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# Decision

**Matter of:** L3 Unidyne, Inc.

**File:** B-414902; B-414902.2; B-414902.3

**Date:** October 16, 2017

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Devon E. Hewitt, Esq., and Michael E. Stamp, Esq., Protorae Law PLLC, for Leidos, Inc., an intervenor.

Richard C. Dale, Esq., and Emilia Muche Thompson, Esq., Department of the Navy, for the agency.

Scott H. Riback, Esq., and Tania Calhoun, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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## DIGEST

1. Protest alleging that agency improperly made award to concern that required execution of binding arbitration agreements as a condition of employment for prospective new hires is sustained where statute prohibits award of a contract to any firm requiring certain types of arbitration agreements as a condition of employment; awardee conditioned employment of prospective new hires on execution of an arbitration agreement; and agency never considered whether or not the required arbitration agreements violated the statutory prohibition.

2. Protest challenging agency's evaluation of proposals is sustained where record shows that agency's evaluation was not consistent with the terms of the solicitation and applicable statutes and regulations.

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## DECISION

L3 Unidyne, Inc., of Norfolk, Virginia, protests the issuance of a task order to Leidos, Inc., of Reston, Virginia, under request for proposals (RFP) No. N66604-17-R-3047, issued by the Department of the Navy for operation of the agency's towed array facility. L3 maintains that the agency miscalculated proposals, unreasonably failed to engage in discussions, and made an unreasonable source selection decision.

We sustain the protest.

## BACKGROUND

The RFP, issued to companies holding contracts under the Navy's Seaport-E indefinite-delivery, indefinite-quantity multiple-award program, contemplates the issuance, on a best-value tradeoff basis, of a cost-plus-fixed-fee and cost-reimbursement task order. The task order seeks various services in connection with the operation of the Navy's towed array facility for a base year and two 6-month option periods.<sup>1</sup> The RFP stated that proposals would be evaluated considering cost and several non-cost factors. The non-cost factors were: technical capability (which included two subfactors in descending order of importance, technical and operational management scenarios, and personnel); past performance (deemed equal in importance to technical capability); and small business participation (deemed less important than the other two non-cost factors).<sup>2</sup> RFP at 57. The agency was to perform a cost realism evaluation; reserved the right to perform additional cost analyses in accordance with Federal Acquisition Regulation (FAR) § 15-404-1; and was to consider potential quality or service shortfalls that could result from an unbalanced distribution of uncompensated overtime among skill levels, and from its use in key technical positions. Id. The RFP also advised that the non-cost factors in combination were significantly more important than cost, but also warned that, as proposals were found relatively more equal under the non-cost factors, cost would be a more important consideration.<sup>3</sup> Id.

The agency received a number of proposals in response to the solicitation. After evaluating the proposals, the agency assigned the following ratings to the protester's and awardee's proposals:

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<sup>1</sup> The Navy's towed array facility is dedicated to the comprehensive fabrication, maintenance, and disposition of the agency's "towed arrays" which essentially are devices towed behind ships and submarines.

<sup>2</sup> Proposals were to be assigned adjectival ratings of outstanding, good, acceptable, marginal or unacceptable under the technical capability factor (and each of its subfactors) and small business participation factor. RFP at 58. The offerors' past performance was to be evaluated for relevance (and assigned relevance ratings of very relevant, relevant, somewhat relevant or not relevant), and assigned an adjectival confidence rating of substantial confidence, satisfactory confidence, unknown confidence, limited confidence or no confidence. RFP at 59.

<sup>3</sup> The RFP also provided for the evaluation of proposals under three pass/fail criteria--transition plan, plan for obtaining security clearances and organizational conflict of interest--that are not at issue here. RFP at 55.

		L3 Unidyne	Leidos
<b>Technical Capability</b>	Tech. & Operational Mgmt. Scenarios	Good	Outstanding
	Personnel	Unacceptable	Acceptable
<b>Past Performance</b>		Substantial Confidence	Substantial Confidence
<b>Small Business</b>		Acceptable	Acceptable
<b>Pass/Fail Elements</b>		Pass	Pass
<b>Evaluated Cost</b>			\$41,391,131

Agency Report (AR), exh. 10, Source Selection Decision Document (SSDD), at 1. Because L3 was found not to have submitted a technically acceptable proposal, the agency did not perform a realism evaluation of its proposed cost. AR, exh. 10, SSDD, at 2. On the basis of these evaluation results, after finding that Leidos was the only firm to have submitted a technically acceptable proposal, the agency issued a task order to Leidos based on its evaluated cost of \$41.4 million. This protest followed.<sup>4</sup> Id. at 2.

## PROTEST

L3 makes several challenges to the agency's evaluation of proposals. We have considered all of L3's allegations and sustain its protest for the reasons discussed below. We deny L3's remaining allegations. We note at the outset that, in reviewing protests challenging an agency's evaluation of proposals, we do not independently evaluate proposals. Rather we review the record to determine whether the agency's evaluation was reasonable and consistent with the terms of the solicitation and applicable statutes and regulations. Metis Solutions, LLC et al., B-411173.2 et al., July 20, 2015, 2015 CPD ¶ 221 at 4. While we will not substitute our judgment for that of the agency, we will sustain a protest where the agency's conclusions are inconsistent with the solicitation's evaluation criteria, inadequately documented, or not reasonably based. Id.

## Binding Arbitration Agreements

L3 argues that the agency acted improperly when it failed to find the Leidos proposal unawardable because Leidos required certain of its proposed new (not yet hired) key employees to enter into binding arbitration agreements as a condition of employment. The record shows that, in the case of several prospective new key employees, Leidos provided letters of intent with its proposal that included the following provision: "All new hires and rehires of Leidos must execute an Arbitration Agreement prior to commencement of employment. Enclosed is a copy of the Arbitration Agreement you

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<sup>4</sup> The task order at issue is valued in excess of \$25 million. Accordingly, our Office has jurisdiction to consider L3's protest. 10 U.S.C. § 2304c(e)(1)(B).

are required to execute as a condition of employment.” Leidos Technical Proposal, at D-6, D-11, D-16, D-24.

In support of its allegation, L3 directs our attention to a provision of the Fiscal Year 2010 Defense Appropriations Act, which precludes the expenditure of funds on any contract in excess of \$1 million unless the contractor agrees not to enter into an agreement with any of its employees that conditions that an individual’s employment on his or her agreement to resolve through arbitration certain types of employment claims, for example a claim under title VII of the Civil Rights Act of 1964. Pub. L. No. 111-118, § 8116, 123 Stat. 3454, 3455 (2009). (Although the provision to which the protester refers related to fiscal year 2010 funds, Congress repeatedly has reenacted identical provisions, most recently in the Consolidated Appropriations Act, 2017, Pub. L. No. 115-31, § 8096 \_\_\_ Stat. \_\_\_ (May 5, 2017). Those provisions, in turn, were extended under the Continuing Appropriations Act, 2018, Pub. L. No. 115-56, \_\_\_ Stat. \_\_\_, (Sept. 8, 2017), which provided continued funding through December 8, 2017.) Each provision permits the Secretary or Deputy Secretary of Defense to waive its requirements. Specifically, each provision provides as follows:

(d) The Secretary of Defense may waive the application of subsection (a) or (b) to a particular contractor or subcontractor for the purposes of a particular contract or subcontract if the Secretary or the Deputy Secretary personally determines that the waiver is necessary to avoid harm to national security interests of the United States, and that the term of the contract or subcontract is not longer than necessary to avoid such harm. The determination shall set forth with specificity the grounds for the waiver and for the contract or subcontract term selected, and shall state any alternatives considered in lieu of a waiver and the reasons each such alternative would not avoid harm to national security interests of the United States. The Secretary of Defense shall transmit to Congress, and simultaneously make public, any determination under this subsection not less than 15 business days before the contract or subcontract addressed in the determination may be awarded.<sup>5</sup>

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<sup>5</sup> The agency argues that consideration of whether Leidos’s arbitration agreements violate these statutory provisions is a matter of contract administration, and therefore not subject to our review. We disagree. Since the above-quoted provision expressly requires that any waiver of the statutory requirement be made and transmitted to Congress 15 days before a contract may be awarded, it follows that Leidos’s compliance with the requirement relates to the propriety of the agency’s award decision, and therefore is subject to our review.

(Emphasis added.) Id.<sup>6</sup> L3 argues that the agency did not evaluate the Leidos proposal for compliance with this requirement, nor is there any showing that the agency sought and obtained a waiver of the requirement, as contemplated by the statutes.

We sustain this aspect of L3's protest. As noted, the record shows that four of Leidos's key employees were proposed as contingent hires. Each of them executed a letter of intent agreeing to accept employment with Leidos, and each of those letters of intent expressly conditioned the individual's employment on execution of an arbitration agreement. As the protester correctly notes, there is no evidence in the record to show that the agency ever meaningfully considered whether or not the Leidos proposal complied with the statutory requirements described above in light of the terms of the letters of intent. In fact, there is no evidence to show that the agency even had a copy of the Leidos arbitration agreement before making award to the firm. There also is no evidence to show that the agency sought or obtained a waiver of this statutory requirement prior to making award to Leidos. Under these circumstances, we conclude that the agency could not properly have considered the Leidos proposal awardable without resolving whether or not the arbitration agreements here violate the statutory prohibition. We therefore sustain this aspect of L3's protest.

#### Evaluation of L3's Government Property Manager

L3 also argues that the agency unreasonably identified a deficiency in its proposal relating to the location of one of its proposed employees. The RFP required offerors to identify any employees working outside of the local commuting area (Newport, Rhode Island), demonstrate that such employees can be used effectively and efficiently, and explain how the offeror would maintain effective management control over those employees. RFP at 50, 56. The record shows that the agency assigned a deficiency to L3's proposal solely because it identified a government property manager working in Norfolk, Virginia (outside of the Newport, Rhode Island, commuting area), but did not demonstrate how the individual in question would be used effectively and efficiently or explain how the company planned to maintain effective management control over the individual. AR, exh. 2, L3 Technical Proposal, at 21; exh. 8, Source Selection Evaluation Board (SSEB) Report, at 11.

L3 argues that the agency's assignment of a deficiency to its proposal for this reason was unreasonable because the individual in question is a minor, non-key employee fulfilling a position not identified in the RFP.<sup>7</sup> In addition, L3 explains that government property management is a centralized function for the company. L3 also points out that

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<sup>6</sup> These statutory provisions are mirrored in the Defense Federal Acquisition Regulation Supplement (DFARS). See DFARS Subpart 222.74. As prescribed in that subpart, DFARS § 252.222-7006 was incorporated into the solicitation, although it did not require any affirmative action on the part of the offeror. RFP at 37.

<sup>7</sup> The record shows that Leidos [deleted] in its proposed staffing.

the individual in question is not identified as a directly-billed employee in its cost proposal; that it has been using this same individual under its incumbent contract to perform these requirements; and that its government property management system was (and continues to be) approved by the Defense Contract Management Agency (DCMA). The record further shows that in L3's contractor performance assessment report (CPAR) its government property management system was reviewed in connection with the performance of the predecessor contract, and the system was described as "extremely accurate and well maintained." AR, exh. 6, L3 Past Performance Information, at 21. L3 asserts as well that it included information in its proposal describing the resources available to its senior technical representative (the individual responsible for overall contract management) demonstrating that he would have all of the resources necessary to effectively manage the government property management system. L3 concludes by noting that the agency's evaluation record does not explain how the allegedly missing information led the agency to conclude that its proposal merited a deficiency for this reason.

The agency states that the L3 proposal was lacking the required information relating to how L3 would effectively or efficiently use the individual, and how the firm would exercise effective management and control over the individual. The agency therefore maintains that it reasonably assigned a deficiency to the L3 proposal for this reason.

We sustain this aspect of L3's protest. The RFP defines a deficiency as "a material failure of a proposal to meet a government requirement . . . that increases the risk of unsuccessful contract performance to an unacceptable level." RFP at 58. Here, the record shows that the protester identified only a single, non-key employee as working outside of the commuting area and, as explained by L3, the individual in question participates in a centralized function that L3 uses on more than one of its government contracts. The record also shows that this centralized function is approved by DCMA for use by L3 in connection with its performance of not just the subject requirement, but other contracts as well. AR, exh. 2, L3 Technical and Cost Proposal, at 30. Moreover, as noted, the record includes information showing that L3's proposed government property management system is the same system that it has used in the past to perform the solicited requirements, and that the system--which uses the services of the individual in question--was found by the agency to be "extremely accurate and well maintained." AR, exh. 6, L3's Contractor Performance Evaluation Report, at 21.

We agree with the agency that L3's proposal lacks a fulsome description of how the protester effectively and efficiently will use and manage the individual in question. Nonetheless, given the totality of the circumstances, the agency has not explained--and it is not apparent to our Office--how this informational deficiency amounts to a material failure of L3's proposal that increases the risk of unsuccessful contract performance to an unacceptable level. Simply stated, neither the agency's evaluation record nor its submissions in connection with the protest, provide any explanation for the agency's finding. AR, exh. 8, SSEB Report, at 11. Instead, the agency's evaluation record concludes, without elaboration, that the information lacking in the L3 proposal amounts to a deficiency. Id. Under the circumstances, we conclude that the agency

unreasonably identified this as a deficiency in the L3 proposal, and sustain L3's protest on this basis.

### Evaluation of the Offerors' Level of Effort and Staffing Profiles

L3 also advances several arguments in connection with the agency's evaluation of staffing profiles. L3 first argues that the agency's evaluation failed to take into consideration the offerors' differing proposed levels of effort for each of the solicitation's enumerated tasks (the RFP identified a total of 11 separate tasks during contract performance). According to the protester, the record shows that the agency failed to give any consideration to the offerors' proposed levels of effort, which varied significantly.

The agency responds that it adequately and comprehensively evaluated both offerors' staffing profile.

We sustain this aspect of L3's protest. The RFP provided the offerors with the total level of effort to be performed over the life of the contract (524,597 total hours) along with estimates (in the form of percentages of the total level of effort) for each of the solicitation's enumerated tasks. RFP at 31, 49-50. The RFP also provided that the agency would evaluate the proposed staffing mix to determine how well the overall mix of personnel was suited to perform the requirement. RFP at 56. The record shows that both offerors proposed to perform using the RFP's identified overall level of effort. L3 Technical Proposal, at LM-3, Table 4-4; Leidos Technical Proposal, E-3. However, each offeror proposed to use significantly different levels of effort for each of the solicitation's enumerated tasks.

For some tasks, Leidos proposed a significantly [deleted] level of effort than identified in the agency's estimate. For example, under task No. 4.4, Utilization and Management of Databases, the RFP provided that the estimated level of effort was 31,475.8 hours. RFP at 49-50.<sup>8</sup> L3 proposed [deleted] hours for this task, while Leidos proposed [deleted] hours for this same task, a level of effort approximately [deleted] percent [deleted] than the level of effort estimated in the RFP. L3 Technical Proposal at LM-1; Leidos Technical Proposal at E-3.

In other instances, Leidos proposed a significantly [deleted] level of effort compared to the level of effort estimated in the solicitation. For example, under task No. 4.8, Quality Management System, the RFP provided that the estimated level of effort was 52,479.7 hours. RFP at 49-50. L3 proposed a level of effort for task 4.8 using [deleted] hours. L3 Technical Proposal, at LM-1. In comparison, Leidos proposed to perform task No.

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<sup>8</sup> We derived the solicitation estimated level of effort for each task by multiplying the total level of effort (524,597) by the percentage listed for each task. For example, the solicitation estimates that task No. 4.4 will require 6 percent of the total level of effort.  $524,597 \times .06 = 31,475.8$  hours.

4.8 using [deleted] hours, a level of effort approximately [deleted] percent [deleted] the agency's estimated level of effort. Leidos Technical Proposal at E-3.

An examination of the offerors' proposed staffing at the subtask level reveals more significant variances.<sup>9</sup> For example, under subtask No. 4.3.8, Parts Inventory (Management), L3 proposed to perform using [deleted] hours, while Leidos proposed to perform this same subtask using [deleted] hours. L3 Technical Proposal at LM-1; Leidos Technical Proposal at E-3. In other instances, for example, under subtask No. 4.3.6, Action Items, Corrective Action and Preventive Actions, L3 proposed to perform using [deleted] hours, while Leidos proposed to perform this same task using [deleted] hours. Id.

We offer no opinion regarding the comparative merit of these differences among the offerors' proposed staffing for the various tasks; however, there is no evidence in the record to suggest that the agency identified these differences or gave meaningful consideration to whether the different levels of effort for each task (and, correspondingly, the differing staffing mixes associated with these differing levels of effort) would affect the relative technical merit of the two proposals.

L3 also contends that the agency evaluated only the offerors' staffing profiles--that is, staffing mix--under solicitation task No. 4.2, which required firms to perform troubleshooting, evaluation, testing, diagnosing, upgrading, repairing, refurbishing and manufacturing of towed arrays. According to L3, the agency did not evaluate the proposed staffing mix for the other 10 tasks identified in the RFP. L3 also argues that, within its limited evaluation of solicitation task No. 4.2, the agency only considered the offerors' proposed staffing profiles within a single labor category set (engineering technicians I through V). L3 maintains that the agency's evaluation failed meaningfully to consider the offerors' proposed staffing mix for solicitation tasks other than task No. 4.2, and also failed to consider the overall adequacy of the offerors' proposed staffing mix for all of the labor category sets other than engineering technician I through V.

We sustain this aspect of L3's protest. As noted, the RFP provided that the agency would evaluate the offerors' proposed staffing mix to determine how well the overall mix of personnel was suited to perform all aspects of the requirement. RFP at 56. The record shows that the agency's evaluation of the offerors' proposed staffing profiles largely was confined to consideration of their proposed staffing for solicitation task No. 4.2. AR, exh. 8, SSEB Report, at 6-11, 22-23. The agency's evaluation materials show that the agency gave brief consideration to the adequacy of the offerors' overall proposed staffing, but only for the labor category set of engineering technician I through V, and not the remaining labor categories. AR, exh. 8, SSEB Report, at 6, 22. In addition, beyond advancing generalized statements about the offerors' proposed staffing within the engineering technician I through V labor category set, these overall

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<sup>9</sup> The RFP did not specify estimated levels of effort at the subtask level.

findings do not explain in any detail the rationale for the agency's findings regarding the adequacy or inadequacy of the offerors' proposed staffing mix.

In addition, the agency's evaluation of the offerors' staffing profiles within task No. 4.2 was confined to their staffing profiles for the engineering technician I through V labor category set, but did not take into consideration the remainder of the offerors' proposed labor categories. The agency's evaluation materials include tables that examine the adequacy of the offerors' staffing for task No. 4.2; however, those tables include only the engineer technician I through V labor category set. AR, exh. 8, SSEB Report, at 8, 22-23.

Although the agency claims to have evaluated the offerors' proposed staffing for all tasks and labor category sets, there is nothing in either the contemporaneous record or the agency's submissions during the protest to support its claim.<sup>10</sup> Where, as here, an agency's evaluation essentially is undocumented, it bears the risk that there will be inadequate supporting information for us to conclude that the agency's evaluation and source selection are reasonable. Metis Solutions, LLC et al., supra, at 11.

As a final matter, L3 argues that the agency's cost realism evaluation failed to take into consideration the variances from the RFP's estimated levels of effort and staffing profile proposed by Leidos. (As noted, because the agency found the L3 proposal technically unacceptable, it did not evaluate it for cost realism purposes.)

There is no dispute that the agency's cost realism evaluation of Leidos did not take these considerations into account. The agency takes the position that the RFP contemplated consideration of the offerors' proposed staffing under the technical evaluation factor. The agency therefore reasons that it was not required to consider the adequacy of the offerors' proposed staffing profiles in connection with evaluating proposals for cost realism.

While we do not address this question extensively here (given the absence of any evaluation of the Leidos cost proposal based on its proposed staffing), we do note that, as a general rule, an agency's technical evaluation and cost realism evaluation in the context of a cost reimbursement contract must be consistent with one another and withstand logical scrutiny. ITT Systems Corp., B-405865, B-405865.2, Jan. 6, 2011, 2012 CPD ¶ 44.

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<sup>10</sup> L3 also argues that the agency unreasonably assigned its proposal a significant weakness based on its proposed staffing for task No. 4.2, maintaining that the agency's evaluation failed to take cognizance of its total staffing plan under the task, including labor categories not evaluated by the agency [deleted]. Because the agency's evaluation was confined to consideration of L3's staffing of task No. 4.2 under only the engineering technician I through V labor category set, we have no basis to determine whether or not the assignment of a weakness to the L3 proposal for this reason was reasonable.

## RECOMMENDATION

We recommend that the agency determine as an initial matter whether the Leidos proposal violates the statutory prohibition against requiring individuals to enter into arbitration agreements as a condition of employment. We further recommend that the agency reevaluate proposals in a manner consistent with the discussion above and make a new source selection decision. To the extent the agency determines that a concern other than Leidos properly is in line for award, we recommend that the agency terminate the task order issued to Leidos for the convenience of the government and issue a task order to the firm determined to offer the best value to the government, if otherwise proper. Finally, we recommend that the agency reimburse L3 the costs associated with filing and pursuing its protest, including reasonable attorney's fees. The protester should submit its certified claim for costs, detailing the time expended and costs incurred, directly to the contracting agency within 60 days after receipt of this decision. 4 C.F.R. § 21.8(f)(1).

The protest is sustained.

Susan A. Poling  
General Counsel