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**United States Government Accountability Office  
Washington, DC 20548**

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## Decision

**Matter of:** L-3 Systems Company

**File:** B-404671.2; B-404671.4

**Date:** April 8, 2011

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W. Jay DeVecchio, Esq., Kevin P. Mullen, Esq., James C. Cox, Esq., and Ethan E. Marsh, Esq., Jenner & Block, LLP, for the protester.

Richard J. Vacura, Esq., Robert Salerno, Esq., Michael Anderson, Esq. and K. Alyse Latour, Esq., Morrison & Foerster LLP, for DynCorp International, LLC, the intervenor.

Wade L. Brown, Esq., and David Scott, Esq., Department of the Army, for the agency. Glenn G. Wolcott, Esq., and Sharon L. Larkin, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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### DIGEST

1. Protester's assertions challenging the agency's past performance evaluation reflect mere disagreement with the agency's reasonable judgments where the record establishes that the agency comprehensively considered relevant past performance information for both offerors, recognized positive and negative aspects of both offerors' past performance, considered each offeror's corrective actions to address prior performance problems, and reasonably determined that the proposals presented essentially the same performance risk.
2. Agency performed a reasonable cost evaluation where it relied on statistical analysis, considered other information provided by the offerors related to the status of the labor market and the costs incurred under similar contracts, and recognized and evaluated the differences in fringe benefits, tax status, and related factors regarding each offeror's proposed labor rates.
3. Protester's assertions that it was misled during discussions regarding its proposed rates for mentor/trainers does not provide a basis to sustain the protest since, whether or not discussions were misleading, protester was not prejudiced since the cost difference between protester's and awardee's proposals for the relevant portion of their proposals was substantially less than the awardee's total cost advantage and the proposals were otherwise equal.

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## DECISION

L-3 Systems Company, of Alexandria, Virginia, protests the Department of the Army's award of a contract to DynCorp International LLC (DI), of Fort Worth, Texas, pursuant to request for proposals (RFP) No. W91CRB-10-R-0059 to provide support for the Afghanistan Ministry of Interior (MOI) and the Afghan National Police (ANP) in building, developing, and sustaining an effective law enforcement organization.<sup>1</sup> L-3 challenges the agency's evaluation under the past performance, cost and technical evaluation factors, and maintains that the agency failed to conduct meaningful discussions.

We deny the protest.

## BACKGROUND

In July 2010, the agency published the solicitation at issue, seeking proposals for a cost-plus-fixed-fee contract to provide mentoring, training, and logistics support for the MOI/ANP.<sup>2</sup> The solicitation reflects a joint decision by the Department of Defense (DOD) and the Department of State (DOS) to transfer full responsibility for the development of the Afghanistan national security forces from the DOS to the DOD. AR, Tab 3, Acquisition Strategy Document, July 2, 2010, at 5. The solicitation states that the goal of this contract is to train and mentor the Afghan government to "manage all aspects of its police training within two years of contract award." RFP at 11.

The solicitation established various contract line item numbers (CLIN), dividing the contract performance requirements into three basic areas: program management (CLIN 0002 for the base period and CLIN 0102 for the option period); mentoring/training services (CLINs 0003 and 0103); and logistics support services (CLINs 0004 and 0104). RFP at 2-7. For each of these CLINs, the solicitation established certain minimum requirements, including required labor categories and corresponding hours. Offerors were required to submit their proposed labor rates on spreadsheets provided with the solicitation. *Id.* at 72-73.

With regard to the evaluation of proposals, the solicitation established four evaluation factors: technical, experience, past performance, and cost. The

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<sup>1</sup> The Afghan MOI is responsible for nationwide law enforcement. The MOI consists of a number of divisions, including the ANP. Agency Report (AR), Tab 5, Source Selection Plan, Aug. 23, 2010, at 4.

<sup>2</sup> The solicitation contemplated a 2-year base performance period and a 1-year option period.

solicitation provided that the first two factors—technical and experience—would be evaluated on an acceptable/unacceptable basis.<sup>3</sup> RFP at 76. With regard to past performance, the solicitation provided that each proposal would be assigned one of three performance risk ratings—low, moderate, or high—based on consideration of the offeror’s, and its proposed subcontractors’, past performance information.<sup>4</sup> Id. With regard to cost, the solicitation provided that each offeror’s proposal would be evaluated for reasonableness and realism, elaborating that “the analytical techniques and procedures prescribed in FAR [Federal Acquisition Regulation] 15.404-1 for evaluating offeror proposals may be used singly or in combination with others to ensure the costs are fair, reasonable and realistic.” Id. at 77. Finally, the solicitation provided that the source selection decision would be based on a tradeoff between past performance and cost, with past performance being significantly more important than cost. Id.

In August 2010, initial proposals were submitted by eight offerors, including L-3 and DI. Based on the evaluation of initial proposals, the agency established a competitive range consisting of L-3, DI, and four other offerors. Thereafter, the agency provided items for negotiation (IFN) to each offeror in the competitive range, and conducted an initial round of discussions. Revised proposals were submitted in October 2010.

In November 2010, the agency advised the offerors that it would conduct a second round of discussions. In connection with these discussions, each offeror was again provided a written list of IFNs. On November 24, final proposal revisions were submitted and, thereafter, evaluated. The final evaluation ratings were as follows:

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<sup>3</sup> The solicitation defined an acceptable technical proposal as: “Proposal indicates an understanding of the minimum technical and performance requirements. Proposal is determined adequate and all proposed approaches are considered feasible.” RFP amend. 5, at 3. With regard to evaluation of experience, the solicitation defined an acceptable proposal as: “Proposal demonstrates that the offeror (entity) has at least three years continuous [experience] from a single firm (within the entity) with programs/projects similar size and scope of this requirement to include [various specific activities].” Id.

<sup>4</sup> The solicitation defined low risk as: “Essentially no doubt exists that the offeror will successfully perform the required effort based on their performance record.” RFP at 76. The solicitation defined moderate risk as: “Some doubt exists that the offeror will successfully perform the required effort based on their performance record.” Id. The solicitation defined high risk as: “It is extremely doubtful that the offeror will successfully perform the required effort based on their performance record.” Id.

	<b>Technical</b>	<b>Experience</b>	<b>Past Performance</b>	<b>Cost</b>
<b>DI</b>	Acceptable	Acceptable	Low Risk	\$1.034 Billion
<b>L-3</b>	Acceptable	Acceptable	Low Risk	\$1.279 Billion
<b>Offeror A</b>	Acceptable	Acceptable	Low Risk	\$1.122 Billion
<b>Offeror B</b>	Acceptable	Acceptable	Moderate Risk	\$1.108 Billion
<b>Offeror C</b>	Acceptable	Acceptable	Moderate Risk	\$1.172 Billion
<b>Offeror D</b>	Acceptable	Acceptable	Moderate Risk	\$1.555 Billion

Contracting Officer's Statement, Jan. 20, 2011, at 7; AR, Tab 22, Source Selection Decision Document, at 2.

Based on his review of the evaluation record, as well as his communications with the evaluation boards, the contracting officer made the following determinations:<sup>5</sup>

Since the Technical and Experience factors are Acceptable/Unacceptable criteria, all offerors in the competitive range are equal with regard to these two factors.

Past Performance is the discriminating factor because three companies are rated Low Risk (DI, L-3, and [Offeror A]), while the other three are all rated Moderate Risk . . . . In accordance with the procedures outlined in the solicitation, I have assessed the Performance Risk rating of DI's, L-3's, and [Offeror A's] Past Performance information. Based on that assessment, I find that there is no qualitative difference between the three entities.

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As described [above] the non-cost proposals of DI, L-3, and [Offeror A] are equal; DI is the lowest cost offeror. Therefore a tradeoff analysis to determine best value is not warranted because the decision is clear. By awarding to the lowest cost offeror, the Government also awards to the company reflecting the lowest performance risk and hence, the best value.

AR, Tab 22, Source Selection Decision, Dec. 20, 2010, at 3-4.

A contract was awarded to DI on December 20. This protest followed.

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<sup>5</sup> The contracting officer was also the source selection authority (SSA).

## DISCUSSION

L-3 protests the award to DI based on alleged errors in the agency's evaluation under the past performance, cost, and technical evaluation factors, and also asserts that the agency failed to conduct meaningful discussions. None of the allegations provide a basis to sustain the protest.

### Past Performance Evaluation

First, L-3 challenges the agency's evaluation under the past performance factor, complaining that it was unreasonable for the agency to assign DI's proposal a low performance risk rating, that is, the same rating the agency assigned to L-3's proposal. More specifically, L-3 asserts that the agency "failed to consider [DI's] exceedingly poor performance" on prior contracts, further complaining that the record "contains ample evidence of [DI's] poor performance" and that the agency's evaluation reflected various mistakes and was insufficiently documented. Protest, Dec. 3, 2011, at 10-11; Supp. Protest and Comments, Feb. 10, 2011, at 18-22; Supp. Comments, Feb. 18, 2011, at 1-8; Second Supp. Comments, Mar. 11, 2011, at 2-6.

An agency's evaluation of past performance, which includes its consideration of the relevance, scope, and significance of an offeror's performance history, as well as consideration of actions taken to resolve prior problems, is a matter of agency discretion which we will not disturb unless the agency's assessments are unreasonable, inconsistent with the solicitation criteria, or undocumented. See, e.g., Yang Enter., Inc.; Santa Barbara Applied Research, Inc., B-294605.4 et al., Apr. 1, 2005, 2005 CPD ¶ 65 at 5; Acepex Mgmt. Corp., B-283080 et al., Oct. 4, 1999, 99-2 CPD ¶ 77 at 3, 5. Further, an agency's past performance evaluation may be based on a reasonable perception of a contractor's prior performance, regardless of whether that contractor, or another offeror, disputes the agency's interpretation of the underlying facts, the significance of those facts, or the significance of corrective actions. See, e.g., Ready Transp., Inc., B-285283.3, B-285283.4, May 8, 2001, 2001 CPD ¶ 90 at 5. In short, we will not substitute our judgment for that of the agency, and a protester's mere disagreement with such judgment does not provide a basis to sustain a protest. Birdwell Bros. Painting & Refinishing, B-285035, July 5, 2000, 2000 CPD ¶ 129 at 5.

Here, we have reviewed the substantial record of information the agency considered in evaluating DI's and L-3's proposals under the past performance factor. Based on this review, we cannot question the reasonableness of the agency's risk assessments or its determination that the proposals were equal with regard to performance risk. More specifically, the record shows that the agency initially evaluated both DI's and

L-3's proposals as representing moderate risk, based on various issues related to their or their proposed subcontractors' performance of prior contracts.<sup>6</sup>

With regard to L-3's proposal, the agency's initial past performance evaluation stated:

Subcontractors['] performance examples seemed satisfactory but most of the companies had experienced issues. The examples for the prime were excellent, but there were some very negative comments received from the questionnaires and a history of security violations. Both raise questions regarding management. MODERATE RISK

AR, Tab 7(b), SSEB Past Performance Rating, Sept. 24, 2010, at 2.

Following discussions and L-3's submission of additional past performance information, the SSEB lowered its assessment from moderate risk to low risk, providing the following detailed summary of its evaluation:

For the multiple security violations reported in the original submission, L-3 did take corrective action over an extended period of time with a good effect. While L-3 states that this was an incorrect interpretation of the solicitation, and should not have been reported as security violations, the information was still reviewed by the board and considered to be relevant. In light of the supporting documentation from the Defense Security Service, the board now considers these "incidents" to be neutral.

In reference to the Cure notice for [L-3 Subcontractor A] for linguist fill rates in Iraq, L-3 refers the board to FAR Clause 52.249-14 in which actions by the enemy are grounds for excusable delays. The board acknowledges this and accepts L-3's explanation. Impact is changed to neutral.

In reference to the CURE notice issued to [L-3 Subcontractor B] for the re-locatable building, the board accepts L-3's assertion that a cure notice was issued simultaneously with an executed modification and was not intended to be a "CURE NOTICE" per se. The Board was unable to locate a POC [point of contact] for this contract to verify the intent of the CURE NOTICE, nor was able to review the documentation provided to [L-3 Subcontractor B] in reference to the CURE NOTICE, as this information was not provided to the [board] by L-3 for review.

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<sup>6</sup> The record shows that L-3 did not propose to perform any of the required contract requirements with [deleted]. Rather, L-3 proposed to perform the entire contract effort with [deleted]. AR, Tab 20(c), Final Cost Evaluation Report, at 12.

As such the Board will accept L-3's statements, and the impact is neutral.

The Cure notice that was received by [L-3 Subcontractor B] for a security contract in which guards went on strike was discussed further by L-3. The Board was able to obtain a copy of the cure notice for the two strikes in 2009. While there are discrepancies (200 vs. 500) in the submission to the Board and the actual cure notice, the board considered the actions by [L-3 Subcontractor B], the comments by the COR [contracting officer's representative], and the subsequent award of a bridge contract to [Subcontractor B]. While no corrective action response was located by either the board[] or the USG [U.S. Government] located at VBC [Victory Base Complex] or provided to the board by L-3, the Board did review actions taken by USG representative in IRAQ as acceptance of [L-3 Subcontractor B's] corrective actions. Impact is changed to neutral.

[L-3 Subcontractor B] received a SHOW CAUSE letter based on the misconduct of its Deputy Country Manager. The steps taken by [L-3 Subcontractor B] were thorough, but the fact remains that a [L-3 Subcontractor B] senior employee had improper conduct. This impact remains slightly negative.

In reference to the Questionnaire received from [military personnel], the response from L-3 was reviewed and discussed among the board members. In the previous IFN response, dated 20 Oct 2010, to this issue, L-3 acknowledged that there were "three comment focus areas that merited further management, attention and development relating to management, delivery of report, and personnel." In review of the comments submitted by L-3, it was noted that while the facts were being rebutted, no mention was made of their "further management attention" and actions being taken. The Board recognizes that L-3 reviewed the information provided on the questionnaires and accepts that L-3 will continue to review their reports and actions and improve performance accordingly. Impact is changed to slightly negative.

Upon review of the revised Past Performance proposal submission, the board has determined that some of the areas that were identified as having a negative impact have been changed to slightly negative or neutral. The Risk is changed from MODERATE to LOW. This rating has been assigned as, in the board's judgment, there is essentially no doubt that the offeror will successfully perform the required effort based upon their performance record.

AR, Tab 20(b), Final SSEB Past Performance Rating, Dec. 3, 2010, at 4.

Similarly, in its initial evaluation of DI's past performance, the agency assigned DI's proposal a rating of moderate risk, stating:

Overall subcontractor past performance was excellent. One subcontractor had a CURE notice (not submitted in proposal) that the COR [contracting officers' representative] stated was quickly resolved. The prime [contractor] had excellent performance examples and interviews with government representatives stated that "operational" performance was strong but there were some management and administrative issues. A CURE notice and CPAR [contractor performance assessment report] report back up this issue.  
MODERATE RISK

AR, Tab 7(b), SSEB Past Performance Rating, Sept. 24, 2010, at 2.

Following discussions, and DI's submission of additional past performance information, the agency lowered DI's risk rating from moderate to low, providing the following detailed summary of its evaluation:

The additional information was taken into consideration in reviewing the previously assigned risk rating of MODERATE. In the original rating, MODERATE was assigned on the basis of CURE NOTICES for subcontractor [deleted], a CPARS report for [DI] and CURE NOTICES for [DI].

The revised submission provided additional information regarding each of the above issues. In the original report, no CURE NOTICES for [a particular subcontractor] were noted. However, one was found through questionnaires. In the revision, [DI] states that [the subcontractor] actually had 6 CURE NOTICES. All six occurred at Kandahar Airfield and appear to have been remedied fairly quickly. The major concern with these CURE NOTICES was the fact that they were not reported until pointed out by the board.

A negative CPARS report on a contract worth \$1.2 billion dollars did not have a response from [DI] listed. The revised submission states that [DI] did respond and made changes in leadership and adapted processes that improved administrative functions. The risk rating is changed to slightly negative.

The revised past performance submission addressed the board's concern that the three CURE NOTICES (on three separate contracts) were indicative of management issues. While each issue was addressed after the CURE NOTICE and there is indication that management is improving, the issues could have been prevented in the first place. There is indication that there have been no further issues



since the 2007 notices. The impact of these issues is changed from negative impact to slightly negative.

Upon review of the revised Past Performance proposal submission, the board has determined that some of the areas that were identified as having a negative impact have been changed to slightly negative. There were instances where [DI] appeared to have management and administrative issues leading to CURE NOTICES, but these appear to have been remedied. The board assessment of risk is changed from MODERATE to LOW, based upon [DI's] past performance record and essentially no doubt exists that [DI] will successfully perform the required effort.

AR, Tab 20(b), Final SSEB Past Performance Rating, Dec. 3, 2010, at 7.

Despite the agency's documented consideration of the past performance information discussed above, L-3 complains that the agency made various mistakes in connection with the information it considered, and otherwise ignored or failed to reasonably assess DI's past performance.<sup>7</sup> Protest at 10-11; Supp. Protest and Comments, Feb. 10, 2011, at 18-22.

We have reviewed the entire record, including the various past performance documents that L-3 maintains reflect agency mistakes and/or are inconsistent with the agency's final risk assessment for DI. Based on our review, we conclude that the agency meaningfully, comprehensively, and reasonably considered relevant past performance information for both offerors; that it recognized both positive and negative aspects of each offeror's prior performance record; that it took into consideration the relevance, scope, and significance of both offerors' prior performance histories, including consideration of each offeror's corrective or remedial actions in response to prior problems; and that it contemporaneously documented its evaluation. As noted above, it is within an agency's discretion to consider the significance of an offeror's prior performance in the context of, among other things, the contractor's actions to address prior problems. See, e.g., Yang Enter., Inc.; Santa Barbara Applied Research, Inc., supra. Since it is not the function of this Office to reevaluate proposals, we will not substitute our judgment for the agency's, absent clear and material agency error. Based on our review, we find no material errors in the agency's past performance evaluation, and we cannot conclude that it was unreasonable for the agency to assign low risk ratings to both proposals and to conclude that they presented essentially equal performance risk. L-3's various

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<sup>7</sup> L-3 does not dispute any aspect of the agency's evaluation regarding its own proposal, including the various negative aspects reflected in the final evaluation report.

complaints to the contrary reflect mere disagreement with the agency's judgments and fail to provide a basis for sustaining the protest.

### Cost Evaluation

Next, L-3 asserts that the agency's cost evaluation was flawed. Among other things, L-3 complains that the agency "ignored" the labor rates paid under prior similar contracts<sup>8</sup> and, instead, improperly employed a statistical analysis in evaluating the realism of the offerors' proposed labor rates. Supp. Protest and Comments, Feb. 10, 2011, at 4, 6-9. L-3 also contends that the agency failed to account for differences between offerors' compensation structures and other costs, and improperly performed an "apples to oranges" comparison of L-3's "highly trained, properly paid" personnel with other offerors' allegedly "lesser qualified or lesser paid personnel." Id.; Protest at 10.

When an agency evaluates a proposal for the award of a cost-reimbursement contract, an offeror's proposed costs are not considered controlling because, regardless of the costs proposed, the government is bound to pay all actual, allowable costs. FAR §§ 15.305(a)(1); 15.404-1(d); Tidewater Constr. Corp., B-278360, Jan. 20, 1998, 98-1 CPD ¶ 103 at 4. Consequently, an agency must perform a cost realism analysis to evaluate the extent to which an offeror's proposed costs are realistic for the work to be performed. FAR § 15.404-1(d)(2); Hanford Envtl. Health Found., B-292858.2, B-292858.5, Apr. 7, 2004, 2004 CPD ¶ 164 at 9. However, an agency is not required to verify each and every item in assessing cost realism; rather, the agency must perform a reasonable evaluation, which may, and should, include the informed judgments of the contracting agency. Cascade Gen., Inc., B-283872, Jan. 18, 2000, 2000 CPD ¶ 14 at 8. Similarly, an agency's cost realism analysis need not (and realistically cannot) achieve scientific certainty; rather, the analysis must provide a reasonable measure of confidence that the proposed costs are reasonable and realistic. See SGT, Inc., B-294722.4, July 28, 2005, 2005 CPD ¶ 151 at 7; Metro Mach. Corp., B-295744, B-295744.2, Apr. 21, 2005, 2005 CPD ¶ 112 at 10-11.

Here, as discussed below, we find that the agency performed, and documented, a reasonable and comprehensive cost evaluation of the offerors' proposals. See AR, Tab 7(c), Cost Evaluation of Initial Proposals, Oct. 6, 2010; AR, Tab 14(c), Cost Evaluation of Revised Proposals, Nov. 8, 2010; Tab 20(c), Final Cost Evaluation Report, Dec. 20, 2010. In this regard, the agency considered the proposed costs of

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<sup>8</sup> For example, L-3 repeatedly refers to higher labor rates that were previously paid under a similar contract for the Afghan Ministry of Defense (MOD) and Afghan National Army (ANA), suggesting that the agency should have relied on those higher rates in making its realism determination here. Supp. Protest, Feb. 10, 2010, at 8-9; Second Supp. Comments, Mar. 11, 2011, at 7-8.

each proposal, broken down by CLIN. With regard to L-3's and DI's proposals, the agency's evaluation showed the following:

	<b>CLIN</b>	<b>DI</b>	<b>L-3</b>
<b>Base Period</b>			
<b>Program Mgmt.</b>	0002	\$ [deleted]	\$ [deleted]
<b>Mentoring/Training</b>	0003	\$ [deleted]	\$ [deleted]
<b>Logistics Support</b>	0004	\$ [deleted]	\$ [deleted]
<b>Other Direct Costs<sup>9</sup></b>	0005	\$ [deleted]	\$ [deleted]
<b>Option Period</b>			
<b>Program Mgmt.</b>	0102	\$ [deleted]	\$ [deleted]
<b>Mentoring/Training</b>	0103	\$ [deleted]	\$ [deleted]
<b>Logistics Support</b>	0104	\$ [deleted]	\$ [deleted]
<b>Other Direct Costs</b>	0105	\$ [deleted]	\$ [deleted]
<b>Total Evaluated Cost</b>		\$1,033,828,000	\$1,279,328,000

AR, Tab 20(c), Final Cost Evaluation Report, at 4.

The agency's evaluation reflected the fact that the solicitation established minimum requirements for program management (CLINs 0002, 0102)<sup>10</sup> and established the entire requirement for mentoring/training (CLINs 0003, 0103), including identification of all required labor categories and the corresponding number of hours for each. See RFP attaches. 7, 12. Accordingly, for the mandated portion of CLINs 0002 and 0102, and the entire requirement under CLINs 0003 and 0103, the agency computed the average of all the offerors' proposed rates for each required labor category, then reviewed each offeror's proposed rates to determine whether they were within one standard deviation of the corresponding average rate. AR, Tab 20(c), Final Cost Evaluation Report, at 3. If an offeror's proposed rates were more than one standard deviation below the average rate, the agency sought additional information from that offeror regarding the basis for its lower rate. If the offeror's response failed to sufficiently explain the basis for the low rate, the rate was upwardly adjusted. Id.

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<sup>9</sup> The CLINs for other direct costs (CLINs 0005 and 0105) were "plug" numbers specified by the solicitation, to which offerors were required to add their proposed burdens. RFP at 4, 7.

<sup>10</sup> The solicitation stipulated that offerors must provide certain minimum quantities of labor in designated labor categories for the program management CLINs, but provided that offerors could propose additional personnel above and beyond those requirements, which DI and L-3 both did. RFP, attaches. 6, 11.

Based on our review of the record, we view the agency's comparison of each offeror's proposed rates to the average of the rates proposed by all six competitive range offerors, along with its requirement that offerors further justify rates that were more than one standard deviation below that average, as a reasonable tool in performing a cost analysis. See MPRI, Div. of L-3 Servs., Inc.; LINC Gov't Servs., B-402548 et al., June 4, 2010, 2011 CPD ¶ \_\_, at 5-9; Roy F. Weston, Inc., B-274945 et al., Jan. 15, 1997, 97-1 CPD ¶ 92 at 16; see also Mantech, Inc. v. U.S., 2010 U.S. Claims LEXIS 120 (Apr. 29, 2010). In this regard, as stated above, the solicitation mandated the labor categories and required hours for all of the solicitation's mentoring/training requirements and for the minimum mandatory requirements for program management, effectively precluding offerors from proposing differing approaches with regard to the labor categories and quantities of labor proposed. Further, the record shows that, while the agency's use of statistical analysis was a significant aspect of its evaluation, the agency did not rely on this tool alone.

For example, contrary to L-3's assertion that the agency ignored the labor rates paid under prior, similar contracts, the agency did, in fact, consider such rates. See, e.g., AR, Tab 11(a), IFNs for DI, ¶ 11; AR, Tab 13(a), DI's Proposal Revision, IFN Cross-Reference Matrix, at 8-9; AR, Tab 11(b), IFNs for L-3, ¶ MPRI\_10. Specifically, the agency recognized that higher rates had been paid under such contracts, but declined to view those rates as dispositive benchmarks for establishing realism here, noting that the differing provisions of this solicitation, along with information in the offerors' proposals, indicated that lower labor costs were realistic.<sup>11</sup> Contracting Officer's Statement, Feb. 24, 2011, at 1, 7-8. The agency points out that other offerors' proposals referred to "downward pressure on labor cost[s]" due to an "expanding labor supply" created by the current status of the U.S. and world economy, and the "commoditization [of certain labor categories] based on the current labor market." *Id.* at 7-8. Indeed, L-3 itself, [deleted], stated:

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<sup>11</sup> The agency notes that the evaluation provisions of this solicitation were different than the evaluation provisions in other similar contracts, specifically including the MOD/ANA contract that L-3 has repeatedly referenced. Here, offerors were specifically advised that the agency would evaluate an offeror's technical approach only to establish acceptability/unacceptability. RFP at 76. In contrast, the solicitation for the MOD/ANA contract provided that capability/technical approach was the most important evaluation factor, and was significantly more important than all other factors combined, including cost. Contracting Officer's Statement, Feb. 24, 2011, at 1. Accordingly, the agency expected to receive lower labor rates in response to this solicitation since (in contrast to the MOD/ANA solicitation) an offeror could not reasonably expect to obtain additional credit for proposing higher-priced personnel that exceeded the solicitation's minimum qualification requirements.

This approach is consistent with the trend for the industry in Afghanistan and realistically reflects the fact that the current downsizing of U.S. forces in Iraq has created a larger pool of available candidates for the type of positions proposed herein and, as such, flattens out the expected salary levels for the entire period of performance of the program.

AR, Tab 19(b), L-3's Final Proposal Revision, at 3-7.

Based on the offerors' various references to downward pressure on the labor market and the agency's consideration of the unique provisions of this solicitation, the agency concluded that DI's proposed rates that fell within the parameters of the agency's statistical analysis were realistic. See Contracting Officer's Statement, Feb. 24, 2011, at 8. Neither L-3's disagreement with this conclusion, nor its allegations regarding an "apples to oranges" comparison of personnel, provide a basis to sustain the protest.

Finally, L-3 challenges the agency's cost evaluation arguing that the agency failed to reasonably consider the structure of the offerors' differing compensation packages. In this regard, L-3's primary complaint is based on the fact that [deleted] of the U.S. personnel DI proposed to provide will be employees of a DI subsidiary, identified as DynCorp International Free Zone (DIFZ). L-3 notes that, because half of DIFZ is owned by Palm Trading Investment Corporation, an entity incorporated outside the United States, DI is not required to pay or withhold certain taxes, including Social Security and Medicare taxes, or to provide certain benefits, including unemployment benefits, for these U.S. personnel. Supp. Protest and Comments, Feb. 10, 2011, at 9-12; AR, Tab 20(c), Final Cost Evaluation Report, at 10-11. L-3 asserts that the agency's evaluation failed to reasonably consider this aspect of DI's proposal in performing its cost evaluation, alleging that various negative ramifications flow from DI's proposed approach.

Contrary to L-3's allegations, the agency's evaluation record demonstrates that it gave a significant amount of consideration to DI's proposed use of DIFZ, and recognized the impact this had on various aspects of DI's proposal, including fringe benefits for DI's employees. See AR, Tab 11(a), Cost IFNs for DI, Nov. 8, 2010, ¶¶ 3, 6, 18, 19, 20; Tab 16(a), IFNs for DI, Nov. 10, 2010, attach. 3, ¶¶ 7, 12, 13, 14; Tab 15(a), SSA Briefing Document, at 6; Tab 20(c), Final Cost Evaluation Report, at 5-11. Among other things, the agency's evaluation considered the impact with regard to applicable taxes, unemployment benefits, social security and medicare credits, bonuses, and its application of post and hazard differentials to base hours. E.g., AR, Tab 20(c), Final Cost Evaluation Report, at 5-11. The agency further determined that there was nothing improper in DI's use of DIFZ and concluded, based on an assessment of net compensation to the employees, that the differences flowing from DI's proposed use of DIFZ, along with other aspects of DI's compensation package, did not warrant cost realism adjustments. Id. at 11. While

L-3 disagrees with the agency's judgments, such disagreement provides no basis for sustaining the protest.

### Technical Evaluation

Next, L-3 asserts that DI's proposal should have been rated as unacceptable under the technical evaluation factor because "[f]ailure to propose sufficient rates to attract personnel that meet the minimum qualifications required by the Solicitation is a clear indication that the offeror does not have an understanding of the minimum performance requirement." Supp. Protest and Comments, Feb. 10, 2011, at 23. L-3 asserts that DI's "low labor rate approach puts this important program at great risk" and, thus, its proposal should have been rated as technically unacceptable. Id. at 23-24.

L-3's assertion is based on the premise that DI proposed unrealistically low labor rates for which the agency failed to perform a proper cost realism analysis. However, as discussed above, we have rejected L-3's challenges to the agency's cost evaluation, including L-3's complaints regarding the realism of DI's proposed labor rates. Accordingly, we similarly reject L-3's challenge to the agency's technical evaluation, since it is based on the premise we have already rejected.

### Meaningful Discussions

Finally, L-3 protests that the agency failed to conduct meaningful discussions regarding L-3's proposed costs. More specifically, L-3 complains that the agency failed to advise L-3 that its mentoring/training costs (CLINs 0003, 0103) were [deleted] and, further, that the agency's cost questions actually misled L-3.<sup>12</sup> Protest at 5-7; Supp. Protest and Comments, Feb. 10, 2011, at 14-18.

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<sup>12</sup> L-3's protest does not challenge the agency's discussions, nor its cost evaluation, with regard to logistics support (CLINs 0004, 0104), expressly stating that those CLINs (along with program management CLINs) "accounted for a total of only [deleted] FTEs [full time equivalent personnel] in L-3's final proposal," and asserting that the mentoring/training CLINs (CLINs 0003, 0103) "made up the majority of the contract work." Protest at 6. In this regard, L-3 states that it "proposed to devote [deleted] FTEs to mentoring and training." Id. As the agency points out, L-3's protest allegations are factually inaccurate. Specifically, the record is clear that the RFP mandated (and [deleted]) 1,700 FTEs per year for logistics support (CLINs 0004 and 0104). RFP attaches. 8, 13; AR, Tab 20(c), Final Cost Evaluation Report, at 12. Further, the solicitation required only 690 FTEs per year for mentors/trainers under CLINs 0003 and 0103, with the 301 remaining FTEs to be filled with linguists. RFP attaches. 7, 12; Contracting Officer's Statement, Jan. 20, 2011, at 10; AR, Tab 20(c), Final Cost Evaluation Report, at 12.

In negotiated procurements, if an agency conducts discussions, the discussions must be meaningful. E.g., The Communities Group, B-283147, Oct. 12, 1999, 99-2 CPD ¶ 101 at 4. That is, agencies must lead offerors into the areas of their proposals that contain significant weaknesses or deficiencies, and it may not mislead offerors. E.g., Multimax, Inc., B-298249.6, Oct. 24, 2006 ¶ 165 at 12; Metro Mach. Corp., B-281872 et al., Apr. 22, 1999, 99-1 CPD ¶ 101 at 6-7. Nonetheless, an agency need not “spoon feed” an offeror as to each and every item that could be revised to improve an offeror’s proposal, e.g., Arctic Slope World Servs., Inc., B-284481, B-284481.2, Apr. 27, 2000, 2000 CPD ¶ 75 at 8-9, and an agency need not identify minor weaknesses that are not considered significant, even if such weaknesses ultimately become the determinative factors for award. E.g., Acepex Mgmt. Corp., B-273179.5, 98-2 CPD ¶ 128 at 5-6. While an agency must advise an offeror if its proposed cost/price is considered unreasonably high, Price Waterhouse, B-220049, Jan. 16, 1986, 86-1 CPD ¶ 54 at 6-7, an agency need not advise an offeror that its costs are higher than those of its competitors if the higher costs are not viewed as unreasonable. E.g., DeTekion Sec. Sys., Inc., B-298235, B-298235.2, July 31, 2006, 2006 CPD ¶ 130 at 15.

Here, although L-3’s proposed mentor/trainer rates were higher than those of its competitors, the agency states that it did not consider them to be unreasonably high. Contracting Officer’s Statement, Feb. 24, 2011, at 14-15. The record shows that, during discussions, the agency asked L-3 a total of 54 questions, and that 45 of these questions were directly related to L-3’s cost proposal. See AR, Tab 11(b), IFNs for L-3, Oct. 8, 2010; AR Tab 16(b), IFNs for L-3, Nov. 10, 2010. Of relevance to L-3’s protest are cost questions number 14 and [deleted]\_10,<sup>13</sup> which state as follows:

[Question 14:] Utilizing price analysis, it would appear that L-3’s proposed costs for CLINs 0002, 0004, 0102, and 0104 are [deleted]. This same analysis indicates the total CPFF [cost-plus-fixed-fee] proposed (less transition)<sup>[14]</sup> is [deleted] for this requirement. Given these indications, there is some concern with regard to L-3’s cost proposal. Please substantiate [deleted] of the costs in the proposal revision.

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[Question [deleted]\_10:] Recent analysis conducted by the Government (which includes data from [deleted] contracts with

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<sup>13</sup> [deleted] was the L-3 subcontractor that proposed to provide mentors/trainers, and many of the agency’s questions were directed at particular subcontractor portions of L-3’s proposal. Thus, the question labeled “[deleted]\_10” was the tenth question related to [deleted] portion of the proposal.

<sup>14</sup> The RFP provided that transition costs (CLINs 0001 and 0101) would not be included in offerors’ total evaluated cost. RFP amend. 5, at 4.

CSTC-A [Combined Security Transition Command-Afghanistan]), as well as examination of the competitive environment, suggests some of [deleted] proposed rates do not appear [deleted], while others do not appear [deleted]. Please address this concern.

AR, Tab 11(b), IFNs for L-3, Oct. 8, 2010, at 5, 7.

L-3 first maintains that, because question 14 referenced the program management and logistics support CLINs (CLINs 0002, 0102, 0004, 0104), but did not specifically refer to the mentor/trainer CLINs (CLINs 0003, 0103), L-3 was misled into believing that its costs for mentors/trainers were reasonable. Protest at 6-7; Supp. Protest and Comments, Feb. 10, 2011, at 15. L-3 acknowledges that the agency specifically addressed L-3's mentoring/training rates in question [deleted]\_10, wherein the agency advised L-3 that some of its mentoring training rates were [deleted], and that other mentoring/training rates were [deleted]. Nonetheless, L-3 maintains that it properly interpreted the question as referring only to the particular rates identified and, thus, was misled by this question. Id.

Here, question 14 advised L-3 that its total proposed costs were considered to be [deleted]. More specifically, in the question directed at [deleted] regarding mentors/trainers, the agency advised L-3 that some of its proposed rates were [deleted]. Since the agency's question referred to [deleted] rates, in plural, the agency may have intended for the specific labor category identified in the parenthetical to be an example of those rates. Nonetheless, we need not resolve whether L-3 was reasonably misled by this question, since the record establishes that, even if it was misled, L-3 was not prejudiced.

As discussed above, the agency properly concluded that L-3's and DI's proposals were equal with regard to the non-cost evaluation factors and, further, that DI's total evaluated cost was \$245 million lower than that of L-3. AR, Tab 20(c), Final Cost Evaluation Report, at 4. As further shown above, the difference between L-3's and DI's proposal with regard to CLINs 0003 and 0103 (mentors/trainers) was less than \$[deleted] million--that is, just a little more than [deleted] of DI's total cost advantage. Id. Thus, even if L-3 had [deleted] those of DI (costs that L-3 maintains are unrealistically low), DI's total cost advantage would still be more than



\$(deleted) million.<sup>15</sup> On this record, L-3's protest challenging the agency's discussions provides no basis for sustaining its protest.

The protest is denied.

Lynn H. Gibson  
General Counsel

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<sup>15</sup> As noted above, L-3 has not challenged the agency's evaluation or discussions with regard to the logistics support CLINs (0004, 0104), indicating that it did not believe those requirements constituted a major portion of the contract effort. Protest at 6. Nonetheless, the record establishes that L-3's costs for the logistics support portion of this contract (CLINs 0004, 0104) were approximately \$(deleted) million higher than DI's. AR, Tab 20(c), Final Cost Evaluation Report, at 4.