IN THE UNITED STATES COURT OF FEDERAL CLAIMS
BID PROTEST

FINAL REDACTED VERSION

[redacted]

NORTHROP GRUMMAN SYSTEMS CORPORATION — MISSION SYSTEMS,

Plaintiff,

v.

THE UNITED STATES

Defendant.

Case No. 21-2099 C

Judge _____

BID PROTEST COMPLAINT

Plaintiff Northrop Grumman Systems Corporation — Mission Systems ("Northrop Grumman"), as for its Complaint against Defendant United States of America, alleges as follows[1]:

NATURE OF THE ACTION

1. The Department of the Navy's actions in this procurement present the Court with an extraordinary set of circumstances. The Navy made award to L3 Technologies, Inc. Communication Systems-West ("L3Harris") even though the company was ineligible for two independent reasons. The U.S. Government Accountability Office ("GAO") reviewed the procurement and, in two detailed decisions, explained the Navy's errors and recommended that

[1] This case is related to *L3 Technologies, Inc. Communication Systems-West v. United States*, CFC No. 21-1819 C (Horn, J.). As discussed with the Court and the parties to that case during a hearing on October 25, 2021, this Complaint uses sealed, protected material from that case. This Complaint also uses material covered by protective orders issued by the U.S. Government Accountability Office in *Northrop Grumman Sys. Corp. – Mission Sys.*, B-419560.3 et al., and *Northrop Grumman Sys. Corp. – Mission Sys.*, B-419557.2 et al.

[redacted]

the Navy fix them. The Navy, however, refuses to do so, and intends to proceed with the illegal award to L3Harris.

2. This procurement is for a pod to be carried on the Navy's EA-18G Growler aircraft. The pod will jam enemy air defenses, protecting U.S. military aircraft and personnel from enemy fire.

3. The Navy awarded two related contracts to L3Harris, pursuant to Solicitation Nos. N00019-19-R0069 (the "CB-1 RFP") and N00019-19-R0069-A (the "Addendum RFP").

4. The award by the Navy violated procurement law, and was arbitrary and capricious, in two separate and independent respects.

5. *First*, the awardee, L3Harris, failed to comply with a material term of the solicitation, and was therefore ineligible for award.

a. The requirement at issue is central to the jamming performance of the pod. Failure to comply means that the pod will be less effective at shielding U.S. aircraft and personnel from harm.

b. L3Harris's own proposal stated that its design approach offers only [redacted]' leaving [redacted]

c. The Navy's own evaluation concluded that L3Harris's proposal "does not meet requirements."

6. Despite L3Harris's deficient proposal, the Navy awarded the contracts to L3Harris. That action violated the law and was arbitrary and capricious.

7. GAO found that the Navy erred in evaluating L3Harris's proposal as technically acceptable when that proposal did not meet the solicitation's material requirements. GAO

[redacted]

recommended that the Navy cure that error by re-opening the competition and obtaining revised proposals — which would allow L3Harris an opportunity to fix its non-compliance.

8. The Navy, however, refused to implement GAO's recommendation, asserting that it had discretion to deem L3Harris eligible despite its non-compliance. That action too was arbitrary and capricious.

9. *Second*, L3Harris was also ineligible as a result of its recruitment and hiring of a former Navy official, [redacted]

a. [redacted] was the Navy's key expert on jamming performance for this procurement.

b. In that role, he evaluated and commented on the designs developed by both L3Harris and Northrop Grumman under predecessor contracts.

c. In that role, he also helped the Navy develop its requirements for the solicitation now at issue.

d. Over a period of several months, from August through October 2019, [redacted] sought and then accepted employment with L3Harris.

e. In a stark violation of law, [redacted] never recused himself from this procurement. He continued to evaluate the offerors' designs, and to develop the Navy's requirements, while he pursued employment with L3Harris — and even after he had accepted a position with the company.

10. Despite [redacted] severe conflict of interest, and the resulting appearance of impropriety and harm to the integrity of the procurement, the Navy awarded the contract to L3Harris. That action violated the law and was arbitrary and capricious.

[redacted]

11. GAO found that [redacted] actions created an unmitigated conflict of interest. GAO explained that the "ordinary remedy" would be to exclude L3Harris from the competition, but concluded that it would not be desirable to exclude L3Harris and that the Navy might be able to mitigate the conflict through other means. So in lieu of excluding L3Harris, GAO recommended that the Navy (1) conduct an independent review of [redacted] input into the Navy's requirements; and (2) re-open the competition, obtain revised proposals, and make a new award decision.

12. The Navy, however, failed to fully implement GAO's recommendation. Although it conducted a review of its requirements, it refuses to re-open the competition. That action is arbitrary and capricious, contrary to law, and inadequately documented, for two reasons.

a. The Navy's decision regarding whether to follow GAO's recommendations fails to address GAO's separate and independent recommendation to re-open the competition as a means of mitigating the appearance of impropriety. The Navy has thus failed to document any rationale for its refusal to follow GAO.

b. [redacted] involvement in this competition went far beyond the development of the Navy's requirements and included, among other things, the evaluation of the offerors' designs as they were developed under the predecessor contracts. As a result, [redacted] conflict cannot be mitigated merely by reviewing the Navy's requirements. If L3Harris is not excluded from the competition, then the appearance of impropriety cannot possibly be mitigated without re-opening the competition.

[redacted]

13. The Navy's actions in connection with [redacted] conflict of interest are arbitrary in one final respect: The Navy's review of [redacted] input into its requirements was superficial, and its conclusion was irrational and inadequately documented.

14. For these reasons, Northrop Grumman seeks relief from this Court. Northrop Grumman seeks a permanent injunction prohibiting the Navy from proceeding with the illegal contracts awarded to L3Harris. The Navy should exclude L3Harris from the competition or, at a bare minimum, re-open the competition, obtain revised proposals, and make a new award decision.

JURISDICTION

15. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1491(b).

16. Northrop Grumman was an actual offeror that submitted a proposal in response to the solicitation and whose direct economic interest is affected by the award to L3Harris. Northrop Grumman therefore has standing to sue as an interested party pursuant to 28 U.S.C. § 1491(b).

THE PARTIES

17. Northrop Grumman provides mission-enabling solutions for global security. It maintains offices at 925 South Oyster Bay Road, Bethpage, NY 11714-3582.

18. Defendant is the United States of America, acting by and through the Navy as the contracting agency.

19. L3Harris, the awardee, is a government contractor that maintains offices at 640 North 2200 West, Salt Lake City, UT 84116.

[redacted]

FACTUAL ALLEGATIONS

I. Nature of the Procurement

20. This procurement is for the development and production of an airborne electronic attack pod that will sit under the centerline of the Navy's EA-18G aircraft. The pod will emit jamming signals that will target and neutralize enemy air defenses, thereby protecting U.S. aircraft and personnel from enemy fire.

21. The Navy's EA-18G aircraft are currently equipped with the ALQ-99 tactical jamming system, which provides very low, low, medium, and high frequency band radar and communication jamming capabilities. *See Northrop Grumman Sys. Corp. – Mission Sys.*, B-419560.3 et al., Aug. 18, 2021, 2021 CPD ¶ 305 at 2 (hereinafter, "B-419560.3 Decision").

22. The instant procurement is for the Next Generation Jammer–Low Band ("NGJ-LB") System — a tactical jamming system that will operate at low band frequencies and replace the ALQ-99. *Id.* at 1-2.

23. At a basic level, the NGJ-LB pod works as follows: [redacted]

24. Two concepts are central to the jamming performance of the NGJ-LB pod: Effective Isotropic Radiated Power ("EIRP") and the Field of Regard ("FOR").

[redacted]

25. EIRP measures the strength and effective jamming power of the signal transmitted by the NGJ-LB pod. As a very basic analogy, if the NGJ-LB pod were a flashlight, then EIRP would measure how brightly its beam can shine on the target.

26. The FOR is the area around the aircraft throughout which the NGJ-LB pod must be able to aim [redacted] a jamming signal.

A. Requirements Development and the DET Contracts

27. The NGJ-LB System acquisition process began approximately four years ago.

28. On November 17, 2017, the Navy issued a broad agency announcement "for the award of demonstration of existing technologies (DET) contracts to gather information for development of the NGJ-LB System." *See* B-419560.3 Decision at 2. The Navy intended to use the DET contracts to evaluate whether existing technologies could be integrated into a jammer pod that met the Navy's requirements. *Id.*

29. In October 2018, the Navy awarded DET contracts to Northrop Grumman and L3 Technologies, Inc. — a predecessor entity to L3Harris. *Id.*

30. "During DET contract performance, Navy employees worked closely with both contractors to develop and test contractor developed jammer pod prototypes." *Id.* The data gathered from the DET contracts was then used by the Navy to develop requirements for the CB-1 RFP and Addendum RFP at issue in this case. *Id.* at 2-3.

B. The CB-1 RFP and Addendum RFP

31. On May 15, 2019, the Navy released a Request for Information regarding the NGJ-LB procurement, and on July 17, 2019, it released a draft CB-1 RFP. *See* B-419560.3 Decision at 3.

[redacted]

32. The Navy issued the CB-1 RFP on September 9, 2019. *Id.*

33. Meanwhile, during DET contract performance and concurrent with the development of the CB-1 RFP requirements, the Navy formulated additional NGJ-LB requirements that were [redacted]

34. The Navy subsequently solicited those [redacted] capabilities via the Addendum RFP. *See Northrop Grumman Sys. Corp. – Mission Sys.*, B-419560.6, Aug. 18, 2021, 2021 CPD ¶ __ at 2 n.4 (hereinafter, "B-419560.6 Decision").

35. Although issued as separate solicitations, both the CB-1 RFP and the Addendum RFP set forth the Navy's requirements for the NGJ-LB pod. Because of the interrelationship between the CB-1 RFP and Addendum RFP, the Navy anticipated "select[ing] one Offeror on the basis of its proposal providing the 'best value' to the Government, all factors considered." CB-1 RFP Amend. 0003 at 140, § M.I (GAO AR Tab D).

36. The evaluation included two factors: Technical and Cost. *Id.* at 141, § M.I.B. The Technical factor was "significantly more important than the Cost factor." *Id.*

37. The Technical factor under the CB-1 RFP included eleven technical elements, which were to be considered as a whole and not individually weighed: (1) Jamming Performance; (2) Pod Attributes/Platform Performance and Integration; (3) Structures; (4) Controller, Receiver Exciter Performance; (5) Product Baseline Maturity; (6) GPR (Data Rights); (7) Small Business Utilization; (8) Path to Systems Performance Specification Objective

[redacted]

Capability; (9) Pre-Award Integrated Baseline Review; (10) [redacted] and (11) Security. *Id.* at 141, § M.II.A.

38. The Cost factor included a determination of total evaluated cost, which would be calculated by adding together various cost plus incentive fee and firm fixed price CLINs, plus the total evaluated cost from the RFP addendum. *Id.* at 143-44, § M.II.B.

II. L3Harris's Failure to Meet a Material Requirement

A. The Navy's Stated Requirements

39. The purpose of this procurement is to provide the Navy with an NGJ-LB pod that will effectively jam enemy air defense systems, protecting Navy personnel and aircraft from enemy attack.

40. The Navy's specific performance requirements for the NGJ-LB pod are set forth in the System Performance Specification ("SPS"). As relevant to this protest, individual provisions within the SPS are referred to as "cSPS" provisions.

41. Section L stated that "[o]fferors are expected to comply with all requirements of this RFP." CB-1 RFP Amend. 0003 at 79, § L.A.1.

42. In Section L, "Jamming Performance" is the first technical element listed and evaluated under the Technical factor. *Id.* at 92-92, 95-96, §§ L.C.2, L.C.2.1.

43. As part of the Jamming Performance element, the RFP required that "[t]he Offeror ***shall*** describe how its design approach ***meets*** the Effective Isotropic Radiated Power (EIRP) requirements cSPS-62 and ***cSPS-1128*** . . . ." *Id.* at 95, § L.C.2.1.1(a) (emphasis added).

[redacted]

44. cSPS-1128 requires that an offeror's "pod ***shall*** radiate with mean EIRP" meeting specified values expressed in decibels, over a specified range of frequencies [redacted] Unclassified Third Suppl. Protest at 8-9 (emphasis added) (quoting CB-1 SPS at 48).[2]

45. The specification further required offerors to measure EIRP using Bounded Area Percentage: "[T]he NGJ-LB pod ***shall*** maintain a Bounded Area Percentage (BAP) for EIRP of at least [redacted] . . ." *See id.* at 9 (quoting CB-1 SPS at 45, 48, with emphasis in protest document).

46. The SPS states that "requirements . . . that use '**shall**' statements, are considered mandatory, binding, and require formal verification." *Id.* at 8 (emphasis in original) (quoting CB-1 SPS at 2).

47. Thus, to comply with cSPS-1128, an offeror had to achieve a BAP of [redacted] or greater for each frequency [redacted] *See id.* at 9 (citing CB-1 SPS at 45, 48).

48. The RFP defined "Deficiency" to be "a material failure of a proposal to meet a Government requirement. . . ." CB-1 RFP Amend. 0003 at 145, § M.III.B. The RFP stated that a proposal would be considered "Unacceptable" if it "does not meet requirements of the solicitation and, thus, contains one or more deficiencies and is unawardable." *Id.* at 144, § M.III.A.

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[2] For purposes of discussing the requirement established in cSPS-1128, this Complaint relies solely on the Unclassified Third Supplemental Protest at GAO, which the Navy sanitized and provided to all parties as an unclassified document.

[redacted]

B. L3Harris's Proposal

49. L3Harris submitted Revision 7 to its technical proposal on October 8, 2020. *See* Unclassified Third Suppl. Protest at 10 (citing 10/8/20 L3Harris Prop., Vol. 2b).[3]

50. Beginning on page three, the proposal addresses Jamming Performance. Table 2 addresses the cSPS requirements applicable to Jamming Performance. *Id.* (citing 10/8/20 L3Harris Prop., Vol. 2b at 3).

51. [redacted]

52. But for cSPS-1128, Table 2 states that L3Harris's solution offers only [redacted] with the requirement. *Id.* (quoting 10/8/20 L3Harris Prop., Vol. 2b at 3). It explains that L3Harris's solution [redacted]

53. Table 2 states [redacted]

54. On page 7, the proposal acknowledges that "[redacted] *Id.* at 10-11 (quoting 10/8/20 L3Harris Prop., Vol. 2b at 7).

55. On page 8, L3Harris's proposal details its [redacted] with cSPS-1128. *Id.* at 11 (emphasis omitted) (quoting 10/8/20 L3Harris Prop., Vol. 2b at 8). [redacted]

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[3] For purposes of discussing L3Harris's Revision 7 proposal, this Complaint relies solely on the Unclassified Third Supplemental Protest at GAO, which the Navy sanitized and provided to all parties as an unclassified document.

[redacted]

[redacted]

56. As noted above, the SPS required a BAP of at least [redacted] for all [redacted] *Id.* at 9 (citing CB-1 SPS at 45, 47-48).

57. For 16 of the required [redacted] Figure 1a shows a BAP of less than [redacted] *Id.* at 11 (citing 10/8/20 L3Harris Prop., Vol. 2b at 8). The non-compliant BAPs range from [redacted] down to [redacted]

58. L3Harris's proposal acknowledges that "[redacted]" *Id.* (quoting 10/8/20 L3Harris Prop., Vol. 2b at 8).

59. The proposal then states [redacted] The proposal states that [redacted]

[redacted]

60. L3Harris's proposal concludes the discussion of its non-compliance with cSPS-1128 by stating, [redacted]

[redacted]

61. The Navy raised this issue in discussions with L3Harris, and in response the company proposed certain modifications to its proposed pod design. B-419560.6 Decision at 7 (citing L3Harris Resp. to EN No. 173 (AR Tab HH)).[4] Even with those modifications, however, L3Harris's final revised proposal shows that "L3Harris's approach will not meet the requirement for 12 frequencies." *Id.* (citing L3Harris Resp. to EN No. 173 at 9).

C. The Navy's Evaluation

62. The Navy's contemporaneous evaluation concluded that L3Harris's pod design "does not meet requirements" established by cSPS-1128. Redacted Source Selection Evaluation Board ("SSEB") Report at 41.[5]

63. The Navy explained why L3Harris's solution does not meet requirements:

[redacted]

Id. (citing 10/8/20 L3Harris Prop., Vol. 2b at 7-8 & Fig. 1a).

64. [redacted] that meets cSPS-1128, the Navy did not assign L3Harris a Deficiency. B-419560.6 Decision at 7. Instead, the Navy labeled L3Harris's failure as a Significant Weakness. *Id.* The Navy found L3Harris's proposal to be acceptable. *Id.*

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4 The GAO decision in B-419560.6 is unclassified.

5 The Redacted SSEB Report is an unclassified document that the Navy produced to GAO and all parties on June 22, 2021.

[redacted]

D. The GAO Decision

65. On August 18, 2021, GAO sustained Northrop Grumman's protest, finding that

> There is no dispute that the Navy's own evaluators found that L3Harris's proposal did not demonstrate an approach that met the threshold requirements for the cSPS-1128 specification. L3Harris's proposal includes a table identifying 16 frequencies that do not achieve the . . . BAP threshold requirements and even with L3Harris's anticipated modifications in its proposal, L3Harris's approach will not meet the requirement for 12 frequencies.

B-419560.6 Decision at 7 (citations omitted).

66. GAO therefore concluded that

> L3Harris's proposal did not comply with the cSPS-1128 requirements. To the contrary, L3Harris's proposal clearly reflected a design approach that did not meet these requirements. Accordingly, the agency erred by failing to assign L3Harris's proposal a deficiency for this failure.

Id.

67. GAO explained that "[t]he error in the agency's evaluation is not whether, or the degree to which, L3Harris substantiated its design approach. Rather, the error is the agency's failure to properly assess L3Harris's failure to comply with the requirement to provide a design approach that 'meets' the cSPS-1128 specification threshold requirements." *Id.* at 7.

68. GAO "recommend[ed] that the Navy reopen discussions and request revised proposals; evaluate proposals consistent with the evaluation criteria; and make a new source selection" — or, in the alternative and in conjunction with GAO's opinion sustaining a separate protest ground, issue an amendment to the solicitation, request revised proposals, and make a new source selection decision. *Id.* at 8.

[redacted]

III. [redacted] Conflict of Interest

69. [redacted] is a former Navy official who was involved in both the DET contracts and the NGJ-LB procurement during his time at the Navy. He now works for L3Harris.

70. [redacted] began pursuing employment with L3Harris in August 2019, during performance of the DET contracts and approximately one month before the Navy issued the CB-1 RFP. PCO Investigation Mem. at 6 (GAO AR Tab K). He was approached by an L3Harris recruiter in August, *id.*; submitted his application for a position with L3Harris on September 13, 2019, *id.* at 6, 28; interviewed with L3Harris on September 23, 2019, Waiver Request at 4 (GAO AR Tab U); and received an offer of employment with L3Harris on September 25, 2019, PCO Investigation Mem. at 27, 28 n.16; 2/16/21 [redacted] Decl. at 2 (GAO AR Tab L-24).

71. [redacted] accepted the job offer from L3Harris on October 1, 2019. PCO Investigation Mem. at 28 n.16.

72. During the time in which he was pursuing — and after he accepted — employment with L3Harris, [redacted] worked on the CB-1 RFP and DET contracts on a "full time" and uninterrupted basis. *Id.* at 11; 4/14/21 [redacted] Decl. at 1 (GAO AR Tab L 31.4). He served as the Navy's foremost technical expert on jamming performance for NGJ-LB. *See, e.g.*, 9/26/19 [redacted] Email Re "NGJ Engineering Help" (GAO AR Tab 31.5) (referring to [redacted] as "THE expert for [redacted]

[redacted]

73. [redacted] first led the [redacted] PCO Investigation Mem. at 4,[6] and then in September 2019 — while he was pursuing employment with L3Harris — he was promoted to the [redacted] Lead, *id.* at 4 n.4.

74. In his work on the CB-1 RFP, [redacted] was responsible for revisions to a wide range of requirements found in the Statement of Work, Section L, and the SPS and cSPS, among other things. *See* Tech. Analysis Mem. at 10-22 (GAO AR Tab L-46); JHU/APL Rep. at 2 (GAO AR Tab L-46.1).[7] He drafted government responses to industry questions on the draft and final CB-1 RFP; developed instructions to offerors in Section L; developed the SOW and CDRLs; developed SPS requirements; and [redacted] *See* PCO Investigation Mem. at 20-21; Tech. Analysis Mem. at 21.

75. In his work on the DET contracts, [redacted] evaluated the jamming performance of the offerors' DET designs, as well as certain related CDRLs (which contained data used in the CB-1 proposals). *See* Tech. Analysis Mem. at 1-10. He participated in CDRL reviews, DET program management reviews ("PMR")/technical interchange meetings ("TIM") with Northrop

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[6] The record at GAO sometimes refers to [redacted] as an [redacted] Lead" instead of the [redacted] Lead; according to the Navy, the different terminology is the result of an "NGJ-LB re-organization" and the terms are "synonymous for purposes of [redacted] duties prior to his departure from Government employment." PCO Investigation Mem. at 4 n.4.

[7] The Navy was assisted during the procurement by the Johns Hopkins University Applied Physics Laboratory ("JHU/APL").

[redacted]

Grumman and L3Harris, and DET Facility for Antenna and Radar Cross Section measurement test planning, among other things. *See* PCO Investigation Mem. at 16-20.[8]

76. [redacted] did not seek guidance on his post-government employment — or otherwise notify the Navy of his pursuit of employment with L3Harris — until September 26, 2019, [redacted] PGE Opinion Request at 3 (GAO AR Tab L-23), after he received the offer of employment from L3Harris, PCO Investigation Mem at 27, 28 n.16; 2/16/21 [redacted] Decl. at 2.

77. At no point did [redacted] recuse from his involvement in either the DET contracts or the CB-1 RFP. Waiver Request at 9 ("[redacted] did not recuse from [the] DET contract or NGJ-LB CB-1 RFP activities from 1 August – 18 October 2019 (his last day of active employment with the Government)[.]"). To the contrary, [redacted] continued working uninterrupted on both the DET contracts and the CB-1 RFP.

78. On October 15, 2019, [redacted] arranged a meeting to discuss transitioning his work upon his departure for L3Harris, 10/15/19 [redacted] Email Re "[redacted] Transition" (GAO AR Tab L-31.4a), and on October 16, 2019, [redacted] conducted his exit interview with the Navy, 10/16/19 Exit Interview Questionnaire (GAO AR Tab L-28).

79. [redacted] continued to work on the DET contracts and CB-1 RFP even after this date, however. He attended a [redacted] and — despite being on leave at the time, PCO Investigation Mem. at 6, 27 n.15, 28; 3/1/21 [redacted] Decl. at 1 (GAO AR Tab L-25) — answered a colleague's question about an offeror Q&A on October 30, 2019, JHU/APL Rep. at 4.

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[8] [redacted] activities during the period in question are catalogued over dozens of pages in the agency report at GAO. *See generally* PCO Investigation Mem.; Tech. Analysis Mem.; JHL/APL Rep.; JHL/APL Brief (GAO AR Tab GG).

[redacted]

80. [redacted] last day of employment with the Navy was November 1, 2019. 3/1/21 [redacted] Decl. at 1 (GAO AR Tab L-21). He joined L3Harris on [redacted] PCO Investigation Mem. at 6; Waiver Request at 5.

81. As relevant here, on May 10, 2021, Northrop Grumman filed a protest with GAO alleging that [redacted] failure to recuse from his work on the CB-1 RFP and DET contracts while he pursued — and after he accepted — employment with L3Harris created a conflict of interest and appearance of impropriety under FAR 3.101-1.

82. GAO sustained the protest under FAR 3.101-1 on August 18, 2021. *See* B-419560.3 Decision. GAO found:

> The record shows, and the agency does not dispute, that during the period of August through early October of 2019, [redacted] 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. . . . [redacted] 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.

Id. at 8.

83. GAO then concluded:

> Based on our review of the record, we conclude that [redacted] 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 reflects [redacted] 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

[redacted]

> have an impact on the competition because the conclusion was without a reasonable basis. We therefore sustain the protest.

Id. at 8-9.

84. In crafting its recommendation, GAO observed that "[t]he ordinary remedy where a conflict cannot be mitigated is the elimination of that competitor from the competition." *Id.* at 14. It noted, however, that it was "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 [redacted] conflict of interest." *Id.*

85. GAO "therefore recommend[ed] that the Navy engage individuals with the requisite technical expertise to conduct an independent review of [redacted] input during the relevant period of conflict on the CB-1 specifications to determine whether [redacted] input was consistent with the Navy's actual requirements." *Id.* It stated:

> 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.

Id.

IV. The Navy's Refusal and Failure to Follow GAO's Recommendations

86. On October 18, 2021, the Navy notified GAO that it would not fully implement GAO's recommendations. *See* 10/18/21 Letter to GAO from Vice Admiral Carl P. Chebi (hereinafter, "Chebi Letter").

[redacted]

87. The agency acknowledged that GAO had sustained Northrop Grumman's protests on two grounds: (1) that "the Agency failed to reasonably consider the potential impact of a conflict of interest created by employment negotiations between [L3Harris] and a former government employee"; and (2) that "the Agency unreasonably evaluated [L3Harris]'s proposal as technically acceptable." *Id.* at 1.

88. The Navy summarized GAO's recommendations as follows:

> The GAO recommended the Agency (1) engage non-conflicted individuals with the requisite technical experience to review the specifications tainted by [redacted] conflict of interest to determine whether [redacted] input was consistent with the Navy's actual requirements; (2) re-open discussions, request revised proposals, evaluate proposals consistent with the evaluation criteria, and make a new source selection decision; and (3) reimburse NGC its reasonable costs of filing and pursuing its protest, including reasonable attorney fees.

Id. at 1-2.

89. The Navy stated that it implemented GAO's first recommendation by creating an Independent Review Team ("IRT") of technical experts who were not previously involved with the NGJ-LB program to assess whether the input [redacted] provided on various specifications was consistent with the Navy's actual requirements. *Id.* at 2. According to the Navy, "the IRT determined the specifications with [redacted] input were and remain consistent with the Agency's requirement[s]." *Id.*

90. The Navy further stated that it would "not implement GAO's second recommendation" — i.e., to "re-open discussions, request revised proposals, evaluate proposals consistent with the evaluation criteria, and make a new source selection decision." *Id.* at 1-2. The Navy explained:

[redacted]

> During the course of the protests, the Agency explained . . . that the solicitation provided the technical experts with discretion whether or not to assess a deficiency in the context of this developmental effort. The Agency believes the second recommendation does not adequately account for the developmental nature of the Agency's requirement as it relates to the evaluation criteria and the Agency's evaluation, and that GAO misinterpreted the solicitation requirements in this regard. It is therefore unnecessary for the Agency to reopen discussions and reevaluate revised proposals in order to make a proper source selection decision.

Id. at 2.

91. This statement addresses only GAO's recommendation in the B-419560.6 Decision. The agency did not acknowledge or otherwise address GAO's separate and independent recommendation in the B-419560.3 Decision to reopen the competition in order to remedy the conflict of interest and appearance of impropriety created by [redacted] failure to recuse.

92. Also on November 18, 2021, the Government filed a status report in this Court, appending both the Chebi Letter and a copy of the IRT's report, dated October 8, 2021 and signed on October 15, 2021. *See* Case No. 21-1819 C, Dkt. No. 19-3, "Next Generation Jammer-Low Band (NGJ-LB) Capability Block-1 (CB-1) Independent Review Assessment Report" (hereinafter, "IRT Rep.").

93. The IRT Report states as follows:

> The IRT concluded that all of [redacted] inputs to the NGJ-LB specifications and technical documentation during the potential conflict period were reasonable and consistent with the United States Navy's (USN) requirements. The IRT's final assessment affirms that NGJ-LB CB-1 specifications and technical documentation reflected the USN's needs during the procurement and continue to reflect the USN's needs.

[redacted]

Id. at 1; *see also id.* at 7 ("The IRT's final assessment affirms that the NGJ-LB CB-1 specifications are accurate and continue to reflect the needs of the USN.").

STANDARD OF REVIEW

94. The Court reviews challenges to agency procurement decisions under the standards set forth in the Administrative Procedures Act ("APA"), 5 U.S.C. § 706(2)(A). *See* 28 U.S.C. § 1491(b)(4) ("In any action under this subsection [i.e., in connection with a bid protest], the courts shall review the agency's decision pursuant to the standards set forth in section 706 of title 5."); *see also Mortg. Contracting Servs., LLC v. United States*, 153 Fed. Cl. 89, 119 (2021) ("[A]gency procurement decisions are to be reviewed under APA standards[.]").

95. Under these standards, agency action is reviewed to determine whether it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Accordingly, "a bid award may be set aside if either: (1) the procurement official's decision lacked a rational basis; or (2) the procurement procedure involved a violation of regulation or procedure." *Impresa Construzioni Geom. Domenico Garufi v. United States*, 238 F.3d 1324, 1332 (Fed. Cir. 2001).

96. When a protester alleges that the agency has violated a procurement statute or regulation, the agency decision must be set aside if there has been a "clear and prejudicial violation of applicable statutes or regulations." *Id.* at 1333. One such example of "a violation of procurement statutes and regulations" is a "contract award based on . . . an unacceptable proposal." *Mortg. Contracting*, 153 Fed. Cl. at 142 (quoting *Allied Tech. Grp., Inc. v. United States*, 649 F.3d 1320, 1329 (Fed. Cir. 2011)).

[redacted]

97. When a protester alleges that an agency action was irrational, the Court reviews the record to determine if the agency has provided "a coherent and reasonable explanation for its exercise of discretion." *Impresa*, 283 F.3d at 1332. Agency action must be set aside if the agency "has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *AGMA Sec. Serv., Inc. v. United States*, 152 Fed. Cl. 706, 719 (2021) (quoting *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 658 (2007)).

98. The Court will therefore hold an agency's decision to be irrational if the agency overlooks or otherwise fails to address material issues or key aspects of the problem. *See, e.g.*, *Oak Grove Techs., LLC v. United States*, No. 21-775C, __ Fed. Cl. __, 2021 WL 3627111 at *30 (filed Aug. 2, 2021; reissued Aug. 16, 2021) (holding that agency acted irrationally by failing to sufficiently investigate a potential violation of FAR 3.101-1).

99. The Court will also hold agency action to be irrational if the agency failed to explain its decision or properly document its review. *See, e.g.*, *Starry Assocs., Inc. v. United States*, 127 Fed. Cl. 539, 549 (2016) ("Where the agency fails to undertake a review or fails to document such review, we must conclude that it acted irrationally."); *see also Pro. Serv. Indus., Inc. v. United States*, 129 Fed. Cl. 190, 206 (2016) (the Court will not "rubber-stamp an agency's unexplained decision").

100. Moreover, although the agency is afforded a "presumption of regularity," this "does not require the Court to accept assertions on a critical point that are not otherwise tied to

[redacted]

the administrative record and that are at least in tension with, if not contradicted by, various aspects of that record." *PGLS, LLC v. United States*, 152 Fed. Cl. 59, 69 (2020) (internal citations and quotation marks removed). Thus, the Court will hold an agency's decision to be irrational if it runs counter to the evidence or is otherwise implausible based on the record. *See id.* at 70 (agency decision was irrational when it was "at odds with, if not contradicted by, various parts of the record").

101. If the Court concludes that the agency violated the APA by engaging in conduct that was irrational or contrary to law, the Court must then "determine, as a factual matter, if the bid protester was prejudiced by that conduct." *AGMA*, 152 Fed. Cl. at 724 (quoting *Bannum, Inc. v. United States*, 404 F.3d 1346, 1351 (Fed. Cir. 2005)). An offeror is prejudiced by an agency's error if "there was a substantial chance it would have received the contract award but for that error." *Alfa Laval Separation, Inc. v. United States*, 175 F.3d 1365, 1367 (Fed. Cir. 1999).

102. As a general matter, the protester bears the burden of establishing prejudice. *See id.* Where a conflict of interest exists, however, the protester is "entitled to benefit from the presumption of harm/prejudice." *E.g.*, *Filtration Dev. Co. v. United States*, 60 Fed. Cl. 371, 379 (2004).

CLAIMS FOR RELIEF

I. Count One: The Award to L3Harris Violates Procurement Law and Is Arbitrary and Capricious Because L3Harris's Proposal Failed to Comply With a Material Term of the Solicitation

103. The solicitation required L3Harris to demonstrate that its design approach meets the requirements established by cSPS-1128. L3Harris failed to comply with that material requirement, rendering its proposal ineligible for award.

104. "To be acceptable, a proposal must represent an offer to provide the exact thing called for in the request for proposals, so that acceptance of the proposal will bind the contractor in accordance with the material terms and conditions of the request for proposals." *Centech Grp., Inc. v. United States*, 554 F.3d 1029, 1037 (Fed. Cir. 2009).

105. "'[A] proposal that fails to conform to the material terms and conditions of the solicitation should be considered unacceptable and a contract award based on such an unacceptable proposal violates the procurement statutes and regulations.'" *Allied Tech.*, 649 F.3d at 1329 (quoting *E.W. Bliss Co. v. United States,* 77 F.3d 445, 448 (Fed. Cir. 1996)).

106. "'A solicitation term is material where it has more than a negligible impact on the price, quantity, quality, or delivery of the subject of the [proposal].'" *Mortg. Contracting Servs.*, 153 Fed. Cl. at 142 (alteration in original) (quoting *Transatl. Lines, LLC v. United States*, 122 Fed. Cl. 624, 632 (2015)). Moreover, "[t]he Federal Circuit's guidance regarding non-compliant proposals is not limited by an agency's choice for how [to] consider the non-compliant submission in an agency's evaluation of proposals." *Id.*

[redacted]

107. Here, the RFP required that each "Offeror shall describe how its design approach meets the Effective Isotropic Radiated Power (EIRP) requirements cSPS-62 and cSPS-1128. . . ." CB-1 RFP Amend. 003 at 95, § L.C.2.1.1(a). That requirement is undoubtedly material.

108. cSPS-1128 is central to the quality of the product to be delivered under the contract:

a. The entire purpose of this procurement is to provide the Navy with a pod that will effectively jam enemy air defense systems, thus protecting Navy personnel and aircraft from enemy attack.

b. cSPS-1128 is one of only a handful of requirements that the RFP calls out for Jamming Performance. *Id.* at 92-92, 95-96, §§ L.C.2, L.C.2.1.

c. L3Harris's own proposal acknowledges that cSPS-1128 is critical to jamming performance: [redacted] Unclassified Third Suppl. Protest at 15 (citing 10/8/20 L3Harris Prop., Vol. 2b at 7).

d. A pod that does not comply with cSPS-1128 will be less effective at jamming enemy air defenses, placing U.S. military aircraft and personnel at greater risk of destruction and death.

109. So, although this is a development contract where many requirements could be met at a future date, the RFP identified cSPS-1128 as one of only six key provisions for which

[redacted]

"[t]he Offeror shall describe how its design approach ***meets***" the requirement. CB-1 RFP Amend. 003 at 95-96, § L.C.2.1.1(a) (emphasis added).[9]

110. L3Harris did not comply with cSPS-1128.

a. L3Harris's own proposal states that its pod design achieves [redacted] Unclassified Third Suppl. Protest at 16 (citing 10/8/20 L3Harris Prop., Vol. 2b at 3).

b. L3Harris's proposal identified specific [redacted] *Id.* at 16 (citing 10/8/20 L3Harris Prop., Vol. 2b at 8). Thus, L3Harris did not simply fail to substantiate its compliance. Rather, L3Harris substantiated its noncompliance.

c. Were that not enough, the Navy's own evaluation confirmed that L3Harris's pod design "does not meet requirements at some [redacted] frequencies." Redacted SSEB Report at 41.

111. This is not a matter of technical judgment or agency discretion: The RFP required L3Harris's proposal to describe how it complies with cSPS-1128; L3Harris's proposal stated that it did [redacted]; and the Navy evaluated L3Harris as non-compliant.

112. Moreover, L3Harris identified no pathway — credible or otherwise — for curing its non-compliance. Its proposal merely said that [redacted]

[redacted]

[redacted]

[redacted]

[9] The inclusion of a few key "present day" requirements is not surprising, because the current procurement was preceded by two DET contracts that "determine[d] whether sufficient mature technologies existed" for the new system. PCO Investigation Mem. at 2.

[redacted]

113. Confirming L3Harris's lack of any pathway to compliance, when the agency raised the issue in discussions, L3Harris [redacted]. B-419560.6 Decision at 7, 8 (citing L3Harris Resp. to EN No. 173 at 3, 8-9). Its final proposal remained non-compliant, and its "alleged 'path forward' was little more than the firm's cautiously optimistic statements about a potential ability to comply. . . ." *Id.* at 8 (citing L3Harris Resp. to EN No. 173 at 8).

114. Because L3Harris did not describe a design approach that "meets" cSPS-1128, it "'fail[ed] to conform to the material terms and conditions of the solicitation" and "should be considered unacceptable.'" *See Allied Tech.*, 649 F.3d at 1329.

115. The RFP defined "Deficiency" to be "a material failure of a proposal to meet a Government requirement," and further explained that a proposal was "Unacceptable" if it "does not meet the requirements of the solicitation and, thus, contains one or more deficiencies and is unawardable." CB-1 RFP Amend. 0003 at 144-45, §§ M.III.A-B.

116. The Navy thus had no discretion, and no choice but to deem L3Harris deficient and ineligible for award. Instead, the Navy labeled L3Harris's material failure as a Significant Weakness, and awarded it the contract. B-419560.6 Decision at 4, 7. That action was arbitrary and violated procurement law.

117. GAO wrote a detailed decision explaining the Navy's error, and recommending that the Navy fix it. *See id.*

118. The Navy, however, refused. Its stated reason for refusing to implement GAO's recommendation was that "the solicitation provided the technical experts with discretion whether or not to assess a deficiency in the context of this development effort," and that GAO did "not

[redacted]

adequately account for the developmental nature of the Agency's requirement as it relates to the evaluation criteria." Chebi Letter at 2.

119. The Navy is wrong on both counts.

a. *First*, the Navy did not have the discretion to treat L3Harris's non-compliance as anything other than a deficiency. cSPS-1128 is a material requirement, and the Navy found that L3Harris did not comply. "The Federal Circuit's guidance regarding non-compliant proposals is not limited by an agency's choice for how [to] consider the non-compliant submission in an agency's evaluation of proposals." *Mortg. Contracting Servs.*, 153 Fed. Cl. at 142.

b. *Second*, while this procurement involves development, the RFP identified a handful of critical requirements, and for those requirements it mandated that each offeror show that its design approach "***meets***" the requirement. CB-1 RFP Amend. 0003 at 95, § L.C.2.1.1(a) (emphasis added). cSPS-1128 was one of those requirements. Given the importance of cSPS-1128, and the development work that had already been performed under the DET contract, that RFP requirement makes perfect sense. The Navy's position, meanwhile, is irrational and contrary to the plain language of the agency's own solicitation.

120. For these reasons, the Navy's award violates procurement law, and its refusal to follow GAO is arbitrary and capricious.

121. The Navy's arbitrary and unlawful actions prejudiced Northrop Grumman. *See Mortg. Contracting Servs.*, 153 Fed. Cl. at 143 (explaining that a protester shows prejudice

where "there was a substantial chance it would have received the contract award but for the error" (citation and internal quotation marks omitted)).

122. But for the Navy's error, it would have found L3Harris ineligible for award. There are only two offerors in this competition — Northrop Grumman and L3Harris. So even if the agency believed that Northrop Grumman was also ineligible for award, it would have no choice but to re-open the competition and give both offerors an opportunity to revise their proposals and cure their respective deficiencies.

123. With that additional opportunity, Northrop Grumman likely could cure its deficiency — and there is no reason to believe that L3Harris is any more likely to cure its deficiency than Northrop Grumman. Northrop Grumman therefore has a substantial chance of award, once the Navy's error is properly addressed.

II. Count Two: The Award to L3Harris Violates Procurement Law and Is Arbitrary and Capricious Because the Navy Ignored GAO's Recommendation to Reopen the Competition as a Result of [redacted] Conflict of Interest

A. The Agency's Disregard of GAO's Recommendation Is Arbitrary and Capricious, Contrary to Law, and Inadequately Documented

124. The agency failed to fully implement GAO's recommendation in the B-419560.3 Decision addressing [redacted] conflict of interest. It has provided no notice of, and no documented explanation for, that failure. The agency's disregard of GAO's recommendation is therefore arbitrary and capricious, contrary to law, and inadequately documented.

125. Under 31 U.S.C. § 3554(b)(3), "[i]f the Federal agency fails to implement fully the recommendations of" GAO regarding "an award or proposed award of a contract within 60 days after receiving the recommendations, the head of the procuring activity responsible for that

[redacted]

contract shall report such failure to the Comptroller General not later than 5 days after the end of such 60-day period."

126. This statutory notice is not just a formality. Agencies are obligated to provide reasonable, contemporaneous explanations for their actions, including corrective action following a protest. *See Superior Optical Labs, Inc. v. United States*, 152 Fed. Cl. 319, 323 (2021) (agencies must provide a "coherent and reasonable explanation" for their corrective action decisions). Without such a reasonable, contemporaneous explanation, it cannot be determined whether an agency's action is rational. *See AGMA*, 152 Fed. Cl. at 170 (sustaining protest where "contracting officer [never] explain[ed] why the corrective action and the revised evaluations were occurring, why revisions of proposals were not required by agency, why particular evaluation revisions were undertaken [], or what was wrong with the previous evaluation"); *Caddell Constr. Co., Inc. v. United States*, 111 Fed. Cl. 49, 94 (2013) (sustaining protest where contemporaneous record was "devoid of any explanation of what information [the agency] considered in its . . . decision to pre-qualify [awardee] to move on to Phase II of the procurement").

127. GAO's recommendation in the B-419560.3 Decision contained three parts:

> [1] We therefore recommend that the Navy engage individuals with the requisite technical expertise to conduct an independent review of [redacted] input during the relevant period of conflict on the CB-1 specifications to determine whether [redacted] input was consistent with the Navy's actual requirements.
>
> [2] ***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.***

[redacted]

> [3] 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.

B-419560.3 Decision at 14 (emphasis added).

128. The agency purports to have complied with this recommendation because it completed part 1: It convened an IRT to review the CB-1 specifications, and the IRT concluded "the NGJ-LB CB-1 specifications are accurate and continue to reflect the needs of the USN." IRT Rep. at 7; *see also* Chebi Letter at 2.

129. That does not fulfill GAO's recommendation, however. Even assuming *arguendo* that the IRT's findings were reasonable (they are not, *see infra* Part III), the agency still needed to proceed to part 2 of GAO's recommendation. "***If the agency concludes that the specifications continue to reflect its needs***" — which it has — the agency was then supposed to "reopen discussions and request revised proposals, evaluate proposals consistent with the evaluation criteria, and make a new source selection decision." B-419560.3 Decision at 14 (emphasis added). It has not done so.

130. The agency has provided no notice to GAO of its failure to follow this component of GAO's recommendation. And it has provided no documented explanation of why it has apparently declined to follow GAO's recommendation. While the agency's notice to GAO explained its (irrational) basis for declining to follow GAO's recommendation in the B-419560.6 Decision, *see* Chebi Letter at 2, it is silent on this independent and separate issue.[10]

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[10] Although counsel for the Government appeared to try to backfill this omission in the October 18, 2021 Status Report to the Court, *see* CFC No. 21-1819 C, Dkt. No. 19, the Court should give no weight to that *post hoc* rationale, which is reflected nowhere in the Chebi Letter.

131. They agency's actions are, therefore, arbitrary and capricious, contrary to 31 U.S.C. § 3554(b)(3), and inadequately documented for this reason alone. There is no way for the Court to review the rationality and legality of an agency's actions that are both undocumented and unexplained.

B. The Agency Must Reopen the Competition Because the Award to L3Harris Violates the Law and Is Arbitrary and Capricious

132. Even if the agency had complied with 31 U.S.C. § 3554(b)(3) and the requirement to explain and document its corrective action decision (it has not), the Navy's decision to refuse to reopen the competition, and to proceed instead with the award to L3Harris, would still violate the law and be arbitrary and capricious.

133. The second element of GAO's recommendation — to "reopen discussions and request revised proposals, evaluate proposals consistent with the evaluation criteria, and make a new source selection decision" ***even "[i]f*** the agency concludes that the specifications continue to reflect its needs," B-419560.3 Decision at 14 (emphasis added) — was a critical element of GAO's carefully crafted remedy. The conflict created by [redacted] failure to recuse was so severe that any lesser step would fail to mitigate the damage to the integrity of the procurement.

134. From August through October 2019, [redacted] continued uninterrupted in his role as the Navy's foremost technical expert on jamming performance for NGJ-LB, all the while pursuing — and then accepting — employment with L3Harris, one of only two competitors for NGJ-LB. *See* PCO Investigation Mem. at 5-6; Waiver Request at 9. During that time, he evaluated both Northrop Grumman's and L3Harris's DET technical solutions for NGJ-LB —

See, e.g., *Power Integrations, Inc. v. Lee*, 797 F.3d 1318, 1326 (Fed. Cir. 2015); *Fluor Intercontinental, Inc. v. United States*, 147 Fed. Cl. 309, 334 (2020).

[redacted]

which formed the basis for their respective CB-1 proposals — and also developed the Navy's CB-1 requirements, working on the specifications, the statement of work, and Section L of the RFP. *See* PCO Investigation Mem. at 17-23; Tech. Analysis Mem. at 1-4, 15-17. [redacted] did not recuse himself, or limit his role in the procurement in any way, *see* Waiver Request at 9, and he did not even inform his colleagues that he was pursuing employment with L3Harris until late September, after he received an offer, *see* 4/14/21 [redacted] Decl. at 1; 9/30/19 [redacted] Email Re "NGJ Engineering Help" (GAO AR Tab 31.5).

135. GAO concluded that "the appearance of impropriety resulting from" these facts "tainted the integrity of the procurement[.]" B-419560.3 Decision at 14. It viewed the issue as so serious that it referred the matter to the Department of Defense Office of the Inspector General for a potential criminal investigation. *Id.* at 15 n.21.

136. When fashioning its recommendation, GAO observed that "[t]he ordinary remedy where a conflict cannot be mitigated is the elimination of that competitor from the competition." *Id.* at 14 (citing *The Jones/Hill Joint Venture*, B-286194.4, et al., Dec, 5, 2001, 2001 CPD ¶ 194 at 22 n.26).[11] In view of the unique considerations of this procurement, however, GAO declined to recommend the typical remedy, and instead recommended a narrower remedy. *See id.* ("[W]e

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[11] *See also, e.g.*, *NKF Eng'g, Inc. v. United States*, 805 F.2d 372, 375-76 (Fed. Cir. 1986) (the "appearance of impropriety" created by a conflict is cause to disqualify an offeror); *Oak Grove Techs.*, 2021 WL 3627111 at *26 (similar); *Int'l Res. Grp.*, B-409346.2 et al., Dec. 11, 2014, 2014 CPD ¶ 369 at 7 (similar); *TeleComm. Sys. Inc.*, B-404496.3, Oct. 26, 2011, 2011 CPD ¶ 229 at 7-8 (finding reasonable agency's decision to exclude offeror); *L-3 Servs., Inc.*, B-400134.11, B-400134.12, Sept. 3, 2009, 2009 CPD ¶ 171 at 17 ("[T]he ordinary remedy where the conflict has not been mitigated is the elimination of that competitor from the competition."); *see also Teledyne Brown Eng'g, Inc.*, B-418835, B-418835.2, Sept. 25, 2020, 2020 CPD ¶ 303 at 12 ("recommend[ing] that the agency cancel the RFP, begin its acquisition anew, and proceed without the involvement of individuals who have a conflict of interest").

[redacted]

are mindful that it is neither feasible nor desirable to eliminate L3Harris from the competition . . . .").

137. Rather than recommend that L3Harris be disqualified from the competition, GAO recommended the next best thing: reopening discussions and giving the offerors the opportunity to revise their proposals, now that the fact of [redacted] failure to recuse has been surfaced, considered, and disclosed. While still short of an actual cure for the taint, that remedy would come closest to fully mitigating the conflict while not eliminating one of the two offerors from the competition. GAO thus balanced the need to level the playing field with its understanding of the Navy's unique needs.

138. The Navy cannot lawfully make award to L3Harris until it mitigates the conflict of interest created by [redacted] failure to recuse. *See* B-419560.3 Decision; *cf.* 48 C.F.R. § 9.504(a) ("[C]ontracting officers shall . . . Avoid, neutralize, or mitigate significant potential conflicts before contract award.").

139. The agency, however, has apparently declined to implement even GAO's narrow, finely tailored recommendation. There is no rational basis to do so and, as discussed above in Part II.A, the agency has identified no basis at all.

140. Limiting the remedy to the IRT review alone — as the agency evidently has decided to do — would not adequately or rationally mitigate the conflict caused by [redacted] failure to recuse. The IRT is not a complete solution, and it leaves unaddressed serious, significant aspects of the conflict and resulting harm to the integrity of the procurement.

141. As an initial matter, [redacted] work on the CB-1 RFP specifications — the one component of the procurement that the IRT was tasked to review — was only one part of his

[redacted]

sweeping work on NGJ-LB during the period in which he was conflicted. It is natural for GAO to have recommended that the IRT focus on the CB-1 RFP specifications because those are the aspect of [redacted] work that will have the most practical, tangible, forward-looking effect on the procurement. But the IRT's review inherently could not, and did not, consider the taint created by the many other aspects of [redacted] work.

142. Of particular significance, [redacted] was extensively involved in each company's DET contracts, including to evaluate and give feedback on the jamming performance of each company's DET solution, as well as certain related CDRLs (which contained data used in the CB-1 proposals). *See* Tech. Analysis Mem. at 1-10. The companies' DET designs became their CB-1 solution, and [redacted] *See* PCO Investigation Mem. at 20; Tech. Analysis Mem. at 3, 4, 6; L3Harris Vol. 2a Unclassified Tech. Proposal at 3, 11-14 (emphasizing direct relationship between DET and CB-1); 6/9/21 Legal Mem. at 26 (recognizing, although downplaying, that "information produced under the DET contract . . . might have informed the offerors' solutions in the NGJ-LB CB-1 contract"). As a result, [redacted] central role in evaluating the companies' DET designs had a direct effect on the agency's view of their CB-1 proposals.

143. The only way to begin to mitigate the taint created by [redacted] involvement in the companies' DET contracts, short of excluding L3Harris from the competition, is to reopen discussions and permit offerors to submit revised proposals. The IRT's review has no bearing on the issue at all. While even proposal revisions will not actually eliminate the taint — there is no

[redacted]

way to unring the bell on this issue — giving offerors the opportunity to revise their proposals is the closest approximation.

144. Limiting the remedy to the IRT review alone is further irrational because there is a broad universe of unknowns and unknowables that remain despite the agency's earlier investigation. Quite simply, the agency still does not know everything that [redacted] did during the period he was conflicted, and the Navy still continues to lack important information that it would need to even begin to suggest that reopening the competition is unnecessary — including information as fundamental as [redacted] emails. *See* PCO Investigation Mem. at 13 ([redacted] email profile was "deleted after he left Government employment"); 3/1/21 [redacted] Dec. at 1 (same); 6/9/21 Legal Mem. at 10 ([redacted] "electronic profile was no longer available for review"); *see also* JHU/APL Rep. at 1, 3 (referencing [redacted] emails with JHU/APL as "available upon request"); 3/3/21 [redacted] Email Re "SharePoint search by user and time" (GAO AR Tab 47) (suggesting that it is "possible" that [redacted] created or modified additional documents related to the DET contracts). [redacted] involvement in the CB-1 RFP and DET contracts was too extensive for the agency to be able to comprehensively capture everything he did.

145. And at a more fundamental level, no matter how thorough the investigation, there is no way for the agency to determine what decisions would have been made or not made, and what actions would have been taken or not taken, had [redacted] recused and thus ceased his involvement in both the CB-1 RFP and the DET contracts when he should have. *See* 7/12/21 Suppl. Legal Mem. at 12 (acknowledging that agency cannot "consider every imaginary scenario

[redacted]

and . . . disprove every potential negative"). It is for that reason that, where a conflict like this exists, the procurement is presumed to be tainted. *See, e.g.*, *Filtration*, 60 Fed. Cl. at 379-80.

146. Where a government official fails to recuse, it cannot be known "whether any improper influence has occurred, nor, as a practical matter, can the agency now determine, after the fact, or with any reasonable degree of certainty, whether the acquisition has been tainted by [the official]'s actions." *Teledyne*, 2020 CPD ¶ 303 at 12. "[T]he potential harm flowing from an actual or apparent conflict of interest is, by its nature, not susceptible to demonstrable proof of bias or prejudice." *Id.* at 11; *see also* B-419560.3 Decision at 13 ("[T]he potential harm from such a conflict is by its nature, not susceptible to [demonstrable] proof."). Thus, no amount of investigating or independent review can actually and fully eliminate or mitigate the conflict. While proposal revisions will not fully eliminate or mitigate the conflict either, they are the closest approximation to leveling the playing field, short of excluding L3Harris.

147. Northrop Grumman was prejudiced by the agency's irrational failure to reopen the competition. *See Alfa Laval*, 175 F.3d at 1367.

148. Conflicts of interest render an offeror ineligible for award unless they can be adequately mitigated. *Cf.* 48 C.F.R. § 9.504(a) ("[C]ontracting officers shall . . . Avoid, neutralize, or mitigate significant potential conflicts before contract award."). L3Harris is therefore ineligible for award unless and until the conflict of interest caused by its hiring of [redacted] can be cured. The Navy's only options are to exclude L3Harris or to try to mitigate the conflict by reopening the competition. Either action would give Northrop Grumman a substantial chance of award.

[redacted]

149. That the Navy deemed Northrop Grumman ineligible because of a perceived deficiency in its proposal does not change the analysis. *See* B-419560.3 Decision at 4. If the agency reopens discussions, as GAO recommended, Northrop Grumman will be able to fix that perceived deficiency. With its new, improved Technical and Technical Risk ratings, and nearly $50 million price advantage over L3Harris, there is a substantial chance that Northrop Grumman will win the competition.

III. Count Three: The Navy's Investigation of [redacted] Involvement in the NGJ-LB Procurement Was Arbitrary and Capricious

150. In the single component of GAO's recommendations that the agency was willing to follow — the IRT review — it acted irrationally, and its conclusions are arbitrary and capricious and inadequately documented.

151. Despite purporting to cover roughly 50 aspects of the CB-1 solicitation and specifications,[12] the IRT's report spans only six-and-a-half pages (plus one final page listing references). It is written at such a summary level that it is largely unclear (A) what the Navy's actual requirements are for each of the listed items; (B) what [redacted] input actually was for each of the listed items; and (C) whether and why [redacted] input was consistent with the Navy's actual requirements. The agency's actions are not rational or adequately documented when these basic elements are indecipherable.

152. Several examples illustrate each of these shortcomings.

153. *First*, for a number of items, the report does not make clear what the Navy's actual requirements are. In those instances, the IRT is silent on what the Navy's actual needs are

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[12] The IRT report identifies [redacted] areas of input made by" [redacted], IRT Rep. at 1, but many of those "areas" contain a number of different, distinct components.

[redacted]

and instead announces that [redacted] (largely unspecified) input is consistent with those (unspecified) needs. *See, e.g.*, IRT Rep. at 3 (Item 3.c, cSPS-118); *id.* at 5 (Item 9, cSPS-1059 and cSPS-1060); *id.* (Item 10, cSPS-109 and cSPS-329); *id.* (Item 11.b, Final RFP Q&A 24, 25, and 26); *id.* (Item 11.c, Final RFP Q&A 54); *see also id.* at 3 (Item 3.a, cSPS-1059 and cSPS-109).

154. But because the [redacted] individuals on the IRT were not "previously involved with the NGJ-LB program" and did not "report to the Program Executive for Tactical Aircraft Programs," — i.e., the source selection authority for this procurement, *see* Chebi Letter at 2 — they would not have had any personal knowledge of the Navy's actual needs, and instead would have needed to receive (and work off of) documentation of those needs. Without information about the Navy's actual needs for these items, it is therefore impossible to determine whether the IRT's conclusions are rational. The IRT report is arbitrary and capricious and inadequately documented for this reason alone.

155. *Second*, for a number of specifications in the IRT report, the IRT does not make clear what [redacted] input actually was. Item #7, cSPS-74, is a good example. *See* IRT Rep. at 4. This item does not appear to have been addressed in the agency's prior investigation into the conflict created by [redacted] failure to recuse, and it does not appear to be addressed anywhere in the record before GAO. Presumably, by virtue of its inclusion in the report, [redacted] had some involvement in creating or revising cSPS-74, but the IRT report does not indicate what that involvement was. Without this information, it is again impossible to determine whether the IRT's conclusions on this issue are rational, particularly because the IRT acknowledges that cSPS-74 includes "additional derived detail" beyond what is apparently

[redacted]

reflected in the Navy's other requirements documents. *See id.* The IRT report is similarly vague for many of the other items addressed therein. It is arbitrary and capricious and inadequately documented for this additional reason.

156. *Third*, for a number of items, the report does not make clear whether and why [redacted] input was consistent with the Navy's actual requirements. Rather than consider "whether [redacted] input was consistent with the Navy's actual requirements," B-419560.3 Decision at 14, the IRT appears to have largely focused on the separate question of whether [redacted] input was "reasonable" and/or "consistent with fundamental scientific and engineering principles." *See generally* IRT Rep.

157. That is not what GAO recommended, however, and it does not address the question of whether amendments to the solicitation are necessary to mitigate [redacted] conflict. Just because [redacted] input is reasonable or scientifically sound does not mean that it is "consistent with the Navy's actual requirements." Presumably there are many potential specifications that are both reasonable and scientifically sound but that do not reflect the Navy's actual needs and thus, on these facts, would be tainted by conflict.

158. But even where the agency does appear to have considered the Navy's actual requirements, in a number of instances it does not explain how or why [redacted] (unspecified) input was consistent with those requirements. The IRT appears to have relied on "JROC Approved NGJ CDD (*DELETED*) – 11 Aug 2015" (referred to as "Reference D") and "Draft NGJ-LB CDD Annex – 20 Jul 2021" (referred to as "Reference E") as reflecting the Navy's actual requirements. *See* IRT Rep. at 8; *see also id.* at 2 ("The original pedigree of technical requirements was confirmed if the identified cSPS requirements reflected the operational

[redacted]

requirements of the Capability Description Document (CDD) and Annex."). These documents were not included in the record at GAO.

159. For a number of items, the IRT states, without explanation, that [redacted] (unspecified) input is consistent with References D and E, but then proceeds to mention — yet fails to address — additional content or detail that [redacted] evidently added beyond what is contained in References D and E. *See id.* at 2 (Item 2, cSPS-1128); *id.* at 3 (Item 3.b, cSPS-1148); *id.* at 4 (Item 5.a, Verification Requirements for cSPS-62); *id.* (Item 5.b, Verification Requirements for cSPS-80, cSPS-82, cSPS-84, and cSPS-85); *id.* at 4 (Item 7, cSPS-74); *see also id.* at 3 (for Item 4, Verification Assets Table (Final RFP Question 19), acknowledging inconsistency between [redacted] input and agency's actual requirements, but dismissing as "inconsequential"); *id.* at 5 (Item 11.a, Final RFP Q&A 19); *id.* (Item 12, RFP Section L Part 2.1.3 and DRAM Changes). The IRT's analysis cannot be rational, however, if it did not consider whether [redacted] additional content or detail was itself consistent with the Navy's actual requirements.[13] The IRT report is arbitrary and capricious and inadequately documented for this additional reason.

160. Finally, separate and apart from the errors above, the IRT failed to reasonably consider whether [redacted] input to the Technical Appendix to the Evaluation Plan for the evaluator guidance in RFP Section L was consistent with the Navy's actual needs. *See id.* at 6.

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[13] For a number of items, the IRT likewise discounts [redacted] input as "editorial" or "administrative" in nature and thus declines to consider whether it reflects the Navy's actual requirements. *See, e.g.*, IRT Rep. at 5 (Item 12, RFP Section L Part C 2.1.3 and DRM Changes); *id.* at 6 (Item 13, All changes in SOW section 3.3.11 and 3.4.3 and referenced CDRLs and CDEs); *see also id.* at 2 ("Areas of input observed to be unchanged or editorial and administrative in nature were not considered significant to USN requirements."). The IRT report is arbitrary and capricious for this additional reason.

[redacted]

The Navy declined to produce the Technical Appendix to the Evaluation Plan during the proceedings at GAO, *see* 06/14/21 Agency Resp. to Add'l Doc. Reqs. at 3, so neither GAO nor Northrop Grumman has had the opportunity to review that document. The IRT concludes that the Technical Appendix to the Evaluation Plan must reflect the Navy's actual requirements because it "correctly traces to the final version of Ref. (j)" — i.e., the CB-1 RFP itself. *See* IRT Rep. at 6 (Items 14.a and 14.b).

161. All that means, however, is that the evaluator guidance and solicitation are consistent — it does not mean that either reflects the Navy's actual requirements. In any event, in the record before GAO, the agency stated that "[i]n some instances, the evaluator guidance is changed from the Section L proposal instructions, because the evaluators are looking at the effects described by a set of data required by Section L." Tech. Analysis Mem. at 21-22. Thus, it is unclear what "correctly trac[ing] to the final version of Ref. (j)" signifies in the first place. The IRT's analysis cannot be rational where it did not meaningfully consider whether [redacted] input to the Technical Appendix to the Evaluation Plan is consistent with the Navy's actual needs. The IRT report is arbitrary and capricious and inadequately documented for this additional reason.

162. Had the IRT team performed a reasonable, meaningful analysis, there is a substantial likelihood that it would have found that certain specifications did not reflect the Navy's actual needs, and that the RFP therefore needed to be amended. As discussed above in Part II, [redacted] involvement in the solicitation was both extensive and deep. Based on the face of the IRT report, the IRT did not meaningfully consider the full scope and effect of that involvement.

[redacted]

ENTITLEMENT TO INJUNCTIVE RELIEF

163. The standard of review for a permanent injunction in a protest action is well established: "To determine if a permanent injunction is warranted, the court must consider whether (1) the plaintiff has succeeded on the merits; (2) the plaintiff will suffer irreparable harm if the court withholds injunctive relief; (3) the balance of hardships to the respective parties favors the grant of injunctive relief; and (4) the public interest is served by a grant of injunctive relief." *Centech Grp., Inc. v. United States*, 554 F.3d 1029, 1037 (Fed. Cir. 2009).

164. Here, the Navy's award violated the law and was arbitrary, and will cause irreparable harm to Northrop Grumman. Permanent injunctive relief enjoining performance of the contract awarded to L3Harris is therefore appropriate.

165. Northrop Grumman's claims are meritorious.

166. Without an injunction, Northrop Grumman would be irreparably harmed because it would lose the opportunity to compete fairly for this award and reap the economic benefit of winning the contract. *See BCPeabody Constr. Servs., Inc., v. United States*, 112 Fed. Cl. 502, 514 (2013) (denial of a fair opportunity to compete and loss of financial benefit from a lawful procurement process constitute irreparable harm).

167. The balance of harms weighs in favor of injunctive relief. An injunction will benefit the government by (1) preventing it from proceeding with an award that is based on a deficient proposal that does not meet material requirements; and (2) preserving the integrity of the procurement process.

168. Finally, the public interest also weighs in favor of injunctive relief. It is well established that the public interest is well-served by ensuring that the government procurement

process is fair and even-handed. *See BCPeabody*, 112 Fed. Cl. at 514. The current award is marred by [redacted] extraordinary conflict, and it therefore undermines the strong public interest in maintaining fairness and integrity in public procurement. In addition, the award is for a solution that does not meet the Navy's jamming requirements, and it therefore contravenes the public interest in the effectiveness — and safety — of the Nation's military forces.

PRAYER FOR RELIEF

For all the reasons identified above, Northrop Grumman respectfully requests that this Court grant the following relief:

1. Permanently enjoin the Navy from proceeding with the illegal contracts awarded to L3Harris.

2. Declare L3Harris ineligible by reason of its failure to comply with a material term of the solicitation.

3. Declare L3Harris ineligible by reason of the conflict of interest created by [redacted] failure to recuse.

4. Declare that the Navy's failure to fully implement the corrective action recommended by GAO was irrational, inadequately documented, and contrary to law.

5. Grant such other and further relief as the Court deems just and proper.

[redacted]

DATED: October 28, 2021

Respectfully submitted,

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