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**Comptroller General
of the United States**

**United States General Accounting Office
Washington, DC 20548**

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Decision

Matter of: Lockheed Martin Systems Integration--Owego

File: B-287190.2; B-287190.3

Date: May 25, 2001

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Raymond M. Saunders, Esq., Maj. Howard W. Roth, and Capt. Richard L. Hatfield, Department of the Army, for the agency.
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DIGEST

Protest that agency improperly awarded requirement on a sole-source basis because it determined that only one firm could meet its requirements is sustained where record shows that another potential vendor was given an incorrect understanding of the agency's requirements; agencies are required to provide potential sources an opportunity to demonstrate their ability to meet the agency's requirements based on an accurate portrayal of the agency's needs.

DECISION

Lockheed Martin Systems Integration--Owego protests the actions of the United States Special Operations Forces Command in connection with the acquisition of a common avionics architecture system for its fleet of helicopters. Lockheed maintains that the agency improperly has issued sole-source delivery orders to Rockwell Collins, Inc. under a contract held by that firm.

We sustain the protest.

I. BACKGROUND

A. The Rockwell and Lockheed Avionics Systems

The 160th Special Operations Aviation Regiment, Airborne (SOARA) maintains a fleet of helicopters that have been specially modified to meet unique mission requirements. These helicopters, while variants of the regular Army's helicopters¹, currently have different support requirements because of differences in their configuration. For purposes of this protest, five different helicopter models maintained by SOARA are relevant: the MH-47D and MH-47E (variants of the regular Army's Chinook helicopter), Agency Report, Mar. 5, 2001 (AR), at 2; the MH-60L and MH-60K (variants of the regular Army's Blackhawk helicopter), id.; and the A/MH-6, variants of a small, maneuverable helicopter. Id. at 4.

Rockwell designed and maintains its Cockpit Management System (CMS), a combination of software and hardware that serves to operate all systems on board the aircraft; it currently is installed on the MH-47D, the MH-60L and A/MH-6 helicopter models. The CMS operates on the Control Display Unit (CDU), a Rockwell-proprietary processor. While the government has "government purpose" data rights to some of the CMS software² (in particular, the Operational Flight Program software within the CDU), it does not have data rights with respect to various other elements of the CMS software.³ Consequently, the government is unable to competitively acquire its software maintenance and enhancement requirements for the CMS as it is presently constituted. The software that comprises the CMS is written in what is regarded as a higher order computer language, ADA.

Lockheed designed and maintains a different system, the Integrated Avionics System (IAS), which is installed on the MH-47E and MH-60K helicopter models. The IAS, like Rockwell's CMS, is a combination of hardware and software. The hardware includes a Lockheed-proprietary mission processor, as well as a display processor that is proprietary to Honeywell. The IAS has several hardware obsolescence problems. Specifically, the multifunction display units, the cathode ray tubes and the mission processors that are installed on all of the helicopters that employ the IAS

¹ The contracting agency is the United States Special Operations Command, a Department of Defense component comprised of elements from the Army, Navy and Air Force. Contracting Officer's Statement (COS) at 5. As used in this decision, the phrase "regular Army" refers to the Department of the Army.

² See Federal Acquisition Regulation (FAR) §§ 27.402 and 27.408 for a description of the nature and purpose of government purpose data rights.

³ The government does not own data rights to the display software, the weapons control software or the development environment.

are out of production. Further, the display processors installed on all helicopters employing the IAS are at capacity, so that no new functionality can be added to that system. As for the IAS software, while the agency has government purpose rights, the software is written in a computer language known as JOVIAL, which is not regarded as a higher order language.

Currently, each firm has contractual responsibility to provide support for its respective system; these indefinite-delivery, indefinite-quantity contracts, awarded on a sole-source basis, are referred to as the post-deployment software support (PDSS) contracts. Delivery orders awarded under Rockwell's PDSS contracts are the subject of the current protest.

B. The Common Avionics Architecture System (CAAS) Initiative

The CAAS initiative is designed to provide new software and hardware for the helicopter cockpits in question. The overall immediate objective is to develop a common avionics software system that can be deployed across all of the different helicopter models used by SOARA. In addition, there is interest within the regular Army in fielding a common cockpit architecture for its Chinook and Blackhawk fleets that would be the same as the CAAS envisioned for the SOARA fleet, thereby ultimately establishing commonality among numerous Army helicopters. This acquisition is for development of the software only. (The agency states that it intends to conduct a competition for the hardware requirement. COS at 28.) The CAAS will address the obsolescence issues identified with respect to Lockheed's IAS, as well as the limitations relating to the fact that the IAS software is written in JOVIAL (by requiring that the upgraded software be written in a higher order language).

The agency requires the CAAS to meet what are referred to as "open system" requirements. In general, the new software will be required to meet standards established in the Joint Technical Architecture--Army (JTA-A). AR exh. 45. This is essentially a set of standards and protocols established to achieve commonality among all Army software. Three central features of JTA-A compliance are that the software must be written in one of three higher order languages (ADA, C or C++), must comply with one of four portable operating system interface standards (POSIX), and must be written using commercially available standards that are widely recognized and adopted by the information technology industry. Hearing Transcript (Tr.) at 6-10. The central objectives with these requirements are that they allow an outside, third-party vendor to write upgrades or changes to the software (*i.e.*, it is amenable to competitive acquisitions) and that the software be "portable" from one platform (helicopter model) to another. Tr. at 4-10.

Another aspect of the open systems requirement for the CAAS is that the software be written in partitioned modules. Modularity can be described as software architecture that places discrete program functions within encapsulated units that

are partitioned from the rest of the software; sometimes these software modules are described as “virtual machines.” Tr. at 4, 65-67. This modularity has benefits in terms of lowering maintenance costs (work on one module can be accomplished and tested without affecting other modules) and also in terms of aircraft safety. Tr. at 57, 65-67. In addition, modularity allows for use of the software on different hardware platforms by deploying more or fewer modules, depending on differing requirements. Tr. at 69-70. This is referred to as scalability; the objective is to have a single “product line” of software modules that can be scaled up or down to meet different aircraft requirements. *Id.* A third aspect of the agency’s open system requirement is that the software does not require a particular piece of hardware to function (as is currently the case with both the CMS and IAS systems). A final aim of the CAAS initiative is to integrate several new or improved capabilities into the entire fleet of helicopters, including, for example, integration of what is referred to as the improved data modem (IDM).

To summarize, the agency wants to acquire JTA-A compliant, open system software that is written in a higher order language, is POSIX compliant, and is modular, scalable and portable from one aircraft to another, without hardware dependencies. The agency also seeks to integrate several new or improved capabilities.

II. CHRONOLOGY

After studying the question at some length,⁴ the agency concluded that conducting a full and open competition for the CAAS was not a reasonable course of action, because it would result in substantial duplication of costs (that is, any savings generated as a result of a competition would be offset by the money already invested in the CMS and IAS). COS at 8-9; Tr. at 72. Accordingly, the agency decided to query only Rockwell and Lockheed to discover the approximate cost and schedule involved in having either firm meet the CAAS requirement. The agency had a number of meetings with Rockwell and Lockheed, on the basis of which it concluded that Lockheed could not meet its requirements; the agency therefore proceeded to make a sole-source award to Rockwell. The information which the agency conveyed orally about its requirements at certain of the meetings with Lockheed is key to the protest.

A. Early meetings

The agency began meeting with Lockheed in 1999. During an October 1999 meeting, the agency expressed to Lockheed the idea of a fleet-wide upgrade—that is, an

⁴ The agency commissioned the Software Engineering Institute at Carnegie Mellon University (SEI) to evaluate the feasibility of migrating both the IAS and CMS systems to a modular, open systems architecture. SEI issued a report in January 2000.

upgrade of all SOARA helicopters, including those running on both Lockheed's IAS and Rockwell's CMS. Tr. at 146-47. The record shows that the agency did not know how much funding would be available for purposes of accomplishing a fleet-wide upgrade; it thus advised that it might have to accomplish the task incrementally, but that it viewed a new MH-47E then being built as the logical starting point for initiating its upgrade effort. Tr. at 148, 149-51. The agency also expressed the desire to coordinate its upgrade program with a larger Chinook service life extension program (SLEP) being conducted by the regular Army for its helicopters, in hopes of getting the regular Army to fund the SOARA upgrade. Tr. at 152-53.

A December 1999 briefing followed, during which Lockheed responded to the requirements laid out by the agency at the October meeting. Discovery Document (DD) 40. Lockheed recommended a combination of hardware and software to meet the agency's upgrade requirement. Lockheed suggested four alternatives for addressing the software problem--[deleted]. DD 40 at 16. Thereafter, during January and February 2000 briefings, Lockheed was advised for the first time that the agency was definitely looking for a SOARA fleet-wide solution--that is, again, a solution that would include helicopters running both Lockheed's IAS and Rockwell's CMS. Tr. at 191.

B. April 2000

At an April briefing, in response to the agency's advising that a fleet-wide solution now was mandatory, Lockheed presented a solution based on a hardware/software combination, AR, exh. 43, at 2, and recommended [its first approach]^{*} for [deleted]. Id. at 5. During the hearing conducted by our Office in connection with this protest, Lockheed's engineers explained that Lockheed's [first approach] involved [deleted]. Lockheed's engineers estimated that, using this approach, they would need to [deleted], Tr. at 228, that the cost for this approach was approximately [deleted], and that it would take approximately [deleted], including flight testing. Tr. at 258-59.

Lockheed recommended a [deleted], approach to integrating the entire fleet using a single software architecture, in part to respond to the agency's funding limitations, AR, exh. 43, at 3; Tr. at 206-08, and in part because it considered it necessary to obtain additional detail about two of the Rockwell helicopter models, the MH-60L and the A/MH-6. Tr. at 208-11.⁵ Specifically, Lockheed felt it needed to know about

*In this redacted version, "first approach" and "second approach" have been used in brackets to identify Lockheed's two proprietary approaches.

⁵ For example, according to Lockheed's engineers, the helicopter avionics system on the MH-60L is significantly less integrated than the systems installed on the Lockheed models (the MH-47E and MH-60K) as well as the other Rockwell Chinook model (the MH-47D). In addition, Lockheed at the time was under the impression that the pilot-vehicle interface (PVI) on the MH-60L was different (in that it had only
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the PVI's in order to understand how the entire system architecture for those models (hardware, software and PVI) would look. Tr. at 208-10. Lockheed's engineers testified that [deleted]. Id.

C. August 8, 2000

On August 8, the agency met with Lockheed to provide, among other things, feedback on Lockheed's draft presentation (based on the approach presented at the April meeting) for a scheduled August 31 briefing. Lockheed's approach continued to include [deleted], and also remained [deleted] in nature--[deleted]. Hearing exhibit 1 at 19. Before Lockheed had completed its presentation, it was interrupted by the agency's program manager, who proceeded to advise Lockheed for the first time, among other things, that: (1) the agency wanted a purely software solution and was not interested in the hardware Lockheed had been proposing up to this point, Tr. at 263-64; (2) there would be a common PVI, but Lockheed should stop focusing on [deleted], Tr. at 264-65; and (3) the fleet-wide architecture was required at the outset of the effort, and had to take into consideration the possibility of extension to other models of regular Army helicopters, specifically, the CH-47F and UH-60M models. Tr. at 264-65, 322-24.

D. Subsequent Events

After receiving the information on August 8, Lockheed abandoned its [first approach] in favor of [its second approach]. Tr. at 299-300. Lockheed presented its [second approach] during a briefing on August 31, but did not present definitive cost or schedule information at that time. However, based on information conveyed by one of the agency's other attendees (a member of the user community) at the August 31 briefing, Lockheed concluded that it may have been misled during the August 8 meeting. Lockheed concluded that, technically, it was possible to continue with its [first approach] instead of proposing [its second approach]. Nonetheless, Lockheed was subsequently instructed in September to provide the agency cost and schedule information for its [second approach], and it did so. The record shows that accomplishing the [second approach] would cost approximately [deleted] and take approximately [deleted] (exclusive of flight testing). AR at 7. In contrast, the record shows that the [first approach] would cost approximately [deleted] and take approximately [deleted] including flight testing. Tr. at 258-59. The agency relied on the cost and schedule associated with the [second approach] to conclude that Lockheed was not a viable source for the requirement. On the basis of that conclusion, the agency, in January, 2001, executed a justification and approval (J&A) for the award of a sole-source contract to Rockwell on grounds that Rockwell was

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two display screens as opposed to the four display screens found on the other models). AR, exh. 43, at 3; Tr. at 207-09.

the only source capable of meeting the agency's requirements. AR exhs. 64, 77. The agency then made award of the delivery orders that are the subject of this protest under Rockwell's PDSS contract.

III. ARGUMENTS

Lockheed argues that the inaccurate information presented during the August 8 meeting, as well as the agency's subsequent demand for cost and schedule information for the [second approach], led it to abandon its [first approach] in favor of [its second approach]. According to the protester, the record shows that it had provided an acceptable technical solution to the agency during its April briefing, and it had intended to continue recommending that approach until it met with the agency on August 8 and was provided two essentially new requirements (to design the software architecture so that it could be extended to the three regular Army helicopters models that had been mentioned, and [deleted]). Lockheed contends that these in fact are not agency requirements and that, without these requirements, it would not have abandoned its [first approach], which was a valid means of meeting the agency's needs at a substantially lower cost and shorter timeframe than the [second approach] it essentially was forced to adopt. Lockheed also asserts that Rockwell has an impermissible conflict of interest.

The agency responds, first, that the protest arguments are untimely. On the merits, it asserts that Lockheed was told nothing new at the August 8 meeting; as during all other meetings, it told Lockheed the same top-level requirements on August 8: the software had to be JTA-A compliant, open system software that is written in a higher order language, is POSIX compliant, and is modular, scalable and portable from one aircraft to another, without hardware dependencies. The agency (and Rockwell) conclude that Lockheed therefore had a meaningful opportunity to respond to the agency's needs, and that the approach finally selected by Lockheed therefore provided a reasonable basis for the agency to conclude that Lockheed was not a viable source.

IV. ANALYSIS

A. Timeliness

Preliminarily, the agency and Rockwell maintain that Lockheed's protest is untimely because, as early as October 4, 2000, Lockheed was aware of the fact that delivery order No. 9 (block one of the CAAS effort) had been awarded to Rockwell on September 29.⁶ According to these parties, Rockwell presented a briefing on

⁶ Rockwell states that it also discussed delivery order No. 9 with Lockheed at an October 19 meeting. Rockwell additionally maintains that Lockheed's protest should
(continued...)

October 4 that outlined the essential features of the CAAS; they maintain that Lockheed should have known from this briefing all information necessary to protest the agency's actions. The parties conclude that, because Lockheed did not file its initial protest until February 1, 2001, the protest grounds relating to delivery order No. 9 are untimely. See Bid Protest Regulations, 4 C.F.R. § 21.2(a)(2) (2001) (protests must be filed within 10 days after protest grounds were, or should have been, known). The agency and Rockwell further assert that all subsequent grounds of protest also are untimely because they are based on information discovered in connection with Lockheed's pursuit of its original protest. See General Physics Fed. Sys., Inc. B-272795, Jan. 6, 1997, 97-1 CPD ¶ 8 (where initial protest is untimely, subsequent protest grounds based on information learned as a result of filing the initial untimely protest also are untimely).

We find that the protests are timely. The record shows that Lockheed met with the agency on November 1, 2000 to present what turned out to be its final briefing on its approach to the CAAS. AR exh. 57. Regardless of the October briefings, it was reasonable for Lockheed to assume that the agency still was considering its approach, and had made no decision regarding selection of a fleet-wide solution. Thereafter, on November 27 and December 20, the agency published Commerce Business Daily (CBD) announcements of its intention to modify Rockwell's PDSS contract to include the effort necessary to develop a fleet-wide CAAS, and solicited expressions of interest. AR exhs. 58, 63. Lockheed responded with an expression of interest on January 9, 2001. AR exh. 70.

On January 16, Lockheed sent a facsimile and e-mail to the contracting officer inquiring about a press release in which Rockwell apparently had announced that the agency had selected Rockwell as the vendor for the fleet-wide CAAS. AR exh. 74. In response, the contracting officer sent Lockheed a letter, dated January 16 (AR exh. 74), expressly stating:

[SOARA has not selected Rockwell for the entire SOARA fleet]. The use of language [in the article] that encompasses the entire fleet is erroneous. Any decision to encompass the entire fleet is pending resolution as a result of your [expression of interest].

Lockheed did not actually receive a copy of delivery order No. 9 until January 22--fewer than 10 days before it filed its protest--and Lockheed was not advised that its expression of interest had been rejected until February 12, almost 2 weeks after it filed its initial protest. AR exh. 84. We conclude that the agency's actions between October (when Lockheed attended the delivery order No. 9 briefings) and February 1

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be dismissed because the firm failed to diligently seek a copy of delivery order No. 9 after attending both October briefings.

(when it filed its protest) were such as to reasonably lead Lockheed to conclude that no source selection decision had been made for the agency's fleet-wide CAAS, and that the protest therefore is timely.

B. Determination That Lockheed Was Not A Viable Source

The overriding mandate of the Competition in Contracting Act of 1984 (CICA) is for "full and open competition," 10 U.S.C. § 2304(a)(1)(A) (1994 and Supp. IV 1998). We closely scrutinize sole-source procurements conducted under the exception to that mandate authorized by 10 U.S.C. § 2304(c)(1), which permits an agency to award a sole-source contract where it properly determines that only one responsible source can meet its requirements. When an agency uses noncompetitive procedures under section 2304(c)(1), it must execute a written J&A with sufficient facts and rationale to support the use of the specific authority, FAR §§ 6.302-1(c), 6.303, 6.304, and publish a notice in the CBD to permit potential competitors to challenge the agency's intent to procure without full and open competition. 10 U.S.C. § 2304(f). Our review of an agency's decision to conduct a sole-source procurement focuses on the adequacy of the rationale and conclusions set forth in the J&A. When the J&A sets forth reasonable justifications for the agency's actions, we will not object to the award. On the other hand, where the record shows that the agency has failed to adequately justify its sole-source award decision, we will sustain the protest. Support Serv. Int'l, Inc., B-271559, B-271559.2, July 16, 1996, 96-2 CPD ¶ 20 at 2-3.

Here, the agency prepared a J&A that relied on the exception to full and open competition outlined in 10 U.S.C. § 2304(c)(1). The J&A expressly relied on the cost and schedule of the [second approach] recommended by Lockheed in its August 31 briefing (as opposed to the [first approach] offered in earlier briefings). AR exhs. 64, 77. Based on the record--in particular, the hearing testimony--we agree with Lockheed that it was misled as to the agency's requirements during the August 8 meeting, and that this led it to abandon its [first approach] in favor of a higher-cost, longer schedule [second approach]. As a result, the agency's sole-source determination was based on a flawed assessment of Lockheed's capabilities and, therefore, was unreasonable. We discuss in detail below the actions which, in our view, prejudiced Lockheed in its effort to demonstrate its capability as a viable source for the agency's requirements.

1. Effect of the August 8 Information

a. Inclusion of Regular Army Helicopters

Lockheed's engineers testified⁷ that the new information presented on August 8 led them to conclude that they needed to abandon the [first approach] in favor of a plan involving [the second approach]. In particular, they testified that they decided that their [first approach] would not work, especially due to Lockheed's lack of detailed knowledge about a (now) much larger number of aircraft models—including the regular Army's CH-47F and UH-60M—and the agency's indication that the entire software architecture for all aircraft had to be the focus from the outset of the effort. For example, one of Lockheed's engineers stated, "We're going to do [the first approach], but there's new parameters entering the equation about what has to be done when, and which methodology to use to do it." Tr. at 273-74. He stated further, "The fact that it had to go in all at once would tend to swing it [the first approach] over that maybe we need to go back and reevaluate the [second approach]." Tr. at 274.

This engineer explained some of the difficulties associated with the introduction of the regular Army fleet. He testified that, while the [first approach] would work when considering only the SOARA fleet of aircraft, introduction of the regular Army aircraft precluded using that approach because this would involve not only the availability of data relating to all of the aircraft (both SOARA and regular Army), but also the practicality of establishing uniform standards among the users of the aircraft. Tr. at 309-10. He testified that, although Lockheed could probably obtain the data and establish uniform standards for the SOARA fleet alone, doing so for both the SOARA and regular Army fleets at the same time would simply be unrealistic. Tr. at 309-10. Additionally, both of Lockheed's engineers testified (in response to questioning by our Office's hearing official), that the addition of the regular Army helicopter models was directly related to the firm's decision to abandon the [first approach] strategy in favor of [the second approach]; they stated unequivocally that they could have continued with the [first approach] if only the SOARA fleet were involved. Tr. at 308-09.

We find this testimony persuasive. It supports Lockheed's claim that, as a consequence of the information given at the August 8 meeting (in particular, the representation that the software would need to be extendable to several models of regular Army helicopters at the outset), Lockheed abandoned its [first approach] in

⁷ A large portion of testimony took the form of a "walk through" of the various meetings and briefings by the parties, during which personnel from the agency and Lockheed described the events during the times in question. This was done in a round-table setting so that the principals from each party could debate the events.

favor of [its second approach], which it presented at all subsequent briefings. But for that information, Lockheed would have continued pursuing its [first approach].

The record further shows that, in fact, the inclusion of regular Army helicopters, while considered desirable by the agency, in fact was not necessary to meet SOARA's requirements. Further, to the extent that inclusion of the Army helicopters could be achieved, it would not have to be achieved at the outset of the effort, contrary to Lockheed's understanding following the August 8 meeting. In this regard, one of the agency's program managers (who did not attend the August 8 meeting) testified that the agency was looking for a scalable software package that could some day be extended to the regular Army helicopters, but that the agency never said (and did not require) that this had to be accomplished at the outset. Tr. at 323. When this representation was made during the hearing, one of Lockheed's engineers disagreed, maintaining that, in fact, Lockheed had been told on August 8 that several Army helicopter models had to be included at the outset. Tr. at 323-24. The agency's second program manager (who attended the August meeting and gave the feedback that caused Lockheed to change its approach) conceded that, in fact, Lockheed's engineer "may be correct." Tr. at 324.

Considering the hearing testimony as a whole, we find that it supports Lockheed's position that, contrary to the agency's actual needs, Lockheed was led to believe at the August 8 meeting that the regular Army helicopters were to be included in the effort from the outset.

b. Confusion Regarding "System" Architecture (Software, Hardware and PVI)

The record shows that Lockheed was also misled during the August 8 meeting with respect to one of its central assumptions regarding system architecture (as opposed to simply software architecture). Lockheed's engineers testified that the concept of system architecture in this context encompasses not only software, but also processing resources, display resources and data input/output resources, Tr. at 265-68, and that the PVI was key to conceptualizing the system architecture. Tr. at 268. As discussed, Lockheed had assumed that it would begin its [first approach] using [deleted]. This approach would work, provided that the system architecture, functionality and PVI of the [deleted], and that only the SOARA helicopters were under consideration.

Lockheed's engineers testified that they abandoned the [first approach] after being told at the August 8 meeting that the system architecture, functionality and PVI for the [deleted]. Tr. at 268-69. They shifted to the [second approach] because it was the only way to accommodate so many different system architecture/PVI

configurations (both SOARA and regular Army aircraft), and that it could not develop its approach starting with the MH-47E/MH-60K functionality.⁸

Contrary to the information conveyed at the August 8 meeting, the record shows that Lockheed's proposed use of the MH-47E/MH-60K system architecture/PVI as a model for a common system architecture/PVI (consistent with Lockheed's [first approach]) was in fact acceptable to the agency. One of Lockheed's engineers testified that he arrived at this conclusion after one of the agency's user community officials attending the August 31 briefing expressed surprise that Lockheed was presenting what he described as [deleted]. Tr. at 300-01, 321-22. We find nothing in the record showing that this conclusion by Lockheed was incorrect.

We conclude from this uncontroverted testimony that the incorrect advice given on August 8 concerning the system architecture/PVI requirements also contributed to Lockheed's decision to abandon its [first approach].

As a final matter, we note that the record supports the conclusion that the technical approach outlined by Lockheed during its April briefing (which it had intended to present at its August 31 briefing) was acceptable. In this regard, during the hearing, one of Lockheed's engineers provided a detailed explanation of Lockheed's [first approach] as it was presented during that briefing. Tr. at 222-28. During that explanation, the agency's program manager stated, "That's exactly what we wanted." Tr. at 226. This testimony from the agency's own program manager supports Lockheed's position that the agency considered Lockheed's [first approach] an acceptable means of meeting the agency's requirement.

c. Lockheed Instructed to Provide Cost and Schedule for Complete Rewrite

Finally, Lockheed was instructed by the agency on September 25 to prepare a cost and schedule estimate based on [the second approach]. In this regard, the record includes an e-mail from the agency to the protester stating as follows:

The government ha[s] repeatedly asked for cost and schedule for [the second approach], unrestricted by Government resources. I do not

⁸ The agency program manager who provided the August 8 advice did not deny that he had told Lockheed to stop focusing on the MH-47E/MH-60K system architecture/PVI. Rather, he explained that his advice on August 8 was intended to convey to Lockheed the need for the software to be scalable to various different system architectures, and to be independent of hardware. Tr. at 275-82. He also testified that his advice was intended primarily to assist Lockheed in preparing a briefing that would be acceptable to the agency's selection official. He testified that his advice was intended to help Lockheed "protect itself" during its briefing with the selection official. Tr. at 282.

understand why you will not present an estimate for [the second approach] similar to the estimates in cost and schedule you ha[ve] volunteered for [the first approach]. . . . It now appears that you are nonresponsive.

DD 179, Sept. 25, 2000. Lockheed's engineers testified that they understood this e-mail to be an express instruction to provide cost and schedule information for the [second approach]. Tr. at 326-28. As a result, the firm presented its cost and schedule information for the [second approach] at its November briefing, and the agency relied on that information in determining that Lockheed could not meet its requirement.

d. Conclusion

Viewing all of the testimony together, we are left to conclude that Lockheed had developed an acceptable approach as of the April meeting, and that it was misled by the agency's August 8 statements into abandoning it in favor of a more expensive, longer timeframe, [second approach]. The agency's September 25 demand for the cost and schedule for the [second approach] confirmed Lockheed's understanding that it was being asked to propose the more expensive, longer timeframe alternative.

Where, as here, an agency awards a sole-source contract on the basis that only one source can satisfy its requirements, it is required to provide other prospective sources notice of its intentions, and an opportunity to respond to the agency's requirements. 10 U.S.C. § 2304(f). It is implicit in this exercise that the agency must adequately apprise other prospective sources of its needs so that the prospective sources have a meaningful opportunity to demonstrate their ability to provide what the agency seeks to purchase. While the language of CICA does not specifically address this point, the legislative history of the statute does. In this regard, the conference report specifically states:

In situations where competition is not anticipated and solicitation packages have not been prepared, agencies shall provide potential competitors who do respond [to the CBD announcement of the agency's intent to award a sole-source contract] with solicitation packages or comparable information.

H.R. Conf. Rep. 98-861 at 1427 (1984); see also Businessland, Inc., GSBICA No. 8586-P-R, Sept. 4, 1986, 86-3 BCA ¶ 19,288 (agency must convey its requirements to potential sources in writing).

While there is no requirement that an agency express its needs by any particular means, it appears that, had the agency here provided Lockheed a clear, written statement of its requirements, Lockheed would have been assured a meaningful opportunity to demonstrate its capability to satisfy the agency's needs. While Lockheed may have "selected" the [second approach], it did so only in response to

the misleading information presented by the agency, and Lockheed's approach therefore did not reflect its true capability to meet the agency's legitimate requirements. The agency's actions in providing Lockheed misleading oral guidance at the August 8 meeting, coupled with its demands for cost and schedule information based on the [second approach], clearly prejudiced Lockheed in its effort to show that it was a viable alternative source for its requirement. Accordingly, we conclude that the agency's sole-source determination was unreasonable, and sustain the protest on this ground.

C. The Agency's Schedule Considerations

Considerable attention has been devoted by the agency to explaining why various schedule considerations led to its conclusion that only Rockwell can accomplish the CAAS effort. Although (as discussed above) it appears that Lockheed could have met a [deleted] schedule (i.e., the same as Rockwell's) using its original [first approach], we do not think the agency's schedule concerns, in any event, provided legitimate support for the agency's sole-source determination.

The record shows that, in order to address the obsolescence issues associated with the MH-47Es and MH-60Ks, the CAAS program does not need to be qualified for aircraft installation until the first quarter of fiscal year 2004 for the MH-47Es and the fourth quarter of fiscal year 2004 for the MH-60Ks. COS at 14, 17. In contrast, the Army's Chinook SLEP begins in fiscal year 2003, and SOARA's participation in the program imposes numerous additional schedule demands. For example, the agency states that it must integrate one of the new functionalities (the Dual Embedded Global Positioning System /Inertial Navigation Unit) into the CAAS immediately so that this system can be installed on the MH-47Ds during a block modification scheduled for the last quarter of fiscal year 2001. COS at 15. This apparently is a condition precedent to inducting the MH-47Ds into the regular Army's Chinook SLEP.⁹

The agency essentially adopted the Army's SLEP schedule because, if it participates in the Army SLEP, the Army, rather than the agency, will bear the cost of upgrading SOARA's Chinook helicopters (the MH-47D and MH-47E models). SOARA states that it "will avoid millions [of dollars] in costs it would otherwise have to spend because of its obsolescing fleet." COS at 13.

In our view, the more stringent schedule was not a valid requirement against which to assess Lockheed's ability to perform. While the more stringent schedule requirements may enable the agency to have its requirement funded by the regular Army, there will be no actual savings to the government as a whole as a result of this

⁹ There are numerous other schedule drivers identified by the agency that arise in connection with the regular Army's Chinook SLEP.

funding scheme; either one or the other activity will have to pay for the upgrade. CICA specifically proscribes using sole-source contracting methods where they are justified based on concerns related to the amount of funds available to the contracting agency or activity. 10 U.S.C. § 2304(f)(5)(A); see also FAR § 6.301(c). We conclude that it was improper for the agency to rely on an expedited schedule in determining Lockheed's ability to meet its needs.

D. Organizational Conflict of Interest (OCI)

Lockheed maintains that Rockwell has an impermissible OCI because it has written the statement of work and technical description for the CAAS. Lockheed maintains that, because Rockwell authored these documents, it cannot also provide the CAAS software or hardware.¹⁰ Lockheed directs our attention to FAR § 9.505-1 which provides:

A contractor that provided systems engineering and technical direction for a system but does not have overall contractual responsibility for its development, its integration, assembly, and check out, or its production shall not--

(1) Be awarded a contract to supply the system or any of its major components.

This argument is without merit because the delivery orders in question call for Rockwell to have overall contractual responsibility for the CAAS's development, integration, assembly, check out and production (in the sense that Rockwell will develop, integrate, assemble, check out and produce software to which it will provide government purpose data rights to the agency). AR exh. 54; Agency Letter, Encl. 2, Apr. 2, 2001. As such, the regulation has no application since, by its terms, it is limited to contractors providing systems engineering and technical direction that do not have the additional responsibilities stated in the regulation. See also FAR § 9.505-2(a)(3).

¹⁰ Lockheed's protest also takes issue with a sources-sought synopsis that the agency issued in the CBD on January 3, 2001, relating to its anticipated issuance of a competitive solicitation for the hardware suite for the CAAS. AR, exh. 65. Lockheed makes several arguments relating to that synopsis, including that Rockwell has an improper OCI with respect to furnishing hardware. Since the agency has not issued a solicitation or taken any other action in connection with its contemplated hardware acquisition, Lockheed's allegations merely anticipate improper agency action, and thus are premature. See Ervin and Assocs., Inc., B-279161 et al., Apr. 20, 1998, 98-1 CPD ¶ 115 at 5.

V. RECOMMENDATION

While we ordinarily would recommend that the agency either conduct a competition for the requirement or otherwise provide Lockheed a reasonable opportunity to respond to the agency's requirements, here the agency proceeded with performance of the requirement notwithstanding Lockheed's protest, based on its conclusion that urgent and compelling circumstances significantly affecting the interests of the government would not permit it to wait until our decision was issued. AR exh. 86; Agency Letter, Mar. 26, 2001. Under these circumstances, our recommendation must take into account potential cost and disruption. 4 C.F.R. § 21.8(b). We are unable to determine from the record whether the extent of performance or the agency's legitimate schedule needs would render it impracticable at this juncture to provide Lockheed an opportunity to respond to the agency's requirement. Accordingly, we recommend that the agency determine whether it is practicable to provide Lockheed such an opportunity, and then take action consistent with its determination. (In light of our conclusions above, the Army's SLEP program schedule would not appear to be a proper basis for determining the feasibility of this corrective action.) We also recommend that the agency reimburse Lockheed the reasonable costs associated with filing and pursuing its protest, including reasonable attorneys' fees. 4 C.F.R. § 21.8 (f)(1). Lockheed's certified claim for costs, detailing the time spent and the costs incurred, must be submitted to the agency within 60 days of its receiving our decision.

The protest is sustained.

Anthony H. Gamboa
General Counsel