *had* changed CTE 1. Specifically, Raytheon had [redacted] Tab 2038 at AR 58142. Raytheon does not dispute that it made this change.

The RFP clearly stated that if offerors made *any* changes to CTEs subsequent to the pre-

[redacted]

EMD evaluation, the offeror had to provide substantiation proving that the changed CTE also met TRL 6 maturity level requirements. Tab 1110 at AR 39181. Raytheon did not submit this required substantiation.

Before the GAO, the Air Force claimed that it did not need the substantiating documentation required by the RFP and did not need to document its evaluation of Raytheon's change, because the change did not involve the "most critical" elements of Raytheon's CTE 1. But there is no "most critical" exception in the RFP. In effect, the Air Force was simply seeking to waive the RFP's substantiation requirement for Raytheon, whose proposal would have been deemed unacceptable and ineligible for award without such a waiver.

It was unlawful for the Air Force to waive an RFP requirement to award the contract to Raytheon. *See, e.g., Red River Holdings, LLC v. United States*, 87 Fed. Cl. 768, 786-88 (2009). Moreover, and in all events, the Air Force did not adequately document any evaluation of Raytheon's CTE 1 change. *See, e.g., CBY Design Builders*, 105 Fed. Cl. at 350. Thus, the Air Force was amply justified in taking corrective action to re-open discussions regarding the technical maturity of Raytheon's design change.

IV. Raytheon Is Not Entitled to a Permanent Injunction

Since Raytheon has not shown that it can prevail on the merits, it is not entitled to permanent injunctive relief. *See Global Computer Enters., Inc. v. United States*, 88 Fed. Cl. 350, 403 (2009); *accord Allied Materials & Equip. Co. v. United States*, 81 Fed. Cl. 448, 463 (2008). However, even if the Court is inclined to enjoin the Air Force's proposed corrective action, the scope of that injunction should be quite narrow. The Court should *not*, as Raytheon requests, declare "that the initial contract award to Raytheon was valid and not reasonably subject to corrective action based on the Lockheed and Northrop protests." Pl. Br. at 6 n.3; *see also* Cplt.

[redacted]

¶ 40. Reinstatement of the original contract award and prohibition of any future agency corrective action would be an overbroad and unwarranted remedy. *Cf. Sys. Application*, 100 Fed. Cl. at 720 n.22 (denying as overbroad a request for injunction to prevent Army from implementing any other corrective action).

First, even if the Court declines to uphold the Air Force's corrective action based on the reasons adopted by the agency, both Northrop Grumman and Lockheed Martin raised numerous other challenges to the procurement at the GAO, and the Court should not enjoin the agency from considering those challenges as alternative reasons for taking corrective action. Nor should the Court enjoin the agency from implementing corrective action different than that originally proposed, especially given that the Air Force explicitly "reserve[d] the right to take any other corrective action it deems appropriate." Tab 3585 at AR 76735. Accordingly, if the Court concludes that the particular proposed corrective action is not rational based on the specific grounds on which the Air Force relied, that should *not* mean that the Air Force can never choose to take a different corrective action on different grounds, or that the Court must reinstate the original contract award to Raytheon.

Raytheon argues that a recompetition will cause it irreparable harm because its proposed price has been disclosed to its competitors. Pl. Br. at 39. But the mere disclosure of Raytheon's price, standing alone, does not constitute irreparable harm. *Sys. Application*, 100 Fed. Cl. at 721 n.23. If it did, in every case, "the government would be hampered in its attempts to take corrective action to cure legitimate deficiencies unearthed during bid protests." *Id.* More importantly, however, because any recompetition for the 3DELRR contract will occur only after the Air Force has clarified its approach to evaluating IR&D, the original price proposals will likely have little bearing on how future price proposals are structured.

[redacted]

Nor is Raytheon correct that a recompetition will harm the Air Force's or the public's interests. Given the Air Force's voluntary decision to take corrective action – after incurring significant time and expense in conducting the original procurement – an order enjoining that corrective action would seriously undermine the discretion afforded to the agency under the law. *See, e.g., Axiom Res. Mgmt., Inc. v. United States*, 564 F.3d 1374, 1384 (Fed. Cir. 2009) ("The Supreme Court has warned against undue judicial interference with the lawful discretion given to agencies."). Enjoining the Air Force's corrective action also would undermine the public's interest in fair and impartial competition in government procurements.

CONCLUSION

For the reasons stated above, Northrop Grumman respectfully requests that the Court grant its Cross-Motion for Judgment on the Administrative Record and deny Raytheon's Motion for Judgment on the Administrative Record.

Dated: March 20, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 20, 2015, I caused a true and correct copy of the foregoing to be served by electronic means, via the Court's CM/ECF system, which sent a notification of such filing to the following:

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