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Comptroller General
of the United States

Decision

Matter of: Northrop Grumman Systems Corporation-Mission Systems

File: B-419557.2; B-419557.3; B-419557.4

Date: August 18, 2021

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Mark D. Colley, Esq., and Mike D. McGill, Esq., Arnold & Porter Kaye Scholer LLP, for L3 Technologies, Inc., Communications Systems - West, the intervenor.
Thy Nguyen, Esq., Department of the Navy, for the agency.
Sarah T. Zaffina, Esq., and Edward Goldstein, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that awardee gained an unfair competitive advantage from hiring former government employees is denied where the record does not support this allegation.

2. Protest challenging agency's interpretation of solicitation requirements is dismissed as untimely where the agency advised protester of the agency's interpretation during discussions, and prior to the time for receipt of final proposal revisions, the protester changed its proposal to conform with the agency's interpretation, and the protest was filed after award.

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-0069A, issued by the Department of the Navy, Naval Air Systems Command (NAVAIR), for an aircraft mounted jamming system prototype for low band radar. Northrop contends that L3Harris maintained an unfair competitive advantage from having hired former Navy employees and that the Navy's failure to investigate the resulting organizational conflict of interest (OCI) was unreasonable. Northrop also disputes the agency's interpretation of solicitation requirements, which led the agency to assign Northrop's technical approach a deficiency, rendering Northrop's proposal ineligible for award.

We deny the protest in part, and dismiss the protest in part.

BACKGROUND

The Next Generation Jammer (NGJ) system is intended to augment and replace the ALQ-99 Tactical Jamming System currently in use on the Navy's EA-1BG Growler (EA-1BG) aircraft. Contracting Officer's Statement and Memorandum of Law (COS/MOL) at 6. The NGJ-Low Band (NGJ-LB) pod is one element of the Navy's overall ALQ-99 replacement strategy. *Id.* This procurement, referred to as the NBJ-LB Capability Block 1 (CB-1-) requirement, is for the development, integration, and production of an operational prototype low band[1] jammer pod that will attach to the underside of the EA-18 Growler, to conduct electronic surveillance and electronic attacks to jam and otherwise counter enemy air defense. Protest at 2. The NGJ-LB CB-1 requirement addresses all the NGJ-LB pod components and their ability to attack well-known and understood threats from existing air defense systems. COS/MOL at 7; Agency Report (AR), Tab 20, Program Streamlined Acquisition Plan (PSTRAP) at 1-2.

Procurement History

Before the Navy issued the solicitation, which is the subject of this protest, the Navy awarded two NGJ-LB contracts for the demonstration of existing technologies (DET), one to Northrop and the second to L3Harris.[2] The DET contracts were to assess the technical maturity of the critical advanced electronic attack technologies and to identify possible solutions and acquisition strategies to deliver low band capability. COS/MOL at 7. As explained by the Navy, the DET contracts were intended to assist the Navy with the development of technology for the NBJ-LB CB-1 requirement.

In addition to the DET contracts, the Navy conducted market research for the engineering, manufacturing, and development contract for the CB-1 requirement. COS/MOL at 7-8. The Navy ultimately solicited the requirement using full and open competition and issued RFP No. N000-19-19-R-0069 (the CB-1 RFP) using negotiated contracting procedures on September 9, 2019.[3] *Id.* at 10.

[redacted]

[1] The agency explains that the term "low band" refers to the frequency band that the pod is intended to work within. COS/MOL at 6.

[2] L 3 Technologies, Inc. and Harris Corporation (Harris) merged on July 1, 2019 to form a new corporate entity, L3Harris, of which L3 Technologies, Inc. Communication Systems-West is a division.

[3] Federal Acquisition Regulation (FAR) part 15 governs contracting by negotiation.

[redacted]

Before issuance of the NJG-LB solicitations, the Navy sought input from the two DET contractors [redacted]

4 [redacted]

5 [redacted]

6 [redacted]

7 The Addendum RFP was amended five times. COS/MOL at 10 n.6. We cite to the original solicitation unless otherwise noted; page numbers refer to the Adobe pdf page number.

[redacted], the Navy requested that both DET contractors submit paperwork for five individuals [redacted]

When the agency ultimately issued the NGJ-LB solicitation, the RFP contemplated the award of two contracts to a single offeror, one for the CB-1 RFP and one for the Addendum RFP.[9] AR, Tab 6, Addendum RFP at 114. The RFP provided for award on a best-value tradeoff basis considering technical and cost factors. *Id.* at 114-115. The technical factor was significantly more important than cost and consisted of a technical rating[10] and technical risk rating.[11] *Id.* at 115. Offerors assessed a deficiency would be ineligible for award. *Id.* at 114.

Northrop and L3Harris each submitted proposals by the proposal submission deadline of January 31, 2020. COS/MOL at 10. The agency conducted several rounds of discussions with both offerors. *Id.* at 11. As relevant here, over the course of several rounds of discussions, the agency issued evaluation notices (ENs) informing Northrop that its proposed solution [redacted] The Navy also objected to Northrop's proposed design based on the Navy's concern that using [DELETED] [redacted] the aircraft [redacted] was a design modification to the aircraft. AR, Tab 8, EN No. 0111 at 2; AR, Tab 9, EN No. 0125

[redacted]

[9] The CB-1 RFP is not relevant to our resolution of this protest except where noted.

[10] The RFP provides the following adjectival ratings for the technical factor: outstanding, good, acceptable, marginal, and unacceptable. AR, Tab 6, Addendum RFP at 118.

[11] The RFP provides the following adjectival ratings for the technical risk factor, proposals: low, moderate, high, or unacceptable risk. AR, Tab 6, Addendum RFP at 118.

at 8-9; AR, Tab 11, EN No. 0127. Northrop's responses to the ENs explained how its proposed solution met the RFP requirements. AR, Tab B-3, Resp. to EN No. 0078 at 9; AR, Tab 10, Resp. EN No. 0125 at 6-11.

The agency did not agree with Northrop's explanations, and in the last EN issued to Northrop, the Navy explained that it found Northrop's proposed approach [redacted] to be deficient. AR, Tab 11, EN No. 0127. The agency explained that Northrop's proposed design using a [redacted] approach [redacted] failed to meet the RFP's requirements. *Id.* The agency [redacted] *Id.*

Northrop did not contest the agency's findings. Instead, Northrop stated that it would provide a [DELETED] solution to meet [redacted]

On October 29, the Navy closed discussions and required offerors to submit final proposal revisions (FPRs) by November 5. AR, Tab 13, Letter Closing Discussions at 1-2. The Navy informed offerors that it had completed its evaluation of initial proposals, responses to ENs, and other proposal updates, and identified the remaining significant weakness and deficiencies in their proposals. *Id.* at 1. In particular, the agency notified Northrop that it did not provide sufficient documentation [redacted] The agency therefore assessed Northrop's proposal with a deficiency because the lack of substantiation raised the risk of failing [redacted] to an unacceptable level. *Id.* at 6.

Northrop submitted its FPR, which included its [DELETED] design, by the November 5 deadline. In evaluating Northrop's FPR, the source selection evaluation board (SSEB) assessed Northrop's proposal a deficiency for its [DELETED] design. AR, Tab 14, SSEB Addendum Report at 19-25. The SSEB concluded that Northrop's FPR continued to provide insufficient documentation to substantiate how its approach would satisfy [redacted] As a result, the SSEB concluded that Northrop was unable to resolve the deficiency because of the limited substantiation in its final proposal and that Northrop's multiple failures to adequately substantiate [redacted] combined to "increase the risk of unsuccessful contract performance to an unacceptable level." *Id.* at 19. The agency therefore assigned Northrop's proposal a rating of unacceptable. *Id.*

The SSEB evaluated the revised proposals and assigned the ratings below.[12]

	Northrop	L3Harris
Technical Rating	Unacceptable	Outstanding
Technical Risk Rating	Unacceptable	Moderate
Cost[13]	$496.0 million	$544.4 million

AR, Tab D-2, Source Selection Advisory Council (SSAC) Report, encl. 1 at 3.

In December 2020, the agency concluded that L3Harris's proposal represented the best value and awarded the contracts to L3Harris at $544.4 million, [redacted] AR, Tab, D-3, Source Selection Decision Document at 2-3; COS/MOL at 13.

Following its debriefing, Northrop filed an unclassified protest with our Office on February 1, 2021 alleging that, among other things, L3Harris's employment of a former Navy employee created a disqualifying OCI that precluded award of the CB-1 contract to L3Harris. COS/MOL at 14. Northrop also filed a [redacted] classified protest challenging the award of the contract to L3Harris for the Addendum RFP. On March 3, the agency announced it was taking corrective action to investigate the OCI allegation related to the CB-1 solicitation and we dismissed both protests as academic. *Id.*; *Northrop Grumman Sys. Corp.--Mission Sys.*, B-419557 *et al.*, Mar. 5, 2021 (unpublished decision).

Upon completion of the investigation, the Navy affirmed award of both contracts to L3Harris. COS/MOL at 14. This protest followed.

DISCUSSION

Northrop raises two primary challenges in connection with the Addendum RFP. First, the protester argues that L3Harris's employment of two former Navy employees created an appearance of impropriety and an unfair competitive advantage that the Navy failed to investigate.[14] Protest at 23-25, 29-37; Second Supp. Protest at 4-13. Second, the protester contends that the agency's unreasonable interpretation of the solicitation's

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[12] These ratings reflect the ratings for both the CB-1 RFP and the Addendum RFP. AR, Tab D-2, SSAC Report, encl. 1 at 2.

[13] The cost includes the value of the contract for the Addendum RFP. COS/MOL at 13.

[14] In addition, Northrop alleged that L3Harris gained an unfair competitive advantage by hiring a third former Navy employee. Northrop later withdrew this protest ground after learning this individual did not have a role in developing the addendum specifications. Northrop Comments at 4. Other issues related to this individual and the CB-1 RFP are resolved in *Northrop Grumman Systems Corporation--Mission Systems*, B-419560.3 *et al.*, Aug. 18, 2021, 2021 CPD ¶_.

requirements during discussions led to the improper rejection of Northrop's [redacted] solution [redacted] Protest at 37-41. For the reasons discussed below, we find no basis to sustain the protest.[15]

As a preliminary matter, L3Harris argues that we should dismiss Northrop's protest in its entirety as untimely. According to the intervenor, Northrop did not file its protest within 10 days of the required debriefing and failed to diligently pursue information forming its protest grounds because Northrop rescheduled the debriefing date initially offered by the Navy until certain individuals Northrop sought to attend the debriefing could be [redacted] Intervenor Comments at 3-7. In support of its position, L3Harris cites our decisions in *Pentec Environmental, Inc.*, B-276874.2, June 2, 1997, 97-1 CPD ¶ 199 (dismissing protest as untimely where protester delayed debriefing for more than one month so that it could first obtain information under the Freedom of Information Act and Pentec's vice president/senior biologist could attend an unrelated business conference and take a vacation) and *Professional Rehabilitation Consultants, Inc.*, B-275871, Feb. 28, 1997, 97-1 CPD ¶ 94 (dismissing protest as untimely where protester requested debriefing two months after it was informed it had not been awarded the contract). In this respect, L3Harris argues that once Northrop chose to forego the offered debriefing, the debriefing exception to our timeliness rules no longer applies and Northrop was required to file its protest within 10 days after the protester knew, or should have known, the basis for its protest. Intervenor Comments at 5-6. We disagree.

First, when a protester negotiates a different post-award debriefing date with the agency, especially when the delay is related to accommodate individuals who need to obtain [redacted] access to participate in debriefing covering classified information, we cannot conclude that the delayed debriefing, to which the agency agreed, no longer constitutes a required debriefing. Second, unlike the cited decisions, Northrop's request to delay the offered debriefing by 12 days so its counsel could obtain access [redacted] and attend the debriefing does not rise to the level of failing to diligently pursue information that forms the basis for its protest. *See Scientific & Commercial Sys. Corp.; Omni Corp.*, B-283160 *et al.*, Oct. 14, 1999, 99-2 CPD ¶ 78 at 3 n.4. Accordingly, Northrop's protest filed within 10 days after receiving the Navy's debriefing, is timely, except where discussed below.[16] 4 C.F.R. § 21.2(a).

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[15] Northrop's protest raises other collateral allegations. While we do not address them all in this decision, we have considered them and find that they do not provide a basis to sustain the protest.

[16] We note that this protest follows the corrective action taken in Northrop's original protest filed February 1, 2021. Subsequent protests based on information derived from the original protest process depend on the timely filing of the original protest. *See General Physics Fed. Sys., Inc.*, B-274795, Jan. 6, 1997, 97-1 CPD ¶ 8 at 4.

Unfair Competitive Advantage Due To Employment of Former Government Employees

Northrop contends that L3Harris maintained an unfair competitive advantage because it hired two former [redacted] Navy employees (hereinafter Mr. A and Mr. Z) who had access to non-public information that would have been useful to L3Harris in the competition. Protest at 29-37. In this respect, Northrop speculates that the Navy had been developing the Addendum RFP requirements for years and that by virtue of their positions in the Navy, Mr. A and Mr. Z would have been briefed about the requirements. *Id.* at 29-30. Northrop contends that L3Harris gained an unfair competitive advantage because of the "head start" it received when it hired Mr. A, in 2017, and then Mr. Z, in 2019, which allowed L3Harris more time to develop an acceptable solution to integrate the Addendum RFP requirements with the CB-1 requirements. *Id.* at 31-34. Finally, Northrop argues the Navy failed to conduct a reasonable investigation of the alleged conflict of interest. *Id.* at 34-37; Second Supp. Protest at 4-14.

In response, the agency argues there was no appearance of impropriety or unfair competitive advantage associated with L3Harris's hiring of Mr. A and Mr. Z. COS/MOL at 21-30. Specifically, the agency represents that neither Mr. A nor Mr. Z were authorized [redacted] *Id.* at 22, 24-27. The agency also contends that L3Harris and Northrop were authorized [redacted] at the same time on July 8, 2019; therefore, L3Harris could not have had any "head start" or inside knowledge about the requirements, which forms the basis of Northrop's alleged unfair competitive advantage arguments. *Id.* at 27-29. Because there are no facts to support the possibility of any unfair competitive advantage, the agency asserts that it was not required to further investigate Northrop's allegations about Mr. A and Mr. X. *Id.* at 15, 23-25.

Contracting agencies are to avoid even the appearance of impropriety in government procurements. FAR 3.101-1; *Perspecta Enter. Sols.*, B-418533.3 *et al.*, June 11, 2020, 2020 CPD ¶ 213 at 7. Where a firm may have gained an unfair competitive advantage through its hiring of a former government employee, the firm can be disqualified from a competition based on the appearance of impropriety that results.[17] *Health Net Fed. Servs., LLC*, B-401652.3, B-401652.5, Nov. 4, 2009, 2009 CPD ¶ 220 at 29. This is true even if no actual impropriety can be shown, so long as the determination of an unfair competitive advantage is based on hard facts and not mere innuendo or suspicion. *Verisys Corp.*, B-413204.5 *et al.*, Oct. 2, 2017, 2017 CPD ¶ 338 at 9. Thus, a person's familiarity with the type of work required, resulting from the person's prior position in the government, is not, by itself, evidence of an unfair competitive

[17] The standard for evaluating whether a firm has an unfair competitive advantage under FAR subpart 3.1 stemming from its hiring of a former government employee is virtually indistinguishable from the standard for evaluating whether a firm has an unfair competitive advantage arising from its unequal access to information as a result of an OCI under FAR subpart 9.5. *Health Net Fed. Servs., LLC*, *supra* at 28 n.15.

advantage. *Dewberry Crawford Grp.; Partner 4 Recovery*, B-415940.11 *et al.*, July 2, 2018, 2018 CPD ¶ 298 at 24-25.

To resolve an allegation of an unfair competitive advantage, our Office typically considers all relevant information, including whether the government employee had access to competitively useful non-public information, as well as whether the government employee's activities with the firm were likely to have resulted in a disclosure of such information. *Physician Corp. of Am.*, B-270698 *et al.*, Apr. 10, 1996, 96-1 CPD ¶ 198 at 4-5. An unfair competitive advantage is presumed to arise where an offeror possesses competitively useful non-public information that would assist that offeror in obtaining the contract, without the need for an inquiry as to whether that information was actually utilized by the awardee in the preparation of its proposal. *Health Net Fed. Servs., LLC*, *supra* at 28 n.15; *Aetna Gov't Health Plans, Inc.; Foundation Health Fed. Servs., Inc.*, B-254397.15 *et al.*, July 27, 1995, 95-2 CPD ¶ 129 at 18-19 n.16.

The identification of conflicts of interest is a fact-specific inquiry that requires the exercise of consideration 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, 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 7.

Upon review of the record, we cannot conclude L3Harris gained an unfair competitive advantage as a result of its employment of Mr. A and Mr. Z. The record demonstrates that neither Mr. A nor Mr. Z had access to competitively useful non-public information and we therefore deny this protest ground.

The record reflects that Mr. A served as [DELETED] from July 2008 until August 2017. AR, Tab 22, Mr. A Decl. at 1. The Office of [DELETED] is not responsible for deciding the Navy's operational requirements like the NGJ-LB system; instead, the Office Naval Operations (OPNAV) makes those decisions. Req. for Dismissal at 4. In September 2017, Mr. A left the Navy and went to work for L3Harris. AR, Tab 22, Mr. A Decl. at 2. Mr. A was [redacted] and he has not sought or been granted access [redacted] since his departure. *Id.*; Req. for Dismissal, exh. 3.

Similarly, Mr. Z served as the [DELETED] from October 2015 to October 2018. AR, Tab 23, Mr. Z Decl. at 1. Mr. Z left the Navy in October 2018 and accepted a position with L3Harris in January 2019. *Id.* Prior to leaving the Navy in October 2018, Mr. Z was [redacted] and he too has not sought or been granted access [redacted] since his departure. *Id.*; Req. for Dismissal, exh. 3.

The record shows that the positions held by Mr. A and Mr. Z involved acquisition management or leadership roles within the Navy; however, the Navy points out that

OPNAV and not[DELETED] is the office primarily responsible for developing the NGJ-LB requirements. [redacted] More importantly, the record demonstrates that both former government employees left the Navy months, if not years, before the Navy decided to add [redacted] to the NBJ-LB pod and before the addendum requirements were developed.[18] The record also shows that both L3Harris and Northrop were [redacted] the same time to attend the July 8, 2019 briefing about the technology.

Based upon our review of the record, we find no support for Northrop's contention that L3Harris gained an unfair competitive advantage through its employment of Mr. A and Mr. Z. As explained above, the requirements at issue [redacted]. The purpose of [redacted] when access is no longer needed, individuals [redacted] information or discuss that information. COS/MOL at 6-7, 27 n.15. Violating these restrictions can result in severe civil and criminal penalties. *See* Req. for Dismissal exh. 1 ¶¶ 6, 7. In this context, Northrop claims that Mr. A and Mr. Z must have known about [redacted] at issue; yet, the protester fails to provide any logical explanation for how Mr. A and Mr. Z would have learned competitively useful non-public information [redacted], when all the evidence in the record indicates that the requirements were added to the NGJ-LB pod after Mr. A and Mr. Z left the Navy, and when they no longer had access [redacted]

Even assuming they did in fact have some knowledge about the requirements when they left the Navy, we fail to see how that knowledge could have imparted any advantage to L3Harris as a practical matter. Without others within L3Harris having been [redacted], there was no practical way for L3Harris to have started working on these requirements before Northrop (the alleged head start theory) absent blatant criminality by Mr. A and Mr. Z through their violation of their duties to maintain the confidentiality of the information they are alleged to have learned prior to having been [redacted]

It should be noted that both individuals submitted sworn declarations affirming that they have not violated their restrictions under [redacted] *See* AR, Tabs 22 and 23, Declarations. To the contrary, it was only when L3Harris's technical team was [redacted] that any of the alleged knowledge maintained by these individuals could have been used, even in an unintentional way. The record, however, establishes that

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18 [redacted]

both L3Harris and Northrop were [redacted] at the same time and for the same purpose--to attend the July 8 briefing. Because other members of L3Harris were [redacted] at the same time as Northrop's staff, both firms were on the same footing and there was no reasonable possibility of the type of head start advantage alleged by Northrop.

In conclusion, we find that the protester's allegations of an unfair competitive advantage based on the alleged conflicts of Mr. A and Mr. Z are not supported with hard facts, the Navy meaningfully considered Northrop's allegations and reasonably concluded that Northrop did not allege hard facts establishing an apparent conflict; therefore, the agency was under no obligation to further investigate Northrop's allegations. *Verisys Corp.*, *supra* at 12 (denying protest where no hard facts exist in the record that support the protester's allegation that the awardee participated in creating requirements). As a result, we deny this protest ground.

Agency Interpretation of Solicitation Requirements During Discussions

Northrop's second protest ground concerns a deficiency the agency identified during discussions regarding Northrop's ability to meet [redacted]. Protest at 37-41. Of note, Northrop does not challenge the agency's assignment of a deficiency based on its [DELETED] approach as detailed in its final submitted proposal. Rather, Northrop argues that the Navy improperly rejected a prior approach it submitted during the discussions process--its proposed [redacted] solution. According to the protester, the agency improperly rejected this approach during discussions based on an unreasonable application of the RFP's requirement set forth in SPS 411, which precluded changes to a variety of aircraft structures, among them being the aircraft [DELETED]. *Id.* at 38.

In response, the agency argues Northrop's allegations are untimely and should be dismissed. Req. for Dismissal at 18-23; COS/MOL at 30-31. To this end, the Navy contends that if the protester disagreed with the agency's rejection of Northrop's [redacted] design as non-compliant with the Addendum RFP, it was incumbent on the protester to challenge the agency's interpretation before the closing date for FPRs. Req. for Dismissal at 20-21, 23; COS/MOL at 30-31. Additionally, because Northrop made the independent business decision to revise its proposal in response to the concerns raised by the agency during discussions, the agency argues that Northrop is now precluded from challenging this evaluation finding since it is unrelated to the deficiency assessed against Northrop's final proposal, which Northrop does not separately challenge. Req. for Dismissal at 20-21; COS/MOL at 30-31.

Although we are unpersuaded by the merits of Northrop's arguments challenging the agency's interpretation of the solicitation and related evaluation of an approach proposed by Northrop but ultimately abandoned during the discussions period, we need not address them because we find Northrop's line of argument to be untimely.

Our Bid Protest Regulations contain strict rules for the timely submission of protests. These rules reflect the dual requirements of giving parties a fair opportunity to present their cases and resolving protests expeditiously without unduly disrupting or delaying the procurement process. *Verizon Wireless*, B-406854, B-406854.2, Sept. 17, 2012, 2012 CPD ¶ 260 at 4. Our timeliness rules specifically require that a protest based upon alleged improprieties in a solicitation that are apparent prior to the closing time for receipt of initial proposals be filed before that time. 4 C.F.R. § 21.2(a)(1); *see Ama Terra Envtl., Inc.*, B-408290.2, Oct. 23, 2013, 2013 CPD ¶ 242 at 3.

We have previously noted the tension within the principles of our timeliness rules where an issue of solicitation interpretation arises during discussions. *See Sikorsky Aircraft Corp*., B-416027, B-416027.2, May 22, 2018, 2018 CPD ¶ 177. On one hand, our timeliness rules regarding solicitation improprieties require challenges going to the heart of the underlying ground rules of competition to be resolved as early as possible during the solicitation process. *Id.* at 7-9. On the other hand, the debriefing exception to our timeliness rules, applicable to negotiated procurements, allows a delay in filing a protest that argues the agency evaluated proposals in a manner inconsistent with the solicitation until after a debriefing so that the agency may provide more information related to whether the protester has a basis to file a protest. *Id.* at 8-9. In this way, debriefings are meant to preclude strategic or defensive protests before the agency has taken final action, and before actual knowledge that a basis for protest exists. *Id.* at 9.

Our decisions assessing the question of whether an offeror should protest the agency interpretation of the solicitation during discussions have come to fact specific conclusions where, as here, that interpretation has been made to one offeror in discussions as part of the agency's evaluation. *Compare Learjet, Inc.*, B-274385 *et al.* Dec. 6, 1996, 96-2 CPD ¶ 215 at 3-4 (failure to dispute agency interpretation of solicitation announced during discussions rendered post-award protest untimely); and *CareandWear II, LLC*, B-419140, B-419140.2, Dec. 10, 2020, 2020 CPD ¶ 398 at 9-10 (failure to dispute agency's interpretation of solicitation requirement to submit a test report advanced during discussions that was contrary to protester's understanding was untimely when raised after award); *with Paragon Tech. Grp., Inc.*, B-412636, B-412636.2, Apr. 22, 2016, 2016 CPD ¶ 113 at 13 n.11 (protester is not required to file a defensive protest challenging an agency's interpretation of solicitation terms during discussions because communications during discussions do not constitute the agency's final evaluation, and to do so would be premature); and *The Boeing Co.*, B-311344 *et al.*, June 18, 2008, 2008 CPD ¶ 114 at 28, 37 at n.41 (protester need not file a defensive protest of the agency interpretation advanced during discussions where the record does not establish that the protester fully understood the agency's interpretation).

We conclude that Northrop's challenge of the agency's interpretation of a solicitation provision about a proposal submitted by Northrop during multiple rounds of discussions and proposal revisions, an approach which Northrop subsequently abandoned in its final proposal, is untimely.

As relevant here, Northrop initially proposed a [DELETED] design, using [DELETED]. AR, Tab B-1, Northrop Tech. Proposal at 51-56. The agency issued EN No. 0078 to Northrop seeking to clarify that its proposed solution would use [DELETED]. AR, Tab 7, EN No. 0078 at 4. Northrop responded that a [DELETED] solution would be difficult [redacted], and proposed an alternative solution. Northrop proposed to [redacted] [DELETED] [redacted]. AR, Tab B-3, Resp. to EN No. 0078 at 9.[19]

In the next exchange, the agency noted that Northrop's solution to use [redacted] "is outside of the specification defined NGJ-LB pod." AR, Tab 8, EN No. 0111 at 3. Northrop did not respond to the agency but asked for more information about why the Navy assessed a weakness. AR, Tab B-4, Resp. to EN No. 0111.

In the next round of discussions, the Navy explained that it assessed a deficiency because Northrop's proposed approach failed to include adequate substantiating information [redacted]. AR, Tab 9, EN No. 0125 at 8. The agency also questioned whether [redacted] Northrop's [redacted] design, as mentioned in Northrop's response to EN No. 0078, was consistent with SPS 411, which did not allow for modifications to the aircraft [DELETED]. *Id.*

In its response to EN No. 0125, Northrop submitted detailed information about its [redacted] design. AR, Tab 10, Northrop Resp. EN No. 0125 at 1. According to Northrop, its [redacted] design did not in fact require any change to the [redacted] the aircraft [redacted] and was therefore consistent with SPS 411. *Id.* at 3.

After reviewing Northrop's response, the Navy concluded that Northrop's proposal was deficient and so advised Northrop. AR, Tab 11, EN No. 0127. The agency explained that Northrop's design failed to meet the RFP's requirements because its proposed change to the aircraft [redacted] was inconsistent with the requirements set forth in SPS 411. *Id.* According to the Navy, Northrop's proposed design was inconsistent with SPS 411 because it required modifying the [redacted]. *Id.*

Northrop did not express any further disagreement with the Navy's comments; rather, Northrop responded that it would provide a [DELETED] solution [redacted]. AR, Tab 12, Northrop Resp. EN No. 0127 at 1. Northrop confirmed that its approach would not [DELETED]. *Id.* Consequently, in its final proposal, Northrop proposed a [DELETED] approach. The

[19] The agency produced additional documents on June 24, 2021; these documents are identified using letters, *e.g.* "Tab A."

agency assessed this approach with a deficiency as well because Northrop could not adequately substantiate [redacted] t. AR, Tab C-3, Northrop FPR at 26-31; AR, Tab 15, Addendum Debriefing Slides at 11-12.

The record clearly shows that during the discussions process, the agency and Northrop held different views about the proper application of SPS 411. In its protest to our Office, Northrop argues that the restrictions of SPS 411 extended to physical changes to the structure of the aircraft. Because its [redacted] modifications did not alter the physical structure of the aircraft, Northrop argues it was improper for the agency to have rejected its proposed approach as inconsistent with SPS 411. Through EN No. 0127, the Navy unequivocally rejected Northrop's interpretation of the specification that would permit its [redacted] design, noting that the changes proposed by Northrop would modify the [redacted], which the agency viewed as part of the aircraft [redacted], and would [redacted] The agency informed Northrop that its proposed design was deficient and did not conform to NGJ-LM pod specifications. Rather than continue to dispute the agency's interpretation of the proper application of SPS 411, Northrop decided to abandon its [redacted] design and reverted to its initial [DELETED] design.

In our view, the protester could not abandon its earlier design approach, revise its proposal, and then wait to see whether it is awarded a contract before challenging the agency's earlier interpretation of SPS 411 with which the protester disagrees. Rather, in this case, the protester should have protested the agency's interpretation of the solicitation provision prior to the due date for the submission of revised proposals, or alternatively, maintained its position for final resolution by the agency. We therefore dismiss this protest ground as untimely.

The protest is denied in part and dismissed in part.

Edda Emmanuelli Perez
General Counsel