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Decision

Matter of: Northrop Grumman Systems Corporation--Mission Systems

File: B-419560.3; B-419560.4; B-419560.5; B-419560.7

Date: August 18, 2021

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DIGEST

Protest is sustained where agency failed to reasonably consider potential impact of a conflict of interest created by a government employee who developed specifications for solicitation while simultaneously engaging in employment negotiations with firm that ultimately received award under the solicitation.

DECISION

Northrop Grumman Systems Corporation--Mission Systems (Northrop), of Bethpage, New York, protests the award of a contract to L3 Technologies, Inc. Communication Systems-West (L3Harris), of Salt Lake City, Utah, under request for proposals (RFP) No. N00019-19-R-0069, issued by the Department of the Navy, Naval Air Systems Command (NAVAIR), for an aircraft-mounted jamming system for low band radar. This procurement is referred to as the Next Generation Jammer-Low Band (NGJ-LB) Capability Block 1 (CB-1) acquisition. The protester alleges that the agency failed to reasonably consider the impact of an apparent conflict of interest stemming from the actions of a government employee who developed specifications for the solicitation while at the same time negotiated for employment with L3Harris, a competitor and ultimate awardee under the solicitation.

We sustain the protest.¹

BACKGROUND

The NGJ-LB system is part of a larger Next Generation Jammer (NGJ) system that will augment and replace the ALQ-99 tactical jamming system currently used on the Navy's EA-18G aircraft for airborne electronic attack. Agency Report (AR), Tab J, Program Streamlined Acquisition Plan (PSTRAP) at 2. The ALQ-99 system, which has operated since 1971, provides very low, low, medium, and high radio frequency band radar and communication jamming capability for the aircraft. AR, Tab AA, RFP Statement of Work (SOW) at 5. The NGJ-LB system is intended to counter low radio frequency band electronic attacks. AR, Tab J, PSTRAP at 2.

Procurement History

On November 17, 2017, the Navy issued a broad agency announcement (BAA) No. N0019-18-R-0008 for the award of demonstration of existing technologies (DET) contracts to gather information for development of the NGJ-LB system. The Navy wanted to learn whether technologies existed and whether the technologies could be integrated into a podded solution that met the Navy requirements as installed on the EA-18G aircraft. AR, Tab L-5.1, BAA No. N0019-18-R-0008 at 3.² In October 2018, the agency awarded two DET contracts,³ one to Northrop and a second to L3 Technologies, Inc.⁴ AR, Tab L-6, Northrop DET Contract; AR, Tab L-7, L3Harris DET Contract. During DET contract performance, Navy employees worked closely with both contractors to develop and test contractor developed jammer pod prototypes. AR, Tab L-5.1, BAA No. N0019-18-R-0008, at 73-76. The data gathered from both DET

¹ Northrop also protested the agency's evaluation of the awardee's compliance with CB-1 technical specifications classified [DELETED]. Classified Third Supp. Protest. We sustained these allegations in a second separate classified decision. *Northrop Grumman Systems Corporation--Mission Systems*, B-419560.6, Aug. 18, 2021, 2021 CPD ¶ ___. Moreover, Northrop raised other allegations relating to an addendum to the RFP, which was classified [DELETED]. We denied these allegations in a third separate classified decision. *Northrop Grumman Systems Corporation--Mission Systems*, B-419557.2 *et al.*, Aug. 18, 2021, 2021 CPD ¶ ___. The allegations and issues addressed in this protest decision are different from those addressed in the classified protest decision and the [DELETED] decision.

² Citations are to the Adobe pdf page number.

³ Our office denied a protest from Raytheon Company challenging the Navy's decision not to award a DET contract to Raytheon under the BAA. *Raytheon Co.*, B-416578, B-416578.2, Oct. 22, 2018, 2018 CPD ¶ 376.

⁴ L3 Technologies, Inc. and Harris Corporation (Harris) completed a merger on July 1, 2019 forming a new corporate entity, of which L3Harris is a division. L3Harris Comments at 10.

contracts aided the Navy in drafting specifications for the NGJ-LB CB-1 procurement at issue in this case. *Id.* at 3.

While the contractors were performing the DET contracts, the Navy began drafting the CB-1 specifications. Contracting Officer's Statement and Memorandum of Law (COS/MOL) at 3. To that end, on May 15, 2019, the Navy released a request for information (RFI) to industry, describing the NGJ-LB program and draft requirements. AR, Tab L-11, CB-1 RFI at 1. The RFI was part of the Navy's market research to evaluate the feasibility of conducting an unrestricted procurement, as well as its continued pursuit of data for the development of the CB-1 specifications. See *id.*

The Navy released the draft CB-1 RFP on July 17. AR, Tab L-13, CB-1 Draft RFP. The Navy also conducted a pre-solicitation industry day with potential offerors that included a group session with all offerors and one-on-one sessions with the government team. COS/MOL at 4.

CB-1 Requirement

On September 9, 2019, the Navy issued the CB-1 RFP for an engineering, manufacturing, and development contract in support of the NGJ-LB program on an unrestricted basis pursuant to Federal Acquisition Regulation (FAR) part 15 procedures. COS/MOL at 2. The resulting contract will require the successful firm to "design, develop, build, integrate, test, and maintain" operational prototypes for the NGJ-LB pod. AR, Tab AA, SOW at 2. The CB-1 RFP contains a number of specifications classified [DELETED].⁵ COS/MOL at 2 & n.3; AR, Tab D, RFP amend. 3 at 140.

The solicitation contemplates the award of a single cost-plus-incentive-fee contract to the offeror that provides the best value to the government considering two factors: technical and cost. AR, Tab D, RFP amend. 3 at 139-141.⁶

The technical factor is significantly more important than the cost factor, and under the technical factor, proposals will be assigned a technical rating and a technical risk rating. *Id.* at 141. Eleven elements comprise the technical factor, of which only jamming performance is relevant to this protest.⁷ *Id.* The RFP provides that the technical

⁵ The CB-1 RFP [DELETED] classified specifications are different from the NGJ-LB requirements that the Navy procured [DELETED]. The Navy issued [DELETED] a separate solicitation [DELETED] (Addendum RFP); however, the RFP provided that the Navy would award contracts for the CB-1 RFP and the Addendum RFP to one offeror. AR, Tab D, RFP amend. 3 at 140; COS/MOL at 2.

⁶ The Navy amended the solicitation three times. All references to the solicitation are to the conformed solicitation as set forth in amendment 3 unless otherwise noted.

⁷ The eleven technical elements were: (1) jamming performance; (2) pod attributes/platform performance and integration; (3) structures; (4) [Controller, Receiver

elements are not individually weighted and are evaluated as a whole under the technical factor. *Id.* The technical rating considers the proposal’s compliance with the solicitation requirements and the benefits and detriments related to program performance and operations.⁸ *Id.* Whereas, the technical risk rating is an assessment of the risk associated with the proposed technical approach in meeting the requirement. *Id.* at 142. For jamming performance, the RFP provides that the Navy will evaluate compliance and risk, and offerors may be assigned “strengths, deficiencies, risk reducers, weaknesses, or significant weaknesses.” *Id.* at 142.

In January 2020, the agency received two proposals, one from Northrop and one from L3Harris. COS/MOL at 6. The agency conducted several rounds of discussions with both offerors and directed them to provide any final proposal revisions by November 5, 2020. *Id.* at 7. The agency then evaluated the revised proposals and assigned the following ratings:

	Northrop	L3Harris
Technical Rating	Unacceptable ⁹	Outstanding
Technical Risk Rating	Unacceptable ¹⁰	Moderate
Price	\$496,000,000	\$544,400,000

AR, Tab O, Source Selection Advisory Council (SSAC) Report at 5.¹¹ In December 2020, the agency concluded that L3Harris’s proposal represented the best value and

Exciter] performance; (5) product baseline maturity; (6) data rights; (7) small business utilization; (8) path to systems performance specification (SPS) objective capability; (9) pre-award integrated baseline review; (10) [DELETED]; and (11) security. AR, Tab D, RFP amend. 3 at 141.

⁸ The RFP provides the following adjectival ratings for the technical rating: outstanding, good, acceptable, marginal, and unacceptable. AR, Tab D, RFP amend. 3 at 144.

⁹ The solicitation specifies that any proposal assessed with a deficiency for the technical rating will be deemed unacceptable and ineligible for award. AR, Tab D, RFP amend. 3 at 144. Northrop’s proposal was assessed with a deficiency under the separate Addendum RFP and was rated unacceptable. AR, Tab Q, Debriefing Slides at 25.

¹⁰ Under the technical risk rating, an unacceptable rating is reserved for a “[p]roposal contain[ing] a material failure or a combination of significant weaknesses that increases the risk of unsuccessful performance to an unacceptable level. AR, Tab D, RFP amend. 3 at 144. The agency found that the deficiency assessed under the Addendum RFP increased the risk of unsuccessful performance to an unacceptable level and rated Northrop’s technical risk unacceptable. AR, Tab Q, Debriefing Slides at 35.

¹¹ The agency initially produced this document with extensive redactions as Tab O in the agency report. Subsequently, an unredacted version of the document was produced on June 22, 2021. We refer to this unredacted document using the tab identifier from the initial agency report.

awarded it the contract. COS/MOL at 7; AR, Tab P, Source Selection Decision Document at 2-3.

Following a debriefing, Northrop filed a protest with our Office on February 1, 2021 alleging that, among other things, the actions of a former Navy employee, who was then employed by L3Harris, created a disqualifying conflict of interest that precluded L3Harris from receiving the CB-1 contract award. The protester also filed a [DELETED] classified protest related to the separate Addendum RFP. On March 3, the agency announced that it was taking corrective action to investigate the conflict of interest allegations, and we dismissed Northrop's protests as academic. *Northrop Grumman Sys. Corp.--Mission Sys.*, B-419557.2 *et al.*, Mar. 5, 2021 (unpublished decision). On April 29, the agency completed its investigation and concluded that there was no appearance of impropriety and L3Harris did not obtain an unfair competitive advantage. AR, Tab K, Organizational Conflict of Interest (OCI) Investigation Memorandum. The agency subsequently affirmed its award to L3Harris and this protest followed.

DISCUSSION

The protester argues that the Navy failed to reasonably consider an apparent conflict of interest created by the actions of a Navy employee who was ultimately hired by L3Harris. Specifically, Northrop asserts the Navy employee created a conflict when that employee negotiated for employment with L3Harris while at the same time substantially participated in the development of the CB-1 specifications and execution of the DET contracts awarded to Northrop and L3Harris. For the reasons discussed below, we sustain the protest.¹²

Contracting agencies are to avoid even the appearance of impropriety in government procurements. FAR 3.101-1; *Perspecta Enter. Sols., LLC*, B-418533.2 *et al.*, 2020 CPD ¶ 213 at 7. In setting out the standards of conduct that apply to the award of federal contracts, the Federal Acquisition Regulation (FAR) provides that:

Government business shall be conducted in a manner above reproach and, except as authorized by statute or regulation, with complete impartiality and with preferential treatment for none. Transactions relating to the expenditure of public funds require the highest degree of public trust and an impeccable standard of conduct. The general rule is to avoid strictly any conflict of interest or even the appearance of a conflict of interest in Government-contractor relationships.

FAR 3.101-1; *Lockheed Martin Corp.*, B-295402, Feb. 18, 2005, 2005 CPD ¶ 24 at 8.

¹² Northrop raises other collateral arguments. We have reviewed them all and except as discussed here, and in *Northrop Grumman Systems Corporation--Mission Systems*, B-419560.6, *supra*, we find none provides a basis to sustain the protest.

We have recognized that, where an agency knowingly fails to investigate and resolve a question concerning whether an agency employee who actively and extensively engaged in procurement-related activities should have been recused from those activities, the existence of an actual or apparent a conflict of interest is sufficient to taint the procurement. *Satellite Tracking of People, LLC*, B-411845, B-411845.2, Nov. 6, 2015, 2015 CPD ¶ 347; *cf. The Jones/Hill Joint Venture*, B-286194.4, *et al.*, Dec, 5, 2001, 2001 CPD ¶ 194 (agency improperly failed to recognize, in the context of an Office of Management and Budget circular A-76 procurement, the appearance of a conflict created where government employee that prepared the solicitation's performance work statement and request for proposals was later assigned to assist in-house employees with preparation of the agency's most efficient organization management plan).

Subpart 3.1 of the FAR provides specific guidance regarding situations in which government employees, because of their job positions or relationships with particular government organizations, may have a conflict of interest. In particular, FAR section 3.104-2, warns agency officials about prohibitions associated with certain employment negotiations and the need for disqualification from government activities in certain circumstances. This section provides in relevant part as follows:

(b) Agency officials are reminded that there are other statutes and regulations that deal with the same or related prohibited conduct, for example-

* * *

(2) Contacts with an offeror during the conduct of an acquisition may constitute "seeking employment," (see Subpart F of 5 CFR Part 2636 and 3.104-3(c)(2)). Government officers and employees (employees) are prohibited by 18 U.S.C. 208 and 5 CFR Part 2635 from participating personally and substantially in any particular matter that would affect the financial interests of any person with whom the employee is seeking employment. An employee who engages in negotiations or is otherwise seeking employment with an offeror or who has an arrangement concerning future employment with an offeror must comply with the applicable disqualification requirements of 5 CFR 2635.604 and 2635.606. The statutory prohibition in 18 U.S.C. 208 also may require an employee's disqualification from participation in the acquisition even if the employee's duties may not be considered "participating personally and substantially," as this term is defined in 3.104-1.

We have also noted that personal conflicts of government employees can be analogized to organizational conflicts of interests (OCI) arising under FAR subpart 9.5. See *The Jones/Hill Joint Venture, supra.*; *DZS/Baker LLC; Morrison Knudsen Corp.*, B-281224 *et al.*, Jan. 12, 1999, 99-1 CPD ¶ 19 at 4; *Battelle Mem'l Inst.*, B-278673, Feb. 27, 1998, 98-1 CPD ¶ 107 at 6-7. Accordingly, although FAR subpart 9.5, by its terms, does not

apply to government agencies or employees, it is instructive in determining whether an agency has reasonably met its obligation to avoid conflicts under FAR section 3.101-1, in that FAR subpart 9.5 establishes whether similar situations involving for-profit organizations would require avoidance, neutralization or mitigation of conflicts of interest so as to prevent an unfair competitive advantage. FAR 9.504, 9.505; see *Aetna Gov't Health Plans, Inc.; Found. Health Fed. Servs., Inc.*, B 254397.15 *et al.*, July 27, 1995, 95-2 CPD ¶ 129 at 12.

The situations in which OCIs arise, as described in FAR subpart 9.5 and the decisions of our Office, can be broadly categorized into three groups: biased ground rules, unequal access to non-public information, and impaired objectivity. As relevant here, a biased ground rules OCI may arise where a firm, as part of its performance of a government contract, has in some sense set the ground rules for the competition for another government contract by, for example, writing or providing input into the specifications or statement of work. FAR 9.505-1, 9.505-2. In these cases, the primary concern is that the firm could skew the competition, whether intentionally or not, in favor of itself. *Energy Sys. Grp.*, B-402324, Feb. 26, 2010, 2010 CPD ¶ 73 at 4.

A protester must identify “hard facts” that show the existence or potential existence of a conflict; mere inference or suspicion of an actual or potential conflict is not enough. *ViON Corp.; EMC Corp.*, B-409985.4 *et al.*, Apr. 3, 2015, 2015 CPD ¶ 141 at 10; see also *Turner Constr. Co., Inc. v. United States*, 645 F.3d 1377, 1387 (Fed. Cir. 2011). Once it has been determined that an actual or potential OCI exists, the protester is not required to demonstrate prejudice; rather, harm from the conflict is presumed to occur. See *McCarthy/Hunt JV*, B-402229.2, Feb. 16, 2010, 2010 CPD ¶ 68 at 10; *Department of the Navy--Recon.*, B-286194.7, May 29, 2002, 2002 CPD ¶ 76 at 12 (where protest establishes facts that constitute a conflict or apparent conflict, we will presume prejudice unless the record affirmatively demonstrates its absence); see also *Lockheed Martin Corp.*, *supra* at 8 (finding “the need to maintain the integrity of the procurement process requires that we sustain the protest unless there is compelling evidence that the protester was not prejudiced”).

The identification of conflicts of interest is a fact-specific inquiry that requires the exercise of considerable discretion. *McConnell Jones Lanier & Murphy, LLP*, B-409681.3, B-409681.4, Oct. 21, 2015, 2015 CPD ¶ 341 at 13. We review the reasonableness of the contracting officer’s investigation and, where an agency has given meaningful consideration to whether an unfair competitive advantage exists, we will not substitute our judgment for the agency’s, absent clear evidence that the agency’s conclusion is unreasonable. *VSE Corp.*, B-404833.4, Nov. 21, 2011, 2011 CPD ¶ 268 at 8.

As explained above, Northrop asserts that a former Navy employee (whom we refer to as [DELETED]¹³ X) engaged in employment negotiations with L3Harris while he was “actively and extensively engaged” in the execution of the DET contract and developing

¹³ We have deleted the prefix for individual X throughout the decision.

specifications for the CB-1 procurement. Protest at 21-25, 27-33; 2nd Supp. Protest at 4-7; 4th Supp. Protest at 8-14. The protester argues that the actions of X created the appearance of an improper conflict of interest in favor of L3Harris such that the agency was required to find L3Harris ineligible for award. Protest at 40-49, 51-59. According to Northrop, the agency's investigation of the conflict of interest was inadequate and its conclusion that no conflict existed was unreasonable. Protest at 33-40, 44-50; 2nd Supp. Protest at 7-11; 4th Supp. Protest at 9-13.

The record shows, and the agency does not dispute, that during the period of August through early October of 2019, X was negotiating for employment with L3Harris while actively participating in the development of the CB-1 specifications, and working closely with Northrop and L3Harris on the performance of their DET contracts. AR, Tab K, OCI Investigation Memorandum at 27. X engaged in this conduct without qualification or reservation notwithstanding the prohibition of FAR section 3.104-2(b), and the related applicable government ethics rules identified under this FAR provision, which provide that a person should be disqualified from participating substantially in an acquisition while negotiating for employment with an offeror such as L3Harris.

In defense of the award, the agency essentially argues that X's actions had no impact on the competition.¹⁴ According to the agency any perceived conflict associated with X's employment negotiations did not taint the competition because his work on the DET contract and the CB-1 specifications was limited and had no discernable impact on the evaluation of Northrop's and L3Harris's proposals. COS/MOL at 9, 18, 21-28, 32.

Based on our review of the record, we conclude that X's actions created the appearance of an unfair competitive advantage in favor of L3Harris and that the agency's consideration of the conflict was unreasonable. As detailed below, the record

¹⁴ The agency also argues that X's activities did not create the appearance of an impropriety because X was negotiating for a position with L3Harris Space and Airborne Systems (SAS), a separate division within L3Harris, which did not submit a proposal in response to the CB-1 RFP and was a different division from the one with which he worked as a government employee under the DET contract. COS/MOL at 9, 18-20.

We are not persuaded by the agency's argument. L3Harris SAS is a division within L3Harris and is therefore an entity controlled by L3Harris. As such, the conflict stems from the potential for bias created by X negotiating employment for a position within L3Harris, regardless of position, title, or role, while simultaneously continuing to work on an acquisition for which L3Harris was a competitor.

In the analogous context of an OCI under FAR subpart 9.5, which does not explicitly address the role of divisions or affiliates in the various types of OCIs, there is no basis to distinguish between a firm and its affiliates, at least where concerns about potentially biased ground rules are at issue. See *Aetna Gov't Health Plans, Inc.; Foundation Health Fed. Servs., Inc.*, B-254397.15 *et al.*, July 27, 1995, 95-2 CPD ¶ 129 at 12. Accordingly, there is no basis to distinguish between L3Harris SAS and L3Harris with respect to the allegations raised here.

reflects X's extensive participation in developing the requirements for the CB-1 RFP at the same time he engaged in employment negotiations with L3Harris, a known potential competitor for the CB-1 procurement, and ultimate awardee. We reject the agency's conclusion that any apparent conflict did not have an impact on the competition because the conclusion was without a reasonable basis. We therefore sustain the protest.

The record reflects that the Navy employed X as an electronics engineer from 2013 to November 1, 2019. AR, Tab K, OCI Investigation Memorandum at 5. Between December 2017 and October 2019, X, based on his subject matter expertise, worked as a team leader within the NGJ-LB program, specifically, the [DELETED] Lead. *Id.* In this role, X participated on the government/contractor technical teams for both Northrop and L3Harris during the execution of their respective contracts; he was familiar with both Northrop's and L3Harris's DET designs, and attended working group and design status meetings with both contractors. *Id.* at 5, 14. As noted above, the Navy used information gathered during the execution of the DET contracts to ascertain the maturity of the technology for the NGJ-LB program and to aid in drafting the CB-1 specifications.

X also was part of the Navy team that developed the CB-1 specifications and provided input for the CB-1 evaluation criteria. *Id.* at 5-6. In this capacity, even though X was not authorized to approve CB-1 requirements unilaterally, he made recommendations to the Chief Engineer. *Id.* at 15.

In August 2019, an L3Harris employee contacted X about a resume he had previously submitted to Harris's space unit several years earlier. AR, Tab L-24, X Decl., Feb. 16, 2021, at 2. On September 9, 2019, the Navy issued the CB-1 solicitation. On September 13, X applied for the Lead, [DELETED] Systems Engineer with L3Harris SAS and was offered a position on September 25. *Id.* X met with Navy ethics counsel on September 30, at which point he was advised that he did not need a post-government employment ethics opinion and that he could accept employment with L3Harris SAS. *Id.* at 3. Although ethics counsel informed X about his obligation to the Navy and with respect to confidential contractor information, the record does not reflect that ethics counsel discussed X's activities during the period of his employment negotiations.¹⁵ See AR, Tab L-24, X Decl., Feb. 16, 2021, at 3.

Thereafter, X accepted L3Harris SAS's offer and notified Northrop and L3Harris during individual team meetings held on October 1 and 2 that he would be leaving the Navy to

¹⁵ The record shows that at least one Navy employee discussed the need for X to recuse himself. Upon learning that X had accepted a position with L3Harris SAS, on or about October 1, the Deputy [DELETED] Lead for the NGJ-LB program specifically advised X not to have further contact with L3Harris or NCG "to avoid even the appearance of impropriety." AR, Tab K, OCI Investigation Mem. at 12; AR, Tab L-31.7, Deputy [DELETED] Lead Decl.

work for L3Harris SAS. *Id.* X performed his duties on the DET contracts and the CB-1 RFP until his employment with the Navy ended on November 1. COS/MOL at 5-6. While X's last day physically in his office was October 18--he was on leave from October 19 through October 31--X continued to work on the CB-1 RFP specifications by answering email from a colleague and providing his input for the agency's response to an offeror's question.¹⁶ AR, Tab L-46.1, John Hopkins University, Applied Physics Lab (JHU/APL) at 4.¹⁷

In response to the initial protest, the contracting officer investigated the OCI allegations Northrop raised.¹⁸ As relevant here, the agency reviewed X's involvement with the DET contracts and the CB-1 RFP from August 1 through November 13.¹⁹ AR, Tab K, OCI Investigation Memorandum at 17.

With regard to the DET contracts, X was part of the technical team for both Northrop and L3Harris during the execution of each of their individual contracts and the record reflects that between August 1 through October 2, X participated in contract data requirements list (CDRL) reviews, DET program management reviews/technical interchange meetings (PMR/TIM) with Northrop and L3Harris,²⁰ and DET Facility for Antenna and Radar Cross Section Measurement (FARM) test planning. *Id.* at 16-20. For example, the record shows that X issued a number of comments on Northrop's DET CDRLs, with particular attention to CDRL AE10-001A, which was the test plan for the transmit/receive module. *Id.* at 18; AR, Tab L-46, OCI Technical Investigation at 1-4. X's comments focused on clarifying information, accurately measuring test information, requesting additional documentation, and eliminating inconsistencies.²¹ AR, Tab K, OCI Investigation Memorandum at 18. X also directed his team to review and comment on L3Harris's CDRL AE10-002A, the low power beamforming test plan. *Id.* at 18; AR, Tab L-46, OCI Technical Investigation at 1-4.

¹⁶ On November 13, the Navy published questions and answers for the CB-1 RFP in amendment 1 to the solicitation. AR, Tab K, OCI Investigation Mem. at 22.

¹⁷ Citation is to the Adobe pdf page number.

¹⁸ The agency's OCI investigation was broader than the scope of the protest grounds addressed in this decision. During development of the record, the protester withdrew other OCI allegations raised initially and we do not address them further. Northrop Comments at 4-5.

¹⁹ The Navy extended its period of review to November 13 because the Navy issued CB-1 RFP amendment 1 on November 13, and that would include all team inputs from August 1 through November 1. AR, Tab K, OCI Investigation Mem. at 10 n.6.

²⁰ These meetings were held with Northrop and L3Harris on October 1 and 2. AR, Tab K, OCI Investigation Mem. at 18.

²¹ "Generally, CDRL comments from the Government to a contractor are attempting to resolve issues with a deliverable that could result in contract requirements not being met." AR, Tab L-46, OCI Technical Investigation at 1.

X also attended portions of the DET PMR/TIM meetings. AR, Tab K, OCI Investigation Memorandum at 18. Both Northrop and L3Harris provided the Navy with meeting minutes from each of their respective meetings with the agency. *Id.* Although L3Harris's minutes do not establish that X made any noteworthy remarks, Northrop's minutes show X was an active participant in Northrop's meeting. *Id.* X made several comments that essentially asked Northrop for more information about different aspects of its design to further the government's understanding. *Id.*

In another example, the investigation reveals that X participated in both Northrop's and L3Harris's FARM test planning meetings, where his input focused on test execution to prepare each DET contractor for its final FARM test where they would demonstrate their technical capability. *Id.* at 19; AR, Tab L-46, OCI Technical Investigation at 9-10. The FARM test events had to adapt to interface limitations for both Northrop and L3Harris, and X provided a number of comments during test planning meetings to gauge whether the DET contractors' test demonstration units could be integrated in the FARM test and data collected. AR, Tab K, OCI Investigation Memorandum at 19.

The contracting officer's investigation also examined X's participation in the CB-1 procurement from August 1 through November 13. The contracting officer found that X participated in the procurement in four different ways: (1) drafting government responses to industry questions on the draft and final CB-1 RFP; (2) developing section L, instructions to offerors; (3) developing the SOW and CDRL; and (4) developing SPS requirements. *Id.* at 20-21. For example, the record establishes that X participated in providing agency responses to industry questions on the draft and final solicitation that included updated technical details that remained in the final solicitation. *Id.*

X also recommended changes to section L.2.1.3 of the RFP, under instructions to offerors about jamming performance. *Id.* at 21-22. X recommended adding contract specifications such as cSPS-84, which is designed to measure jamming performance of [DELETED], and cSPS-85, which is designed to measure the performance of [DELETED]. *Id.* at 21. These recommended changes were incorporated in the final RFP and the Navy evaluated Northrop and L3Harris on their compliance with these requirements. *Id.*

The investigation also showed that X recommended changes to the SOW/CDRL, as well as made substantive changes to several SPS requirements. *Id.* at 22-23. As the record makes clear, X's recommendations were approved and included in the final RFP. *Id.* X recommended substantive changes to several specifications that were reflected in the final RFP. *Id.* In particular, X added significant detail to the draft cSPS-1128 specification, which details an aspect of jamming performance that dictated the required level of performance. *Id.* at 23. The draft SPS requirements did not fully define the cSPS-1128 specification and the requirement was not measurable. *Id.* X recommended edits on August 16, 2019, that defined the cSPS-1128 requirement; X updated the specification text and a new table was added using numbers derived from

X and his team's analysis that defined performance metrics for [DELETED] and the allowable beam degradation. *Id.*

The facts are clear and there is no dispute that X participated in the development of CB-1 specifications and the execution of the DET contracts, while engaged in employment negotiations with L3Harris. Accordingly, the record is consistent with the circumstances attendant to a "biased ground rules" conflict of interest.

In its defense, regarding X's involvement with the CB-1 specifications, the agency points to the fact that its investigation found that X had no authority to approve changes to the requirements and that all changes were approved at least two levels above him. The agency also highlights aspects of the agency's investigation, which found that X's work in developing the CB-1 requirements had no impact on the ultimate evaluation, or that such an impact may have actually benefited Northrop. For example, the contracting officer found that X's recommendations had minimal impact on the CB-1 procurement because neither offeror took exception to the SOW/CDRL changes. *Id.* at 23.

The contracting officer also concluded X's contributions were minimal because the SPS requirement changes were unrelated to technical findings in the agency's evaluation, concluding, without explanation, that X's updated cSPS-1128 specification would affect all proposals. *Id.* Additionally, the contracting officer noted that Northrop received no technical findings from the agency's evaluation related to the cSPS-1128 requirement, whereas L3Harris received a significant weakness for this requirement. *Id.* at 23.

Regarding the DET contracts, the Navy found that X's participation in PMR/TIM meetings and the comments he made during the meetings did not provide direction to change the contractors' designs and did not have a significant impact on the CB-1 evaluation. *Id.* at 19. The contracting officer concluded that X's participation in the PMR/TIM meeting was limited to facilitating data collection from Northrop and L3Harris during the FARM test event. *Id.* The contracting officer found evidence, however, that X provided two specific inputs to the FARM test plan that allowed Northrop and L3Harris to best showcase their test demonstration units during DET FARM tests. *Id.* at 20. Nonetheless, the contracting officer found that X had limited participation in the FARM test planning meetings. *Id.* Ultimately, the contracting officer concluded there was "no evidence indicating X's conduct improperly affected the DET contract[s]." *Id.* at 30. We find these defenses unavailing.

As an initial matter, we must reiterate that in a case such as this, where an apparent conflict is established with hard facts (in this case undisputed facts) there is a presumption of prejudice. *McCarthy/Hunt JV, supra.* An agency can only overcome this presumption by affirmatively demonstrating the absence of harm and the agency has failed to demonstrate a lack of harm in this case. *Department of the Navy--Recon., supra; Lockheed Martin Corp., supra.*

First, the contracting officer argues that the apparent conflict created by X's actions could not have had an impact on the procurement because X had no authority to

approve changes to the requirements and that all changes were approved at least two levels above X. This assertion is not sufficient to overcome the presumption of harm because the investigation findings did not detail the approval process, explain the extent to which the approval process relied on X's recommendations and technical expertise, nor did it reflect any independent consideration of X's recommendations. *Id.* at 22. Moreover, a conflict can exist even if the agency did not solely rely on X's input and others retained ultimate decision-making authority. See e.g., *Safal Partners, Inc.*, B-416937, B-416937.2, Jan. 15, 2019, 2019 CPD ¶ 20 (finding the contracting officer's conclusion there was no conflict of interest was unsupported where the contractor lacked final authority).

As the second main prong of its defense, the agency focuses its attention on the underlying evaluation findings to support its conclusion that X's actions did not prejudice Northrop. This entire line of argument is misplaced. The strict limitation on both actual and apparent conflicts reflects the reality that the potential harm flowing from such situations is, by its nature, frequently not susceptible to demonstrable proof. *Teledyne Brown Eng'g, Inc.*, B-418835.2, Sept. 28, 2020, 2020 CPD ¶ 303 at 12; *Department of the Navy--Recon.*, *supra* at 11. It is for this reason that we presume prejudice where hard facts demonstrate a conflict of interest exists and a protester is not required in these circumstances to establish bias in the solicitation or point to technical findings to establish a conflict of interest. See *Aetna Gov't Health Plans, Inc.; Foundation Health Fed. Servs., Inc.*, *supra* at 18-19.

In this way, the agency's conclusion about its investigation reflects a circular logic. According to the Navy, because there is no evidence in the evaluation record to demonstrate that Northrop's proposal received adverse technical findings for requirements that X worked on while negotiating employment with L3Harris, or that L3Harris received favorable ratings, there was no harm. The failure to find such proof in the evaluation findings, however, does not suggest the lack of a conflict, or the lack of bias in the specifications because, as explained above, the potential harm from such a conflict is by its nature, not susceptible to such proof. See *Teledyne Brown Eng'g, Inc.*, *supra*; *Department of the Navy--Recon.*, *supra*. The hard facts that are required are those which establish the existence of the organizational conflict of interest, not the specific impact of that conflict. See *HBI-GF, JV*, B-415036, Nov. 13, 2017, 2017 CPD ¶ 331 at 7; *Satellite Tracking of People, LLC*, B-411845, B-411845.2 Nov. 6, 2015, 2015 CPD ¶ 347 at 8 (where the contracting officer identified a conflict of interest, but undertook no actions to safeguard the procurement process, GAO "need not resolve the question of whether the program manager's participation in the acquisition favored, disfavored, or had no impact" on the protester. "To maintain the integrity of the procurement process, we will presume that the protester was prejudiced, unless the record includes clear evidence establishing the absence of prejudice.").

Because the circumstances of X's apparent conflict concerned the integrity of the ground rules of the competition, the agency should have instead focused its inquiry on the integrity of the specifications and their potential for bias; rather than the resulting evaluation. For example, we have found that allegedly biased specifications can be

mitigated by subsequent activities by unbiased individuals. See e.g., *BAE Sys. Tech.*, B-411810.3, June 24, 2016, 2016 CPD ¶ 174 at 13-15 (contracting officer reasonably concluded that significant changes to solicitation requirements reasonably mitigated potential biased ground rules conflict). Having failed to do so, we cannot find that the agency has presented clear evidence to establish the absence of prejudice.

For the above reasons, the appearance of impropriety resulting from the biased ground rules conflict of interest at issue here tainted the integrity of the procurement, and we therefore sustain the protest.

RECOMMENDATION

In this protest we sustain the allegation that an apparent conflict of interest was created when X, who was engaged in employment negotiations with L3Harris also developed specifications for the CB-1 solicitation. The ordinary remedy where a conflict cannot be mitigated is the elimination of that competitor from the competition. See *The Jones/Hill Joint Venture, supra* at 22 n.26. Here, we are mindful that it is neither feasible nor desirable to eliminate L3Harris from the competition and it may be possible to mitigate the conflict by engaging individuals without a conflict to review the specifications tainted by X's conflict of interest. We therefore recommend that the Navy engage individuals with the requisite technical expertise to conduct an independent review of X's input during the relevant period of conflict on the CB-1 specifications to determine whether X's input was consistent with the Navy's actual requirements.

If the agency concludes that the specifications continue to reflect its needs, we recommend that the agency reopen discussions and request revised proposals, evaluate proposals consistent with the evaluation criteria, and make a new source selection decision. Alternatively, if the agency decides that its specifications have changed, we recommend that the agency issue an amendment reflecting its updated requirements, request revised proposals, and make a new source selection decision.

We also recommend that Northrop be reimbursed its reasonable costs of filing and pursuing its protest, including attorneys' fees. 4 C.F.R. § 21.8(d)(1). The protester's

certified claim for costs, detailing the time expended and costs incurred, must be submitted directly to the agency within 60 days after receipt of this decision. *Id.*

The protest is sustained.²²

Edda Emmanuelli Perez
General Counsel

²² Because the apparent conflict here may implicate 18 U.S.C. § 207 or 18 U.S.C. § 208, criminal statutes, and their enforcement is not encompassed within our protest jurisdiction, we are by separate letter referring the protester's allegations to the Department of Defense Office of Inspector General for such further review as considered appropriate. See *Sterling Med. Assocs.*, B-213650, Jan. 9, 1984, 84-1 CPD ¶ 60 at 3; *Western Eng'g & Sales Co.*, B-205464, Sept. 27, 1982, 82-2 CPD ¶ 277 at 1; *Consolidated Serv., Inc.*, B-186199, Nov. 21, 1977, 77-2 CPD ¶ 386 at 3.