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 REPLY BRIEF IN SUPPORT OF ITS CROSS-MOTION FOR JUDGMENT ON THE ADMINISTRATIVE RECORD

Dated: April 17, 2015

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INTRODUCTION

Northrop Grumman Systems Corporation ("Northrop Grumman") respectfully submits this reply brief in support of its cross-motion for judgment on the administrative record.

The GAO proceeding in this case illuminated several important facts: the Air Force gave instructions to Northrop Grumman and Raytheon regarding proposed IR&D cost reductions; Air Force contracting officials then "changed" their mind about the instructions and informed Raytheon of the change but not Northrop Grumman; in accordance with the agency's changed instructions, Raytheon relied [redacted] on IR&D cost reductions in its proposal and was awarded the 3DELRR contract [redacted] After these facts were demonstrated at the GAO, and after the GAO attorney predicted in an ADR session that she would sustain the protests on multiple grounds, the Air Force announced that it would take corrective action. Ten days later, the Air Force issued a memo explaining its basis for the corrective action.

Given these straightforward and undisputed facts, and this Court's deferential standard of review, the Air Force's voluntary decision to reopen discussions and evaluate new proposals was neither arbitrary, capricious, nor an abuse of discretion. Yet Raytheon seeks to convince this Court to ignore the agency's stated reasons for corrective action and to adopt legal standards inconsistent with both Federal Circuit precedent and the FAR. The Court should reject these efforts. At its core, the federal procurement system is grounded in principles of equal treatment and fairness. When those principles are violated, as they were in this case, an agency is vested with broad discretion to restore the offerors to a level competitive field. The Court should not disturb the Air Force's efforts to do so here. Northrop Grumman respectfully requests that the Court grant its Cross-Motion for Judgment on the Administrative Record (Dkt. 57) and deny Raytheon's Motion for Judgment on the Administrative Record (Dkt. 48).

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ARGUMENT

I. This Court's Review Is Deferential

Raytheon contends that the Court should consider only the GAO's outcome prediction and do so "without deference." Pl. Resp. at 9. This is plainly wrong. While the GAO's recognition of procurement error should be considered to the extent that the Air Force adopted the GAO's reasoning, the agency's decision remains the focal point. *See, e.g.*, *Turner Constr. Co. v. United States*, 645 F.3d 1377, 1383 (Fed. Cir. 2011) (asking "whether the Army's decision to follow the GAO's recommendation 'lacked a rational basis'"). Moreover, the mere fact that the Air Force's corrective action was "triggered" by the GAO outcome prediction, to use Raytheon's term (Pl. Resp. at 5), does not mean that the Air Force's reasoning was identical to the GAO's. The Air Force's reasoning is cogently laid out in the Memorandum for Record. Tab 3577 at AR 76714. Where, as here, the agency has offered its own reasoned account of its corrective action, the Court should evaluate the agency's action on its own merits. *SP Sys., Inc. v. United States*, 86 Fed. Cl. 1, 14 (2009).

In any event, whether the Court focuses on the Air Force's explanation or the GAO's outcome prediction, its review must be deferential. *Turner*, 645 F.3d at 1384 (Court of Federal Claims review is "a deferential one" and must not be an "independent de novo assessment"); *Honeywell, Inc. v. United States*, 870 F.2d 644, 649 (Fed. Cir. 1989) (reversing where Court of Federal Claims "failed to give appropriate deference to the GAO's conclusion"). This Court's decision in *Systems Application* did not hold otherwise. Indeed, in that case, the Court expressly noted its obligation to "afford[] the Army's decision to take corrective action deference." *Sys. Application & Techs., Inc. v. United States*, 100 Fed. Cl. 687, 716 (2011). But no amount of deference could save that corrective action decision. The Army had adopted the GAO official's email recommendation without any analysis or refinement of its own, or without any statement

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of its reasons, unlike here. *See id.* ("[T]he Army briefly summarizes, in two sentences, Kratos's initial and supplemental protests. Then, without any analysis, it declares: 'After a review of the supplemental issues, the Army has determined that it is in its best interest to take corrective action.'"). Moreover, as the Court found, the GAO's email was irrational on its face: it faulted the Source Selection Authority for overlooking a handful of considerations when she had clearly documented her consideration of every one. *Id.* at 715. Ultimately, the Court concluded that the GAO official had "completely misread" the source selection decision and impermissibly second-guessed the agency's reasonable exercise of judgment. *Id.* at 714. *Systems Application* bears no resemblance to this case, where the GAO thoroughly reviewed the facts and applicable law and reasonably determined that the Air Force's instructions had misled Northrop Grumman into thinking its ability to propose IR&D cost reductions was limited.

II. The Air Force's Decision to Take Corrective Action on the Basis That It Engaged in Misleading and Unequal Discussions Was Plainly Reasonable

As our opening brief showed, the Air Force changed midstream its standards for evaluating IR&D, abandoned its original realism concerns, and communicated this change to Raytheon but not Northrop Grumman. At the GAO hearing, the Contracting Officer ("CO") admitted that the evaluation approach set forth in EN NG-K-011 sent to Northrop Grumman was "not the way that we would apply IR&D with my knowledge now," though it did communicate the Air Force's approach "[a]t the time" it was drafted. Tab 3559 at AR 76537-39. As the CO explained it, and contrary to Raytheon's claim otherwise (Pl. Resp. at 34 n.32), the Air Force's "understanding changed upon receipt of Raytheon's EN response." Tab 3559 at AR 76504.

Raytheon does not dispute that it ultimately received materially different IR&D instructions than Northrop Grumman, or that the two offerors proposed IR&D cost reductions in accordance with the instructions each received. Nor does it dispute that its proposed IR&D cost

[redacted]

reductions [redacted] in final proposal prices. *See* Tab 3256h at AR 72446 (crediting Raytheon with [redacted] in proposed IR&D reductions); Pl. MJAR at 35-37 (referencing [redacted] delta" between proposals). Confronted with these facts, Raytheon argues that the Air Force's provision of materially different instructions is nonetheless unassailable because the EN sent to Northrop Grumman communicated a misstatement of law, and because the different instructions were necessary to prevent Northrop Grumman from learning too much about Raytheon's proposal strategy. Raytheon alternatively argues that the GAO outcome prediction was irrational because it concluded that Northrop Grumman had been misled regarding the allowability of "future IR&D," and "future IR&D" (according to Raytheon) was not mentioned in the EN sent to Northrop Grumman. None of these arguments is persuasive.

A. The Air Force's Decision to Take Corrective Action Was Reasonably Premised on Its Well-Supported Determination That the Agency Had Misled Northrop Grumman About Its Standards for Evaluating Proposed IR&D

1. The Air Force's Misleading and Unequal Discussions Concerned the 3DELRR Price Realism Evaluation, Not a Purely Legal Issue

Contrary to Raytheon's assertion, EN NG-K-011 did not merely address the legal allowability of IR&D proposed for cost reductions. Rather, by its plain terms, the EN articulated the Air Force's approach to its price realism analysis. *See* Tab 1619 at AR 52558 ("Description of Issue: The Government is concerned with the reasonableness and realism of any affordability initiative offered."). EN NG-K-011 instructed that IR&D necessary to perform the contract (*i.e.*, implicitly required IR&D) "unless properly segregated and agreed to as unallowable costs IAW FAR Part 31 . . . may be deemed unrealistic." *Id.* at AR 52559. It further instructed that proposed savings "which could be considered contingent on future events may be considered speculative and unrealistic." *Id.* And it contained a Special H-Clause requiring Northrop

[redacted]

Grumman to agree that any proposed savings would be treated as an unallowable cost in order for its proposal to be "determined reasonable and realistic." *Id.*

Despite this language, Raytheon contends that EN NG-K-011's purpose was to apply the FAR "with no glosses or extra requirements." Pl. Resp. at 30. But that is plainly not the case. EN NG-K-011's use of the phrase "IAW [in accordance with the] FAR" did not negate the remainder of the EN's instructions. Nor does anything in the FAR – including FAR 31.205-18 – regulate or restrict how agencies should treat proposed IR&D when performing price realism analyses in fixed-price contract procurements. And nothing in the FAR prohibits agencies from requiring offerors, as a condition for award, to agree that otherwise allowable costs will be treated as unallowable costs in a particular contract. Those decisions are reserved to the procuring agency's discretion. EN NG-K-011 told Northrop Grumman how the Air Force was exercising that discretion in this procurement.[1]

Moreover, internal Air Force communications confirm what the EN made plain: The Air Force was concerned about IR&D and sought to limit its use to protect the government against future costs and potential contract execution failures. *See, e.g.*, Tab 1471 at AR 50725 (discussing concern that IR&D costs would ultimately be borne by the government); Tab 2203 at AR 58971-72 (suggesting that IR&D costs should be "immediately isolated to an auditable unallowable account," describing the proposed H-Clause as ensuring "that any investment is

[1] In its reply brief (at 32), Raytheon argues that the RFP and ENs made clear that Northrop Grumman could propose IR&D [redacted]. This argument misses the mark. Northrop Grumman has never contended that the RFP prohibited it from proposing *any* IR&D. Rather, the RFP and ENs stated that, if Northrop Grumman proposed IR&D for implicitly required work or other future investments to reduce its price, it had to segregate those costs and treat them as unallowable or its proposal could be deemed unrealistic. This was an extreme disincentive to proposing future or implicitly required IR&D. Raytheon, by contrast, was informed that future or implicitly required IR&D could be treated as an allowable cost with *no* realism risk. Raytheon thus had a strong incentive to propose such IR&D.

[redacted]

truly a savings not a subsequent cost to the Gov. . . . by forcing the IR&D to be categorized as unallowable," and highlighting the potential performance risk associated with "future IR&D").[2]

Raytheon concedes that agencies "have discretion when conducting procurements to impose particular evaluation and contracting standards more strict than those encompassed in the FAR or the statutes." Pl. Resp. at 29-30 & n.23. In light of the EN's plain language, and the Air Force's stated concerns, Northrop Grumman reasonably interpreted EN NG-K-011 as communicating evaluation standards more specific and more restrictive than what was theoretically permissible under the FAR. And because the Air Force communicated a different evaluation standard to Raytheon, it was not arbitrary or irrational for the agency to decide to reopen discussions. After all, "[c]ontracting officers are afforded broad discretion to take corrective action if they determine that such action is necessary to ensure fair and impartial competition." *Ceres Gulf, Inc. v. United States*, 94 Fed. Cl. 303, 318 (2010).

2. Agencies May Not Conduct Misleading and Unequal Discussions About Any Subject, Not Even the Law

Even if, however, the Court concludes that EN NG-K-011 was *not* intended to communicate the Air Force's IR&D price realism approach for this procurement – but rather the agency's view of IR&D allowability more generally – the Court must still uphold the Air Force's corrective action. As even Raytheon admits (Pl. Resp. at 28), the FAR prohibits government conduct that "[f]avors one offeror over another." *See* FAR 15.306(e)(1). This prohibition does

[2] This concern was no aberration. Just last week, the Department of Defense issued a directive acknowledging the risks associated with offerors' use of "future IRAD" to reduce prices in competitive procurements. *See Implementation Directive for Better Buying Power 3.0*, at 11 (Apr. 9, 2015), *available at* http://bbp.dau.mil/docs/BBP3.0ImplementationGuidance MemorandumforRelease.pdf. The directive warns that relying on future IR&D to reduce a proposal's costs is "not the intended purpose of making IRAD an allowable cost." *Id.* at 11-12. And it reveals that the government is contemplating a "proposed regulatory or statutory change that would preclude use of substantial future IRAD expenses as a means to reduce evaluated bid prices in competitive source selections." *Id.* at 12.

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not contain any exception for discussions about matters of law. *Cf. AshBritt, Inc. v. United States*, 87 Fed. Cl. 344, 372 (2009) (supposition that misled offeror could have "ignored the agency's advice does not erase" misleading or unequal discussions).

Nor would it serve federal procurement principles for the Court to fashion such an exception in this case, where the Air Force affirmatively stated its view during discussions. "The primary objective of discussions is to maximize the Government's ability to obtain best value, based on the requirement and the evaluation factors set forth in the solicitation." FAR 15.306(d)(2). Discussions here led Raytheon [redacted] to propose [redacted] IR&D-based cost reductions for implicitly required development work. *See* Tab 3272 at AR 72962, 72969. By leaving Northrop Grumman behind after discouraging it from proposing such IR&D, the Air Force acted against its own interests and increased the likelihood that a suboptimal bid would prevail. *Compare U.S. Foodservice, Inc. v. United States*, 100 Fed. Cl. 659, 686 (2011) ("government procurements should be conducted on as level and fair a playing field as possible" because "[t]his level of competition is ideal for the Government"), *with* Pl. Resp. at 26 (arguing that United States and intervenors seek a "strict liability standard for Government misstatements" that would benefit only contractors). Regardless of whether EN NG-K-011 was more factual or more legal in nature, it was rational for the Air Force to correct its misleading and unequal discussions and conduct a fair procurement to obtain the best proposals possible. *See, e.g.*, *Vitro Servs. Corp.*, B-233040, Feb. 9, 1989, 89-1 CPD ¶ 136 ("[W]here an agency inadvertently misleads a firm during discussions, with the result that the firm may not have competed on an equal basis, the proper course of action for the agency to take is to reopen discussions with all firms.").

Raytheon cites no authority supporting a "mistake of law" exception to these principles.

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The procurement cases it cites do not address misleading discussions, but rather an agency's failure to repeat facts about which there could have been no uncertainty in the first place. *See* Pl. Resp. at 25 (citing *Res. Conserv. Grp. v. United States*, 96 Fed. Cl. 457, 466 (2011) (no obligation to reiterate rule published in CFR); *440 E. 62nd Street Co.*, B-276058, et al., Dec. 11, 1997, 98-1 CPD ¶ 73 (no obligation to reiterate proposal weakness of which bidder was indisputably aware)). None of Raytheon's cases involves an agency *affirmatively misleading* an offeror by expressing its interpretation of the law and then changing its view, either silently or (worse) while notifying the other bidders. Indeed, to the extent that any authority exists addressing Raytheon's novel claim that an agency is free to mislead offerors about legal matters, that authority goes *against* Raytheon. *See, e.g.*, *AMEC Earth & Envt'l, Inc.*, B-401961, et al., Dec. 22, 2009, 2010 CPD ¶ 151, at 7-8 (finding misleading discussions where agency knew of protester's mistaken belief that worksite was designated as a "wetland" under the law, did not inform protester of mistake, and evaluated other proposals as though site were not a "wetland").

In the absence of any procurement cases supporting its position, Raytheon seeks to derive support from contract law. *See* Pl. Resp. at 2, 26. Its cases, however, are entirely inapposite. The very existence of the FAR and the separate body of procurement case law demonstrate that, while common-law principles may inform the *interpretation* of contracts negotiated at arm's length, procurements are a different animal, subject to extensive regulation and oversight.[3]

Moreover, as we explained in our opening brief (at 28 n.6), even under the contract cases cited by Raytheon, a party may be entitled to relief where – like Northrop Grumman – it acted in reliance on an agency's affirmative statement. *See, e.g., C&L Constr. Co. v. United States*, 6 Cl.

[3] For example, Raytheon's contention that "[d]iscussions are nothing more or less than a specific type of" contract "negotiations" (Pl. Resp. at 26) ignores the fact that even "negotiations" is a defined term in the FAR, and are "undertaken with the intent of allowing the offeror to revise its proposal." *See* FAR 15.306(d).

[redacted]

Ct. 791, 797 (1984) ("The court recognizes that, in some instances, mutual mistake of law may be a basis for reformation, especially when affirmative government action is involved."), *aff'd*, 790 F.2d 93 (Fed. Cir. 1986). The contracts treatise cited by Raytheon is consistent in this regard. *See* 27 *Williston on Contracts* § 70:133 (4th ed. 2014) (mistake of law "generally gives rise to relief where . . . superior knowledge of the one justified reliance (and was actually relied on) by the other"). Accordingly, even if the Court agrees with Raytheon that EN NG-K-011 stated the Air Force's view on the legal allowability of IR&D, given that the agency communicated a different view to the other offerors, it was neither arbitrary nor capricious for the Air Force to make uniform its communications by reopening discussions with all offerors.

3. In Any Event, Northrop Grumman Was Justified in Not Contesting the Air Force's Alleged Misstatement of Law During Discussions

Finally, even if this Court were to conclude that EN NG-K-011 merely stated the Air Force's view on IR&D allowability generally (which it should not), and also were to recognize an exception to misleading and unequal discussions doctrine for mistakes of law (which it also should not), the Court still should uphold the Air Force's corrective action decision. Under the circumstances, Northrop Grumman reasonably treated EN NG-K-011 not as indisputably incorrect, but rather as a deliberately chosen conservative interpretation of *ATK Thiokol*.

Raytheon contends that Northrop Grumman was obligated to argue with the Air Force until it changed its mind about IR&D because *ATK Thiokol*'s holding was "unambiguous" (Pl. Resp. at 30) and EN NG-K-011 was "facially incorrect" in light of that decision (*id.* at 31). But Northrop Grumman had no reason to expect that the government would reverse course entirely and accept Raytheon's reading of *ATK Thiokol*.[4] Northrop Grumman had received multiple ENs

[4] Unlike here, the contract in *ATK Thiokol, Inc. v. United States* was for delivery of a final product only, not development work. The contracting parties "did not intend to include the Development Effort costs among the costs paid for under the contract," and so their contract did

[redacted]

expressing concern about IR&D-dependent cost reductions and the recovery of indirect charges. Tab 1599 at AR 52482; Tab 1618 at AR 52552; Tab 1619 at AR 52558-59. DCAA guidance mirrored EN NG-K-011's prohibition on IR&D for implicitly required contract development work. Tab 3536 at AR 75835. The DCMA had even issued a decision in 2012 disallowing over $62 million in IR&D and other costs charged by Raytheon to the government under a different contract, and the government and Raytheon have since been embroiled in litigation over this issue and Raytheon's interpretation of *ATK Thiokol*. *See* Tab 3552 at AR 76293, 76335-39, 76384-86. Given these facts, Northrop Grumman was not required to push back on the Air Force's stated standard for IR&D evaluation in this procurement on the off-chance that the Air Force would change that standard. *Cf. NetStar-1 Gov't Consulting, Inc. v. United States*, 101 Fed. Cl. 511, 523 n.17 (2011) ("No doctrine or case requires a potential protestor to be clairvoyant or to police an agency's general noncompliance with the FAR on the possibility that such misfeasance might become relevant in a protest."), *aff'd*, 473 F. App'x 902 (Fed. Cir. 2012).

B. The Corrective Action Was Not Based on an Irrational GAO Conclusion

Raytheon also argues that the GAO's outcome prediction was premised on a finding that

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not specifically require development or include a "provision for payment of the Development Effort costs." 598 F.3d 1329, 1331 (Fed. Cir. 2010). Nevertheless, because development was implicitly required, the government argued that ATK Thiokol could not account for its general development work as IR&D. *Id.* The Federal Circuit disagreed, holding that in such circumstances, implicitly required development work could be "allowable" (*i.e.*, reimbursable) as IR&D. *Id.* There is yet disagreement as to how broadly this holding extends. *See, e.g.*, *Postscript II, Independent Research and Development Costs, Addendum*, Nash & Cibinic Report, 24 No. 7 at ¶ 31, July 2010 ("The court neither contemplated nor addressed a situation where the contractor signs either a commercial or Government contract to develop a new product agreeing to allocate the cost of some development work to IR&D."). Given the Air Force's clear statement in EN NG-K-011 that it wanted to include costs for development work "as direct charges to the 3DELRR contract," Tab 1619 at AR 52559, Northrop Grumman was justified in concluding that the Air Force intended to adopt a narrow interpretation of *ATK Thiokol*, regardless of whether that interpretation ultimately proves right or wrong as a matter of law.

[redacted]

Northrop Grumman was misled with respect to "future IR&D," where the concept of "future IR&D" does not signify "implicitly required IR&D" and has no relation to EN NG-K-011. *See* Pl. Resp. at 36-38. This argument, however, does not support Raytheon's challenge to the corrective action because it misrepresents the EN, ignores language in Raytheon's own proposal, and disregards both the Notice of Corrective Action and Memorandum for Record.

Raytheon's claim that EN NG-K-011 "only discusse[d] future events generally," and therefore did "not set forth any restrictions regarding future IR&D" (Pl. Resp. at 39), is purely semantic. By referencing "any methodology proposing savings, which could be considered contingent on future events," the EN plainly indicated that proposed future IR&D would be subject to enhanced price-realism scrutiny, and might be deemed "speculative and unrealistic." Tab 1619 at AR 52559. Contrary to Raytheon's assertion, the EN also restricted the allowability of future IR&D: to ensure that proposed cost reductions would be deemed realistic, the EN requested that Northrop Grumman accept an H-Clause whereby Northrop Grumman promised that its cost reduction efforts (including any implicit IR&D and savings contingent on future events, *i.e.*, future IR&D) would be "classified as unallowable costs" and "excluded from any billing . . . applicable to the 3DELRR program and all future Government contracts." *Id.* Thus, to ensure its price would be deemed realistic, Northrop Grumman was asked to promise to treat proposed *future* IR&D as an unallowable cost.[5]

Moreover, in its initial proposal and in response to ENs, Raytheon described the IR&D it was proposing in the place of otherwise necessary development work (*i.e.*, implicitly required IR&D) as "future" IR&D investments. *E.g.*, Tab 1391 at AR 48694-95; Tab 1966 at AR 57574-75. Likewise, the Air Force, upon receiving Raytheon's initial proposal, described Raytheon's

[5] The Air Force initially requested that Raytheon agree to a similar clause, Tab 1683 at AR 52814-15, but ultimately relented and permitted Raytheon to treat such costs as allowable IR&D.

[redacted]

proposed IR&D as "future IR&D." Tab 1662 at AR 52758. Raytheon's suggestion that the GAO's reference to "future IR&D" came out of the blue is belied by the record.

In any event, the GAO's reference to "future IR&D" in its outcome prediction does not dictate the rationality of the Air Force's corrective action decision, which focuses on EN NG-K-011's language regarding implicitly required IR&D. The Air Force's Notice of Corrective Action, for example, states that it intends to clarify the "allowability of Independent Research and Development," not the allowability of future IR&D. Tab 3585 at AR 76735. And the Memorandum for Record states that the Air Force has taken corrective action because it conducted misleading discussions regarding the allowability of "implicitly required" IR&D for purposes of its price evaluation. Tab 3577 at AR 76715.

C. The Air Force Was Required to Remedy Its Misleading and Unequal Discussions Even If It Might Have Led Northrop Grumman to Believe That Raytheon's Proposal Relied on IR&D

Finally, Raytheon argues that the Air Force did not need to inform Northrop Grumman of its changed view of IR&D because doing so might have suggested Raytheon's price strategy. Pl. Resp. at 27, 44. Any such "connecting of the dots," however, could follow only because Raytheon's [redacted] approach to IR&D is already publicly known. *See* Dkt. 40, Ex. A (Meaney Decl.) ¶ 16. Moreover, as the government's opening brief observes (at 46), Raytheon's argument is apparently that the Air Force should not have corrected its error because that would have helped Northrop Grumman too much – logic entirely inconsistent with Raytheon's claim that Northrop Grumman was not prejudiced by the error.

In any event, the FAR is unambiguous and does not support Raytheon's position. Conduct favoring one offeror over another – like the Air Force's discussions with offerors in this case – is expressly prohibited. *See* FAR 15.306(e)(1). While revealing one offeror's price to another is also impermissible, *id.* 15.306(e)(3), that prohibition does not extend to every price-

[redacted]

related revelation. Indeed, the FAR recognizes that a contracting officer "may inform an offeror that its price is considered by the Government to be too high," *id.*, [redacted] even where such communication might cause the offeror to reach conclusions about other offerors' pricing strategies. Even if a concern regarding Raytheon's potential sensitivity about its pricing strategy explains why the Air Force initially decided to leave its unequal treatment uncorrected, the unequal treatment was unlawful all the same and the Air Force is acting reasonably in seeking to correct it now.

III. The Air Force's Decision to Take Corrective Action Is Also Rationally Based in the Agency's Failure to Document Its Evaluation of Raytheon's Proposal

Beyond misleading and unequal discussions, the Air Force's corrective action is further grounded in the need to remedy two additional flaws in the Air Force's price realism analysis.

First, as Northrop Grumman explained in its opening brief (at 30-33), the Air Force failed to assess whether Raytheon's proposed IR&D satisfied even the Air Force's altered view of IR&D cost reductions. The CO testified that the Price Competition Memorandum contained the agency's determination that Raytheon's IR&D projects did not include work explicitly required by the 3DELRR contract. Tab 3559 at AR 76548-49. But neither that document nor any other evidence in the record indicates that the Air Force actually did consider whether Raytheon was proposing IR&D for explicitly required contract work. *See* Tab 3280 at AR 73019-20. Even under the Air Force's changed approach to IR&D, the agency performed only half the analysis.

Second, the Air Force also failed to consider the risks inherent in future IR&D, [redacted] *See, e.g.*, Tab 1662 at AR 52759. As the Air Force's ENs recognized, cost reductions "contingent on future events" are more "speculative" because they may not ultimately be realized, and therefore should have counted against offerors in the agency's price realism evaluation. Tab 1619 at AR 52559; Tab 1683 at

[redacted]

AR 52814; *see also* Tab 1662 at AR 52758. That is particularly true for future IR&D, which cannot readily be budgeted years in advance. NG MJAR 35-36. But the CO testified that the Air Force ultimately ignored this risk that had concerned it earlier. *See* Tab 3559 at AR 76555.

The Air Force's failure to perform a price realism analysis as specified in the RFP and its failure to document that required analysis amply justify the agency's decision to take corrective action here. *See, e.g.*, *Afghan Am. Army Servs. Corp. v. United States*, 90 Fed. Cl. 341, 359 (2009); *CBY Design Builders v. United States*,105 Fed. Cl. 303, 348-50 (2012).

Raytheon contends that these flaws are beyond this Court's consideration. Pl. Resp. at 46-47. This contention is mistaken. The Memorandum for Record notes the importance of "more robust documentation supporting" the agency's decision, and the original evaluation's inadequate documentation extended to both of these issues. *Cf. IBM Corp. v. United States*, 119 Fed. Cl. 145, 154 (2014) (agency's decision must be upheld "if the agency's path may reasonably be discerned"). Raytheon's contention also is inconsistent with its repeated insistence that the GAO's outcome prediction should be the subject of review, since the GAO indisputably found merit in Northrop Grumman's price realism concerns. It went out of its way to say so, even though the point was mooted by its misleading and unequal discussions recommendation.[6] *See, e.g.*, Tab 3579 at AR 76721; Tab 3580 at AR 76723; Tab 3582 at AR 76727; Tab 3584 at AR 76733. Finally, Raytheon has made a point of asking for sweeping relief to prohibit the Air Force from taking corrective action in response to *any* of Northrop

[6] This protest ground provides an independent basis for finding prejudice. If not for the Air Force's failure to evaluate the risk of future IR&D, Raytheon's proposal [redacted] would have been deemed unrealistic and ineligible for award [redacted] Raytheon's proposal was evaluated as containing [redacted] in IR&D reductions [redacted] had been completed at the time of Raytheon's proposal. Tab 1966 at AR 57574. [redacted]

[redacted]

Grumman's GAO arguments. *See, e.g.*, Pl. MJAR at 6 n.3 (asking Court to declare "that the initial contract award to Raytheon was valid and not reasonably subject to corrective action . . . ."); Dkt. 48 at 2. But Raytheon cannot have it both ways. Either this Court should confine its review to the corrective action grounds emphasized by the Air Force – in which case any judgment for Raytheon here would need to leave open the possibility of future corrective action on alternative grounds that have not yet been reviewed – or this Court should review the GAO protest arguments thoroughly – in which case the Air Force's corrective action decision is justified several times over.

IV. Raytheon's Procedural Objections to Northrop Grumman's GAO Protest Do Not Justify Reinstatement of a Substantively Flawed Award Decision

Putting aside Raytheon's substantive case (and its serious flaws), Raytheon contends that the GAO overlooked two supposed "threshold problems" with Northrop Grumman's protest. Pl. Resp. at 2. But Raytheon's timeliness and prejudice arguments readily fail. For one thing, as our opening brief explained (at 40, 43), even if it were true that the GAO had overlooked prejudice and timeliness concerns, that would not provide a sufficient basis for this Court to declare the *Air Force's* corrective action decision unlawful. *See, e.g.*, *Navarro Research & Eng'g, Inc. v. United States*, 106 Fed. Cl. 386, 416 (2012); *Jacobs Tech. Inc. v. United States*, 100 Fed. Cl. 186, 197 (2011).

In any event, Raytheon's objections are entirely without merit. Raytheon first accuses the GAO of a "total failure to consider whether Northrop's protest was timely." Pl. Resp. at 38. Raytheon cannot possibly demonstrate that to be true. Given the post-ADR context in which the Air Force voluntarily decided to take corrective action, there is no contemporaneous or complete record of the GAO's analysis. This case is therefore nothing like *Systems Application*, where the GAO official opined that timeliness was irrelevant and that he "need not resolve the issue." 100

[redacted]

Fed. Cl. at 713-14. Raytheon cannot carry its burden on timeliness by simply positing, without any record support, that the GAO here similarly disregarded the limits of its lawful authority. Any presumption about the GAO's actions in this case must run in the opposite direction. *E.g.*, *Schism v. United States*, 316 F.3d 1259, 1302 (Fed. Cir. 2002) (*en banc*) ("[W]e presume that . . . public officers perform their duties correctly, fairly, in good faith, and in accordance with law and governing regulations, and [this presumption] is valid and binding unless well-nigh irrefragable proof rebuts or overcomes it.") (internal quotation marks and citations omitted).

Moreover, there is every reason here to infer that GAO *did* consider Raytheon's timeliness objection but found it too meritless to warrant a lengthy response. Northrop Grumman pointed out at the GAO that its misleading and unequal discussions challenge concerned the Air Force's conduct during discussions, and was not about the terms of the solicitation. Under the regulations governing GAO protest timeliness, therefore, Northrop Grumman could not bring its protest before the competition's end. *See* 4 C.F.R. § 21.2(a). As the GAO has previously observed:

> To require an offeror to file a protest each time during a procurement that it is advised of an evaluation judgment with which it disagrees or believes is inconsistent with the RFP would not be consistent with the regulatory requirement that such protests can only be filed after a required debriefing. The objective of this regulation is to avoid the filing of "defensive protests" out of fear that our Office may dismiss the protests as untimely and the associated potential to unnecessarily disrupt procurements.

Boeing Co., B-311344, et al., June 18, 2008, 2008 CPD ¶ 114 at 19 n.41. During the outcome prediction session, the GAO *cited* this *Boeing* case, which Northrop Grumman had earlier brought to its attention. Tab 3579 at AR 76720; Tab 3571 at AR 76689 n.5. Given unambiguous regulations and GAO precedent, it is evident that the GAO did consider timeliness but simply did not belabor the point because Northrop Grumman's protest was obviously timely.

Raytheon cannot muster any response to these regulations and GAO precedents; indeed,

[redacted]

it does not even *mention* them. Instead, it argues that the *Blue & Gold* waiver rule should be extended to situations where the protester learned of a (supposed) tension between instructions received during discussions.[7] But Raytheon has not cited a single case supporting that position.[8] In fact, this Court has recently held (in a case cited by Northrop Grumman and ignored by Raytheon) that *Blue & Gold* continues to be limited to untimely challenges to solicitation terms and other issues arising at the start of competition. *Caddell Constr. Co. v. United States*, 111 Fed. Cl. 49, 76-77 (2013). It is therefore Raytheon's "reading of the *Blue & Gold* waiver rule" – not Northrop Grumman's – that "is contrary to this Court's precedent." Pl. Resp. at 40 n.35.

Nor has Raytheon shown that the Air Force's corrective action was irrational because of Northrop Grumman's supposed failure to demonstrate competitive prejudice. The flaws identified by the GAO and the Air Force were decisive errors that determined the outcome of the contract award. Raytheon's failure to demonstrate TRL 6 readiness in accordance with RFP

[7] Raytheon also ignores the fact that mere tension is not enough to trigger the *Blue & Gold* rule. That rule requires "a *patent* error," which cannot be found here. *Blue & Gold Fleet, L.P. v. United States*, 492 F.3d 1308, 1315 (Fed. Cir. 2007) (emphasis added); *see also States Roofing Corp. v. Winter*, 587 F.3d 1364, 1372 (Fed. Cir. 2009). Moreover, EN NG-CP-003, which Raytheon claims informed Northrop Grumman that "future IR&D" could be proposed as an allowable cost, does no such thing. It does not use the term "future IR&D," does not mention "implicitly required" IR&D at all, says nothing about the allowability of any proposed cost reductions, and demands that Northrop Grumman explain how it plans to mitigate risks associated with its proposed funding strategy. Tab 1599 at AR 52482; *see also* NG MJAR at 37-38.

[8] In none of Raytheon's cited cases did the protest issue arise during discussions. All involve issues arising earlier, at the outset of the competition. *See Stratos Mobile Networks USA, LLC v. United States*, 213 F.3d 1375, 1380-81 (Fed. Cir. 2000) (protester had not sought clarification of patently ambiguous RFP provision); *Grumman Data Sys. Corp. v. Dalton*, 88 F.3d 990, 997-98 (Fed. Cir. 1996) (protester had not sought clarification of patently ambiguous solicitation provision *or* subsequent patently ambiguous agency response to other offeror's inquiry about that provision); *Amazon Web Servs., Inc. v. United States*, 113 Fed. Cl. 102, 113 (2013) (protester challenged solicitation terms); *Ceres Envt'l Servs., Inc. v. United States*, 97 Fed. Cl. 277, 310 (2011) (protester had not challenged procedure it knew about at outset of recompetition); *CRAssociates, Inc. v. United States*, 102 Fed. Cl. 698, 712 (2012) (protester's requested amendment to RFP had been rejected and protester competed anyway).

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requirements made it ineligible for award.[9] And Raytheon's IR&D was evaluated as a [redacted] cost reduction, [redacted] Under such circumstances, it was reasonable for the GAO and the Air Force to conclude that the agency had committed far more than "small, harmless errors," "devoid of impact," as Raytheon would have the Court conclude. Pl. Resp. at 42.[10]

Contrary to Raytheon's assertion (Pl. Resp. at 42-43), Northrop Grumman does not seek to hide from the "substantial chance of award" standard for demonstrating prejudice. As explained in our opening brief (at 41-46), Northrop Grumman readily meets that standard. But Northrop Grumman does object to Raytheon's inappropriate attempts to hold Northrop Grumman to an even *higher* standard. *See, e.g.*, Pl. MJAR at 35 ("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."). Raytheon's proposed standard would directly conflict with Federal Circuit precedent (*Bannum, Inc. v. United States*, 404 F.3d 1346, 1358 (Fed. Cir. 2005)), and is particularly unfair given Raytheon's refusal before the GAO to permit information about the IR&D issue to be released outside of the protective order. *See* Dkt. 52 at 5-6.

Raytheon also makes the specious claim that Northrop Grumman "presented no evidence to GAO to support a finding of prejudice." Pl. Resp. at 45; *see also id.* at 44-45 ("Northrop cites only its own briefings to GAO, rather than anything in the record."). This is false. Northrop Grumman cited ample record evidence at the GAO and in this Court to demonstrate that it could

[9] As our opening brief explained (at 47-48), corrective action is also justified by the agency's flawed evaluation of Raytheon's CTE 1 change. Raytheon's Response has not shown otherwise.

[10] Indeed, the two cases cited by Raytheon (at 42) for this point are entirely distinguishable on this basis. *See MCII Generator & Elec., Inc. v. United States*, No. 1:02-CV-00085-LMB, 2002 WL 32126244, at *3 (Fed. Cl. Mar. 18, 2002) (record did "not support a claim that the re-solicitation will result in even a marginally improved result for the Government"); *Sec. Consultants Grp.*, B-293344.2, Mar. 19, 2004, 2004 CPD ¶ 53 (RFP's failure to disclose relative weights of technical factors could not have reasonably prejudiced offeror).

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have proposed IR&D of the type and quantity sufficient to win the 3DELRR award.[11]

Finally, Raytheon contends that Northrop Grumman "made a calculated business decision *not* to rely extensively on IR&D . . . prior to, and independent of, the Agency's issuance of EN-011." Pl. Resp. at 44. This assertion, too, is contradicted by the record. In support of its argument, Raytheon cites Northrop Grumman's response to EN NG-CP-003, which was sent more than two weeks *after* receiving EN NG-K-011. *See* Pl. Resp. at 44 (citing Tab 2131 at AR 58720). This evidence does nothing to undermine Northrop Grumman's contention that it avoided proposing cost reductions for future IR&D solely because of these two ENs, read in light of the solicitation requirements. *See also* Dkt. 40, Ex. A (Meaney Decl.) ¶ 10 ("[I]n response to these ENs and the Air Force's initial instructions in the RFP, NGSC framed its proposal [redacted]"). Nor does this evidence change the fact that [redacted] Raytheon [redacted] IR&D cost reductions after learning that such IR&D could be proposed and recovered through indirect cost rates without risking [redacted] being deemed unrealistic. Tab 3272 at AR

[11] In particular, Northrop Grumman affirmed before the GAO: (1) that the [redacted] IR&D [redacted], Tab 3536 at AR 75790-92 (citing Tab 3304 (SSA Final Decision Briefing) at AR 73533, 73540, 73547; Ex. 2 (Bingham Decl.)); (2) that [redacted], Tab 3552 at AR 76257-58 (citing Tab 3256 [redacted] at AR 72002; Tab 1224 [redacted] at AR 42067); (3) that Northrop Grumman was already developing a [redacted] sharing many commonalities with the 3DELRR system, Tab 3536 at AR 75793 (citing Ex. 5 (Excerpts from NG Initial Proposal Executive Summary)); (4) that Northrop Grumman had an established history of investing in related technologies, Tab 3536 at AR 75793 (citing Ex. 5 (Excerpts from NG Initial Proposal Executive Summary)); (5) that Northrop Grumman had sufficient assets to support this investment, Tab 3536 at AR 75793 (citing Tab 3235 (NG Responsibility Determination) at AR 71934); and (6) that Northrop Grumman would have wanted to make this investment, if it had known that it could, because much of IR&D is recoverable as indirect charges, Tab 3536 at AR 75792 (citing Ex. 2 (Bingham Decl.)).

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72962, 72969. Northrop Grumman plainly could have done the same. The Air Force's determination that these circumstances warranted corrective action was clearly rational.

Raytheon's timeliness and prejudice arguments are entirely meritless, and the GAO gave due consideration to both. Raytheon can cite no support for its contention that the GAO was required, during the outcome prediction, to articulate a lengthy rationale for rejecting every argument raised by any party during the protests. Nor would such a rule make sense. GAO regulations authorize informal, non-binding ADR to facilitate "prompt[] and fair[]" resolution of protests. 4 C.F.R. § 21.10(e). If Raytheon's "threshold" arguments are credited, the GAO may henceforth be prompted in ADR to address in exhaustive detail every argument ever raised, no matter how weak. Expediency and fairness are not served by such a pointless exercise.

CONCLUSION

For these reasons and those in our opening brief, Northrop Grumman asks that the Court grant its cross-motion for judgment on the administrative record and deny Raytheon's motion.

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Respectfully submitted,

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I hereby certify that on April 17, 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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