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Washington, DC 20548

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## Decision

**Matter of:** Liquidity Services, Inc.

**File:** B-409718; B-409718.2; B-409718.3; B-409718.4

**Date:** July 23, 2014

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Craig A. Holman, Esq., Emma V. Broomfield, Esq., and Stuart W. Turner, Esq., Arnold & Porter LLP, for the protester.

Frank S. Swain, Esq., and Sari M. Long, Esq., Faegre Baker Daniels LLP, for the intervenor.

Gregory J. Gusching, Esq., and Robin Walters, Esq., Defense Logistics Agency, for the agency.

Pedro E. Briones, Esq., and Guy R. Pietrovito, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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### DIGEST

1. In a procurement for the award of a sales contract, protest that the proposed awardee, which used former agency employees as consultants, has an actual or potential organizational conflict of interest is denied where the protester does not show that the agency erred in finding, contrary to the protester's arguments, that the awardee obtained no competitively useful information such that the awardee had not obtained an unfair competitive advantage.
2. Protest that an agency unreasonably found that the proposed awardee's proposal was technically acceptable is denied where record shows that the evaluation was reasonable and consistent with the terms of the solicitation.
3. Protest that an agency must cancel a solicitation and conduct a new competition for the award of a contract for the sale of surplus property because of a potential reduction in volume of surplus property is denied where the solicitation advised offerors that such fluctuations were likely and that volume cannot be accurately predicted and where protester has not shown that requirements have significantly changed.

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### DECISION

Liquidity Services, Inc. (LSI), of Washington, D.C., protests the proposed award of a contract to IronPlanet, Inc., of Pleasanton, California, under solicitation

No. 14-0092, issued by the Defense Logistics Agency (DLA), Disposition Services, for the sale of surplus property. LSI contends that IronPlanet has an organizational conflict of interest (OCI) that should have disqualified the firm from the competition, and that DLA's evaluation of IronPlanet's technical proposal was unreasonable. LSI also contends that the agency's requirement has changed dramatically such that DLA should cancel the solicitation and conduct a new competition.

We deny the protest.

## BACKGROUND

DLA awards nationwide "commercial venture" (CV) sales contracts for the sale of surplus Department of Defense (DOD) property pursuant to the Federal Property and Administrative Services Act of 1949 (FPASA), as amended, 41 U.S.C. § 545, and under delegation from the General Services Administration. Agency Report (AR) at 1-2. Procurements for CV sales contracts are conducted, as here, using a two-step solicitation process: first, DLA issues a request for technical proposals (RFTP); second, DLA issues--to those offerors that submitted technically acceptable proposals in response to the RFTP--an invitation for bids (IFB) for a percentage of the gross revenue that the contractor must share with the government when the contractor sells the surplus property. AR at 1-2, 7.

The competition here is for DLA's fourth generation of CV sales contracts (CV4). LSI holds the third generation (CV3) sales contract, which provides for the sale of both rolling (*i.e.*, vehicular) and non-rolling (all other, non-vehicular) surplus DOD property. At issue in this protest is DLA's proposed award of a CV4 contract, which provides only for the sale of rolling surplus property.<sup>1</sup>

On September 11, 2013, the agency hosted the first of three pre-proposal conferences for prospective CV4 offerors. AR at 2. LSI representatives attending the conference observed that the former Director of Disposal Operations (hereinafter, operations director) of DLA Disposition Services was at the conference on behalf of IronPlanet, a potential competitor.<sup>2</sup> Protest at 5; *see* Intervenor's Supp. Comments, Tab 2, Statement of Former Operations Dir., at 2 (stating that he was one of four IronPlanet representatives at the conference).

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<sup>1</sup> *See infra* n.7 (explaining DLA's bifurcation of the CV4 competition into separate procurements for the sale of rolling and non-rolling surplus property).

<sup>2</sup> Representatives from both firms also attended other DLA conferences, which were held on October 22, 2013, and January 23, 2014. DLA 2<sup>nd</sup> Request for Dismissal at 1-3.

On September 25, LSI requested that DLA investigate the former operation director's attendance, on behalf of IronPlanet, at the first pre-proposal conference. See AR, Tab A-4-20, LSI Request for Investigation, at 1-3. LSI alleged that the former director's involvement with IronPlanet raised potential organizational conflict of interest (OCI) concerns and may violate federal post-employment restrictions. In this regard, LSI contended that the former director supervised LSI's performance of the CV3 sales contract while he was employed at DLA and allegedly had access to proprietary LSI information and sensitive DLA procurement information.<sup>3</sup> See id., citing, 5 C.F.R. part 2641, Post-Employment Conflict of Interest Restrictions, and Federal Acquisition Regulation (FAR) part 9.5, Organizational and Consultant Conflicts of Interest. LSI provided two documents to DLA that, according to the protester, exemplified the former operations director's knowledge and access to such information: (1) a December 2008 email to him from LSI's Chief Executive Officer (CEO) discussing various aspects of LSI's performance of the CV3 contract, including a request for a contract price adjustment; and (2) a December 2006 email from the former operations director to DLA staff requesting that Government Liquidation return certain surplus items that had previously been demilitarized.<sup>4</sup> Id., exhibits. A, B.

On October 9, DLA responded to LSI's request for an investigation, informing the protester that the agency had reviewed the former operations director's "participation in the ongoing sales [solicitation] process" and found no statutory or regulatory violations, and that the facts and circumstances neither gave rise to an OCI, nor warranted further action. AR, Tab A-4-15, DLA Response to LSI Request for Investigation, Oct. 9, 2013, at 5-6. In any event, the agency stated that LSI's concerns were premature because the solicitation had not yet been issued and it was unknown which vendors would submit proposals.<sup>5</sup> Id. at 5, 7.

On October 24, LSI replied to DLA, disputing the agency's factual findings and legal conclusions, and provided three additional documents as "sample[s] of the type of

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<sup>3</sup> LSI also alleged that the former operations director may have violated the procurement integrity provisions of the Office of Federal Procurement Policy Act, as amended, 41 U.S.C. §§ 2101-07 (commonly known as the Procurement Integrity Act (PIA)). AR, Tab A-4-20, LSI Request for Investigation, at 2-5. LSI does not raise this allegation in the protest it filed with our Office.

<sup>4</sup> The email was not directed to Government Liquidation, which was the wholly-owned LSI subsidiary that held the CV2 sales contract. AR, Tab A-4-20, LSI Request for Investigation, at 4 n.1. The CV3 contract was awarded to LSI in July 2008 and expires in December 2014. 2<sup>nd</sup> Supp. AR at 2.

<sup>5</sup> DLA also noted that the PIA and FAR do not apply to competitions for sales contracts conducted under FPASA. Protest, exh. B, DLA Response to LSI Request for Investigation, Oct. 9, 2013, at 1, 3.

sensitive and confidential LSI information that [the former operations director] was privy to”: (1) an October 2008 letter from LSI’s CEO to DLA’s sales contracting officers discussing various issues regarding implementation of the CV3 sales contract; (2) slides from a February 2011 briefing that LSI presented to DLA’s staff; and (3) minutes, prepared by LSI, of a March 2009 teleconference with DLA’s staff.<sup>6</sup> AR, Tab A-4-14, LSI Reply to DLA, Oct. 24, 2013, at 1, 5-7; exhs. A-C. LSI again requested that DLA conduct a “full and proper” investigation, and the protester agreed that filing a protest at that time would be premature. Id. at 6.

On November 21, DLA informed LSI that the agency was investigating the matter further, and requested that LSI provide “copies of the sensitive and confidential LSI information that [the firm has] identified as being the most egregious documentation pertaining to this matter.” AR, Tab A-4-13, DLA Email to LSI, Nov. 21, 2013, at 1.

On December 13, LSI replied to DLA’s November 21 request for further information and provided “four types” of documents: (1) additional slides or hand-outs from four 2008 briefings that LSI presented to DLA staff; (2) four additional sets of minutes prepared by LSI of teleconferences between November 2008 and July 2009; (3) a March 2009 LSI letter to the chief of DLA’s Sales Branch regarding various aspects of the CV3 contract implementation; and (4) six, bi-monthly CV3 status reports from December 2009 to September 2010 prepared by LSI. AR, Tab A-4-10, LSI Letter to DLA, Dec. 13, 2013, at 1-3; Tab A-4-9, attachs. 1-4.

On January 31, 2014, the agency issued RFTP No. 14-0092 for the sale of rolling surplus property.<sup>7</sup> As relevant here, the RFTP required offerors to identify any

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<sup>6</sup> The October 2008 letter lists the former operations director as one of three recipients that received copies of the letter. AR, Tab A-4-14, LSI Reply to DLA, Oct. 24, 2013, exh. A, LSI Letter to DLA, Oct. 2008, at 4. LSI did not assert that the former operations director attended the 2011 briefing, and he is not listed in the minutes as having participated on the March 2009 conference call. AR, Tab A-4-14, LSI Reply to DLA, Oct. 24, 2013, at 5-6.

<sup>7</sup> At the September 11, 2013, pre-proposal conference, DLA released a draft solicitation that contemplated the issuance of a single CV4 contract for the sale of both rolling and non-rolling surplus property. 2<sup>nd</sup> Supp. AR at 2. DLA subsequently withdrew the draft solicitation on December 10, after an agency-commissioned study indicated that separating the sales of rolling and non-rolling surplus property would be more profitable to the government. Sales Contracting Officer’s Supp. Statement, at 1; see AR, Tab A-3-29, Questions & Answers, RFTP No. 14-0092, nos. 12, 24, 52. DLA issued a separate solicitation (RFTP/IFB No. 14-0091) on January 31, 2014, for the award of a CV4 sales contract for non-rolling surplus property. AR at 3.

consultants (or advisors) used in the preparation of proposals, in order to assist DLA in screening for potential OCIs.<sup>8</sup> RFTP at 8. The RFTP states that this information would not be used in evaluating technical proposals. Id. Offerors were advised that, while the solicitation and resulting sales contract were not subject to the FAR, the agency would consider the guidance of FAR subpart 9.5 in evaluating potential conflicts of interests.<sup>9</sup> Id. at 9.

On February 3, DLA advised LSI that the agency had determined, based on its review of the record, including all of the documents provided by LSI, that any information that the former operations director was privy to during his employment with the agency was not competitively useful and could not have given IronPlanet a competitive advantage. AR, Tab A-4-2, DLA Letter to LSI, Feb. 3, 2014, at 4.

DLA received a number of technical proposals, including LSI's and IronPlanet's, by the RFTP's February 21 closing date. AR at 6. IronPlanet's proposal identified four consultants that had previously been DLA employees: (1) DLA's former operations director, discussed above, who retired from the agency in February 2011; (2) the former vice director (the agency's most senior civilian official), who retired from the agency in March 2012; (3) the former counsel for DLA's Defense Reutilization and Marketing Services (DRMS),<sup>10</sup> who retired from the agency in January 2005; and (4) the former DRMS Commander, who retired from the agency in October 2005. AR, Tab A-1, IronPlanet Proposal, apps., at 61-62; Supp. AR at 41; see Supp. AR, Tab 3, Post-Gov't Emp't Mem., Mar. 14, 2013, at 1. The proposal describes them as having provided "consultation with respect to preparing a response to RFTP [No.] 14-0092." AR, Tab A-1, IronPlanet Proposal, apps., at 61-62.

On February 25, the agency's sales contracting officer requested a legal ruling from DLA's counsel as to whether IronPlanet gained an unfair competitive advantage and had an OCI, because of IronPlanet's retention of former DLA employees as consultants. AR, Tab A-3-7, Sales Contracting Officer Emails to DLA Counsel, Feb. 25, 2014, at 1-2. The agency states that, prior to evaluating proposals, the

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<sup>8</sup> The solicitation defined OCI to mean:

that because of other activities or relationships with other persons, a person is unable or potentially unable to render impartial assistance of advice to the Government, or the person's objectivity in performing the contract work is or might be otherwise impaired, or a person has an unfair competitive advantage.

RFTP at 8.

<sup>9</sup> See Alamo Aircraft Supply, Inc., et al., B-278215.4, Mar. 11, 1998, 98-1 CPD ¶ 76 at 5 n.5 (FAR not applicable to sales contracts).

<sup>10</sup> DRMS was the predecessor to DLA Disposition Services. Supp. AR at 41.

sales contracting officer and the chairperson of the Technical Evaluation Committee (TEC) were verbally advised by DLA legal counsel that he had conducted an analysis of three of the individuals (nos. 2-4 above) and concluded that no OCI existed with regard to them. See Supp. AR, Tab 1, Sales Contracting Officer Decl., at 1-2. DLA's counsel also advised the sales contracting officer and the TEC chairperson that the agency had previously determined that no OCI existed with regard to the former operations director. Id.

On March 18, the agency issued IFB No. 14-0092 to LSI, IronPlanet, and another firm. AR at 7. The IFB provided for a live auction following bid opening, and stated that award would be made to the responsive, responsible bidder that offered the highest bid price. IFB at 11. DLA received three bids, including LSI's and IronPlanet's, by the April 2 bid opening date, and conducted a live auction among the three of them. AR at 7. IronPlanet was the apparent high bidder (75.29 percent), and LSI was the apparent next highest bidder (74.54 percent). Id.; see Tab A-1-6, Bid Abstract.

On April 14, LSI protested to our Office arguing, among other things, that Iron Planet should be deemed ineligible for award because of an OCI. On April 17, DLA's head of contracting activity (HCA) "exercise[d his] authority under FAR [§] 9.503" and waived all OCI concerns and potential impacts related to the solicitation and subsequent CV4 contract, as well as any issues raised by LSI regarding IronPlanet. AR, Tab A-3-24, OCI Waiver; see AR at 25 nn.2-4. The HCA found, based on his review of the facts and circumstances of the procurement, that any potential or real OCI was unlikely, and that to the extent that there was an OCI, its impact on the solicitation or the integrity of the procurement process was insignificant. AR, Tab A-3-24, OCI Waiver. A detailed memorandum for the record (prepared by the sales contracting officer) accompanies the waiver document and describes the factual findings and legal conclusions discussed above. Id., attach., Mem. for the Record.

## DISCUSSION

LSI protests DLA's proposed award of the CV4 sales contract to IronPlanet, raising numerous arguments challenging the agency's OCI investigation and evaluation of IronPlanet's technical proposal. LSI also contends that the agency's requirement has changed dramatically such that DLA should cancel the solicitation and conduct a new competition. Although we discuss only certain representative examples of the arguments raised by the protester, we have reviewed each of the arguments, and find no basis to sustain the protest.

## Organizational Conflict of Interest

LSI alleges that IronPlanet gained an unfair competitive advantage by retaining former DLA staff.<sup>11</sup> See Protest at 12-15. The protester asserts that DLA's former operations director, for example, had access to LSI proprietary information because he "directly" supervised LSI's performance of the CV3 sales contract that, according to LSI, reflects "precisely" the same requirement as the solicitation here.<sup>12</sup> Id. at 18-22. LSI cites the various briefing materials, correspondence, and reports discussed above (supra at 3-4) as evidence that he was aware of LSI's technical approach, including LSI's development of a web-based "quarantine tool"<sup>13</sup> and procedures for inventory accounting, managing restricted items, and obtaining end-use certificates. Id.; Protester's Comments & 2<sup>nd</sup> Supp. Protest at 30-37. The protester also maintains that these documents show he had inside knowledge of LSI's pricing strategies, proposal assumptions, and resources, including workload and staffing data, and that he divulged these details to IronPlanet. Protest at 21-22; Protester's Supp. Comments at 26-28. In this regard, LSI contends that the former

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<sup>11</sup> As a threshold matter, the protester and agency have engaged in an extensive exchange about whether DLA has, or does not have, authority to waive an OCI, as DLA's HCA attempted here. This dispute concerns a sales contract, not a procurement for goods or services, so that neither the FAR nor the specific waiver provisions of FAR § 9.503 apply to this transaction. See Alamo Aircraft Supply, Inc., et al., supra, at 5 n.5. Here however, the solicitation provided that DLA would consider whether any of the competitors for the sales contract had an OCI, and would use FAR subpart 9.5 as guidance. Under the unusual circumstances presented here, we need not address the question of DLA's authority to waive an OCI in a procurement for a sales contract; as we discuss below, we find no possible prejudice to the LSI, where the protester failed to show that the agency erred in finding that the awardee had not obtained an unfair competitive advantage.

<sup>12</sup> Although LSI generally states that the former operations director had access to source selection sensitive information and may have gained "unique insight into agency requirements," see Protester's Comments & 2<sup>nd</sup> Supp. Protest at 35, the protester does not identify any specific source selection information to which the former operations director had access and which allegedly may have provided IronPlanet with a unfair competitive advantage.

<sup>13</sup> Both the CV3 and CV4 sales contracts require the contractor to provide a web-based quarantine tool that allows the government 5 days to preview items that the contractor is preparing to sell, so that the government can identify and withdraw any item that should not be offered to the public due to national security concerns. AR at 12; IFB at 31-32.

operations director was aware of the firm's 2009 request for a price adjustment in the CV3 contract that LSI argues provided him with confidential pricing information.<sup>14</sup> LSI also contends that DLA's OCI investigation was inadequate, because it did not consider the former operations director's involvement with IronPlanet's proposal preparation, or the scope of his responsibilities with the firm. Protest at 17-18, 22. The protester also complains that the investigation of the other three former DLA employees<sup>15</sup> lacks any contemporaneous documentation, but relied solely on verbal advice, even though the sales contracting officer explicitly requested a legal ruling. Protester's Comments & 2<sup>nd</sup> Supp. Protest at 52-54; Protester's 2<sup>nd</sup> Supp. Comments at 33-34.

DLA responds that LSI overstates the complexity of the CV3 requirements, and disputes the protester's apparent belief that inventorying and selling surplus property requires some unique, proprietary technical approach. AR at 29, 31. The agency maintains that LSI was not required to provide, and did not provide, to DLA under the CV3 contract any proprietary software in order to perform the CV3 sales contract. Rather, the CV3 contract, like the CV4 requirements, simply requires that the contractor have or develop some web-based application (called the Quarantine Tool), to allow the agency a 5-day preview of property that the contractor will offer for sale. DLA states that the government did not obtain any software coding or proprietary information concerning this tool, or any other intellectual property from LSI. See id. at 12, 32; Supp. AR at 34. DLA also states that the solicitation here has significantly changed the pricing methodology and the type of surplus property to be sold, compared to the CV3 sales contract. Supp. AR at 33-36. The agency also points out that neither the CV3 contract, the CV4 contract, nor the IFB here require the contractor or offeror to submit cost or pricing data. See id. Moreover, the agency maintains that the former operations director had no involvement in negotiating the 2009 price adjustment, and regardless, any information that he may have learned in that regard is outdated and useless,

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<sup>14</sup> LSI's only assertion with regard to the former DLA vice director is that she "no doubt had access to LSI's proprietary information in [her] high level position[.]" but unlike the former operations director, the protester does not identify any proprietary or other information that she allegedly had access to or provided to IronPlanet. See Protester's Comments & 2<sup>nd</sup> Supp. Protest at 52-54; Protester's Supp. Comments at 33-34. The protester makes no assertions whatsoever with regard to the former DRMS counsel or former DRMS commander, except to complain about the agency's documentation of its OCI investigations.

<sup>15</sup> LSI learned that IronPlanet had retained the three additional former DLA employees as technical consultants, when protester's counsel (who was admitted under a protective order issued in conjunction with this protest) received a copy of IronPlanet's technical proposal provided with DLA's agency report. See Protester's Comments & 2<sup>nd</sup> Supp. Protest at 1, 52; AR, Tab A-1, IronPlanet Proposal.



because the CV3 and the CV4 are fixed-price contracts and the competition here was conducted using sealed bidding and a live auction. Id. Furthermore, DLA states that LSI's CV3 contract pricing, including sales volumes and types of property sold, are publicly available data and based on standard industry mark-ups. See id. at 33-34.

As an initial matter, we disagree with DLA that the protester's OCI challenges are untimely. The agency maintains that LSI knew, or should have known, that IronPlanet intended to compete for the CV4 contract, based on the firms' attendance at pre-proposal conferences, and that the protester was on notice when it received DLA's February 3 letter that IronPlanet would not be excluded from the competition. AR at 16-18; 2<sup>nd</sup> Request for Dismissal. DLA argues that LSI was thus required to file its OCI protest by the February 21, 2014, closing date for receipt of proposals, rather than wait to see if IronPlanet would be selected for award. AR at 18, citing, inter alia, Honeywell Tech. Solutions, Inc., B-400771, B-400771.2, Jan. 27, 2009, 2009 CPD ¶ 49 at 6-7 and International Sci. & Tech. Inst., Inc., B-259648, Jan. 12, 1995, 95-1 CPD ¶ 16 at 3. Unlike the Honeywell and International Science cases cited by DLA, however, the RFTP here, including its questions and answers, did not advise offerors that the agency had considered and resolved OCI concerns regarding a particular offeror, such that the protester was required to protest the terms of the solicitation in that regard. Accordingly, as we have previously stated, a protester is generally not required to protest that another firm has an impermissible OCI until after that firm has been selected for award. REEP, Inc., B-290688, Sept. 20, 2002, 2002 CPD ¶ 158 at 1-2; see, e.g., North Wind, Inc., B-404880.7, Nov. 5, 2012, 2012 CPD ¶ 314 (finding pre-award OCI protest timely where solicitation advised offerors that agency was not aware of any unmitigated OCIs).

With regard to the substance of LSI's OCI claims, the responsibility for determining whether an actual or apparent conflict of interest will arise, and to what extent the firm should be excluded from the competition, rests with the contracting agency. Aetna Gov't Health Plans, Inc.; Foundation Health Fed. Servs., Inc., B-254397.15 et al., July 27, 1995, 95-2 CPD ¶ 129 at 12. We review the reasonableness of a contracting officer's OCI investigation and, where an agency has given meaningful consideration to whether a significant conflict of interest exists, we will not substitute our judgment for the agency's, absent clear evidence that the agency's conclusion is unreasonable. See TeleCommunication Sys. Inc., B-404496.3, Oct. 26, 2011, 2011 CPD ¶ 229 at 3-4; PCCP Constructors, JV; Bechtel Infrastructure Corp., B-405036 et al., Aug. 4, 2011, 2011 CPD ¶ 156 at 17. The identification of conflicts of interest is a fact-specific inquiry that requires the exercise of considerable discretion. Guident Techs., Inc., B-405112.3, June 4, 2012, 2012 CPD ¶ 166 at 7; see Axiom Res. Mgmt., Inc. v. United States, 564 F.3d 1374, 1382 (Fed. Cir. 2009). A protester

must identify hard facts that indicate the existence or potential existence of a conflict; mere inference or suspicion of an actual or potential conflict is not enough. TeleCommunication Sys. Inc., *supra*, at 3; PCCP Constructors, JV; Bechtel Infrastructure Corp., *supra*, at 17.

Here, the record does not support the protester's OCI challenges, which, though numerous, provide no basis to question the reasonableness of the agency's OCI investigation. The record shows that DLA gave meaningful consideration to the protester's OCI allegations, and reasonably concluded that IronPlanet's use of former agency employees did not give the firm an unfair competitive advantage. As described above, DLA performed a detailed investigation of LSI's allegations, regularly communicating with LSI's counsel and requesting additional information from the protester, from September 2013, when LSI first brought its OCI concerns to the agency and requested an investigation, until April 2014, when LSI filed the instant protest. *See, e.g.*, AR, Tabs A-4-1-20, DLA-LSI emails and correspondence regarding investigation request. DLA states--and the protester does not dispute--that the agency reviewed hundreds of documents, including those provided by LSI, the CV contract files, and any documents that were available to the former operations director. *See* AR, Tab A-4-2, DLA Letter to LSI, Feb. 3, 2014, at 2. The agency also states that it interviewed DLA personnel who attended the vendor conference or who subsequently came in contact with the former operations director, and that none reported any conversations with him where he attempted to discuss the solicitation. AR, Tab A-4-15, DLA Response to LSI Request for Investigation, Oct. 9, 2013, at 2. Moreover, the agency queried the former operations director regarding the facts and circumstances of his involvement with the current solicitation. AR, Tab A-4-2, DLA Feb. 3, 2014, Letter to LSI, at 2.

Although LSI disputes the agency's OCI investigation and its documentation, the protester fails to identify any hard facts showing that IronPlanet had an actual or potential OCI that should have excluded it from the competition. Few, if any, of the documents provided by the protester contain information that could have given IronPlanet a competitive advantage in this procurement. What little information in those documents might, at some point, arguably, have been considered competitively useful or proprietary information, is either outdated or publicly available, as the agency points out. For example, the protester cites, as evidence of the former operations director's knowledge of LSI's technical approach, briefing slides discussing, among other things, the firm's number of licensed fork-lift drivers in February 2011 and the number of "hits" to the firm's website from January to November 2010. AR, Tab A-4-14, LSI Reply to DLA, Oct. 24, 2013, exh. B, Feb. 8, 2011 LSI/DOD Surplus Briefing, at 10-11, 20. There is no explanation in the record for how such information could give a competitor a competitive advantage for the sale of surplus property, nor does such information rise to the level of hard facts that indicate an actual or potential OCI.

To the extent that the documents provided by the protester may include any pricing information, the protester does not rebut the agency's argument that LSI's CV3 contract pricing, including sales volumes and types of property sold, are publicly available data and based on standard industry mark-ups.<sup>16</sup> Similarly, although LSI contends that the former operations director may have had access to its 2009 request for a price adjustment in its CV3 contract, the protester does not explain how access to information in this request would provide competitively useful information, nor has LSI rebutted the agency's position that the price adjustment request is based upon standard industry pricing information. Moreover, LSI fails to address DLA's assertion that the current solicitation significantly altered the pricing methodology for the CV4 contract, such that pricing information from LSI's CV3 contract is not competitively useful. Compare IFB at 11 (bid as percentage of gross revenue that contractor will share with government when property is resold) with CV3 Contract/IFB No. 08-0001-0001, at 10 (bid as percentage of acquisition value of property delivered; contractor's upfront purchase price for property determined by multiplying bid percentage by item's acquisition value).<sup>17</sup>

In this respect, despite access to IronPlanet's proposal under the protective order, LSI has not identified any aspect of IronPlanet's proposal that reflects the use or reliance on proprietary LSI information or agency source selection sensitive information. Rather, as the agency points out, most, if not all, of the protester's allegations regarding an OCI or violations of post-employment are speculative at best. Moreover, contrary to the protester's assertion, nothing in the record suggests that DLA's former operations director directly supervised LSI's performance. See AR, Tab A-3-24, OCI Waiver, Mem. for the Record, at 2-3 (discussing the three levels of staff between the former operations director and those who did, in fact, directly supervise performance of the CV3 contract). Furthermore, nothing in the record suggests that the former operations director was, as the protester wrongly asserts, "directly and substantially involved" in the CV4 procurement, see Protest at 23, 25. Rather, the record shows that he retired in February 2011, and LSI does not persuasively dispute that planning of the successor CV4 solicitation began in 2013 with the issuance of an April 10, request for information seeking disposal concepts for usable and scrap excess property. AR at 33; 2<sup>nd</sup> Supp. AR at 2. The protester also does not dispute that the agency began drafting the solicitation in

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<sup>16</sup> For example, the briefing slides provided by the protester include LSI's 2008 to 2009 cost projections, based on then-current market values, for possible surge-related increases in rolling stock. AR, Tab A-4-9, RCP Solutions Property Surge Briefing, Oct. 3, 2008, at 3.

<sup>17</sup> LSI's CV3 contract, amendments, and its underlying IFB and RFTP are publicly available at [www.dispositionservices.dla.mil/EFOIA-Privacy/Pages/ereadingroom.aspx](http://www.dispositionservices.dla.mil/EFOIA-Privacy/Pages/ereadingroom.aspx).

June 2013, and as noted above, the RFTP at issue here was not issued until January of 2014. AR, Tab A-3-24, OCI Waiver, Mem. for the Record, at 2.

To the extent that LSI alleges that the former operations director violated federal post-employment restrictions, the interpretation and enforcement of post-employment conflict of interest restrictions are primarily matters for the procuring agency and the Department of Justice, not our Office. See Medical Dev. Int'l, B-281484.2, Mar. 29, 1999, 99-1 CPD ¶ 68 at 7-8; Physician Corp. of Am., B-270698 et al., Apr. 10, 1996, 96-1 CPD ¶ 198 at 5 n.1. We will, however, within the confines of a bid protest alleging an OCI, determine whether any action of the former government employee may have resulted in an unfair competitive advantage for, or on behalf of, the awardee during the award selection process. See Creative Mgmt. Tech., Inc., B-266299, Feb. 9, 1996, 96-1 CPD ¶ 61 at 7. Specifically, we review whether an offeror may have prepared its proposal with knowledge of inside information sufficient to establish a strong likelihood that the offeror gained an unfair competitive advantage in the procurement. PRC, Inc., B-274698.2, B-274698.3, Jan. 23, 1997, 97-1 CPD ¶ 115 at 19-20. Our review includes consideration of whether the former government employee had access to competitively useful information, as well as whether the individual's activities with the firm likely resulted in disclosure of such information. OK Produce; Coast Citrus Distrib., B-299058, B-299058.2, Feb. 2, 2007, 2007 CPD ¶ 31 at 9. An individual's familiarity with the type of work required under a solicitation from prior government employment is not, by itself, evidence of an unfair competitive advantage. Id.

As described above, we find that DLA reasonably investigated the protester's OCI allegations, and reasonably concluded that IronPlanet did not obtain an unfair competitive advantage from its hiring of former DLA employees.

#### Technical Evaluation

LSI also protests that the agency unreasonably found IronPlanet's proposal technically acceptable. In this regard, LSI contends that the agency failed to adequately document its evaluation, stating that the contemporaneous evaluation record consists only of "check marks with no associated explanations." See Protester's Comments & 2<sup>nd</sup> Supp. Protest at 5; Protester's Supp. Comments at 7.

Where a protester challenges an agency's evaluation of sales contracting proposals, our Office will not reevaluate proposals, but instead will examine the record to determine whether the agency's judgment was reasonable and consistent with the stated evaluation criteria and applicable statutes and regulations. See, e.g., Liquidity Services, Inc., B-294053, Aug. 18, 2004, 2005 CPD ¶ 130 at 5.

As a preliminary matter, we do not agree that DLA's technical evaluation was inadequately documented. Contrary to LSI's characterization, the contemporaneous record actually includes: composite evaluation reports for each

technical proposal; individual evaluator rating forms; a number of clarification emails between the sales contracting officer and offerors (including charts with pin-point citations to the offeror's proposal and specific questions in that regard); and individual copies of proposals for each of the four TEC evaluators--including their mark-ups and narrative comments.<sup>18</sup> Although LSI believes that more documentation was required to demonstrate a "searching and systematic review of proposals," Protester's Supp. Comments at 6, we find that the contemporaneous record more than adequately documents DLA's technical evaluations and provides a sufficient basis for our review.

### IronPlanet's Business Plan

The RFTP informed offerors that technical proposals would be evaluated on the basis of their proposed business and operations plans, which the solicitation stated would be evaluated as acceptable, reasonably susceptible of being made acceptable, or unacceptable. RFTP at 10. With regard to offerors' business plans, offerors were directed to provide, among other things, evidence of their experience with business arrangements involving the removal, property assurance, and reporting requirements of large and varied quantities of used surplus property such as that described in the IFB.<sup>19</sup> See id. at 7.

The protester argues that the agency unreasonably found IronPlanet's proposal to be acceptable with regard to the solicitation's experience requirements. LSI contends in this respect that offerors must show experience selling customized military equipment, including "unique" reporting and accountability requirements of such sales. See Protest at 11; Protester's Comments & 2<sup>nd</sup> Supp. Protest at 17-19. The protester also maintains that IronPlanet lacks the significant reporting and recordkeeping experience required by the solicitation. Protester's Comments & 2<sup>nd</sup> Supp. Protest at 23.

As DLA correctly points out, nowhere does the RFTP require that offerors have experience selling "military equipment," or even use the term "military." Supp. AR at 18; see RFTP. In fact, the RFTP only requires that offerors demonstrate recent experience, among other things, selling different types of items ranging in size

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<sup>18</sup> See AR, Tab A-1-IP, IronPlanet Composite Tech. Evaluation & Rating Forms at 1-9; Tab A-1-LSI, LSI Composite Tech. Evaluation & Rating Forms, at 1-10; Tabs A-3-13-22, DLA Clarification Emails to Offerors, Feb. 28-Mar. 11, 2014; Tab A-3-30, IronPlanet Proposal, annot.; Tab A-3-31, LSI Proposal, annot.

<sup>19</sup> A draft of the IFB was issued with the RFTP. See RFTP at 2. The IFB contains the CV4 performance requirements, terms, and conditions. See IFB.

from nuts and bolts to large equipment.<sup>20</sup> RFTP at 7. Moreover, LSI does not meaningfully rebut the agency's assertion that the various reports required under the CV4 contract are similar to the inventory lists, and sales and buyer reports routinely used by businesses every day. See AR at 15. While the protester selectively disagrees with the agency's evaluation of IronPlanet's business plan and experience, nothing in the record shows that DLA's evaluation was inconsistent with the RFTP's evaluation criteria.

#### IronPlanet's Operational Plan

With regard to offerors' operational plans, offerors were directed to address, among other things, their plan to maintain accountability of property and produce required reports, and their plan to handle the removal and storage of property, including sufficient detail to meet contractual timeframes and logistical inventory flow. See RFTP at 4-5.

LSI argues that the agency unreasonably found IronPlanet's operational plan to be acceptable. For example, LSI contends that IronPlanet did not adequately address the solicitation's requirement that the contractor remove property from government storage facilities within 10 business days of receipt of a delivery order. Protester's Supp. Comments at 8-11. The protester also maintains that IronPlanet's operational plan did not disclose how its tracking system would be incorporated into its proposed facilities. Id. at 21. Moreover, LSI asserts that IronPlanet proposed [DELETED] logistical personnel "to handle all interactions with all of IronPlanet's shipping and storage vendors nationwid[e]" and that the proposal is ambiguous with regard to contractor and staffing roles. Id.; Protester's Comments & 2<sup>nd</sup> Protest at 12 (emphasis added).

Here, too, the protester mischaracterizes the record, none of which supports LSI's myriad assertions. First, despite LSI's selective reliance on the 10 business day removal requirement, the solicitation, as the agency points out, also permits the contractor to conduct "sales-in-place" (i.e., at the DOD facility) and allows removal of property within 75 days under specified circumstances. See IFB at 27; Supp. AR at 15-16. Second, contrary to the protester's assertion, nothing in IronPlanet's proposal suggests that it would handle all interactions with the firm's shipping and storage vendors nationwide with [DELETED] logistical personnel. Again, the

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<sup>20</sup> The solicitation identifies the pool of rolling surplus property to include passenger motor vehicles, trucks, dozers, and trailers. See IFB at 19. The agency explains that any rolling surplus property issued under the contract would not contain specialized military equipment and that any customized offensive or defensive military components would be removed or destroyed before providing the vehicle to the contractor. Supp. AR at 18-19.

protester selectively ignores the fact that IronPlanet proposed, in addition to [DELETED] dedicated personnel, to use a shipping and hauling firm as part of its logistical team, as well as up to [DELETED] dedicated field operators and related support personnel whose responsibilities will include managing transportation and relocation, and maintaining logistical and loading data in that regard. See, e.g., AR, Tab A-1, IronPlanet Proposal, Business Plan, at 7-10. The record also does not support LSI's assertion that IronPlanet's proposal was ambiguous with regard to the proposed roles of its staff and contractors. See Protester's Supp. Comments at 21-22.

### Change in Requirements

Finally, LSI contends that DLA must cancel and reissue the solicitation because the agency has drastically reduced the sales volume of surplus property. 3<sup>rd</sup> Supp. Protest at 1-5. The protester (which, as noted above, holds the current CV3 sales contract for the sale of both rolling and non-rolling surplus property) explains in this respect that on June 18, 2014, LSI was issued a "Do-Not-Sell" (DNS) list of over 500 trucks and vans with specified gas or diesel engines. Id., exh. A, Sales Contracting Officer's Email to LSI, June 18, 2014; exh. B, Do-Not-Sell List. LSI maintains that this "massive" reduction in sales volume for 2013 (almost 70 percent of the pool of property as measured by acquisition value, according to the protester) undermines LSI's and other offerors' pricing assumptions for their CV4 bids, requiring DLA to conduct a new competition. See 3<sup>rd</sup> Supp. Protest at 1; Protester's 2<sup>nd</sup> Supp. Comments at 2-4.

DLA explains that in April 2014, the agency began exploring the possibility of selling certain types of surplus [DELETED] vehicles. See 2<sup>nd</sup> Supp. AR at 5. [DELETED] DLA indicates that it has halted the sales of these vehicles pending a final determination on sales capabilities, including whether selling them to the public as surplus property would likely be considered [DELETED], and that the agency continues to investigate the type and amount of property affected. See id.; DLA Email to GAO, July, 11, 2014.

As a general rule, agencies should not award a contract on a basis that is fundamentally different from the basis upon which the competition for the requirement was conducted. See, e.g., Consolidated Aeronautics, B-225337, Mar. 27, 1987, 87-1 CPD ¶ 353 at 3. Where, for example, there is a significant change in the government's quantity requirements, the appropriate course of action is for the agency to apprise the offerors of its revised requirements, and afford them an opportunity to submit proposals responsive to those revised requirements, even where, as here, a source selection decision has been made. See, e.g., United Telephone Co. of the Northwest, B-246977, Apr. 20, 1992, 92-1 CPD ¶ 374 at 7-10, aff'd on recon., Dept. of Energy--Recon.; Westinghouse Hanford Co.--Recon.; United Telephone Co. of the Northwest, B-246977.2, et al. July 14, 1992, 92-2 CPD ¶ 20. The purpose of this rule is to avoid award decisions not based on the agency's

most current view of its needs. Int'l Data Sys., Inc., B-277385, Oct. 8, 1997, 97-2 CPD ¶ 96 at 4.

Here, the record does not establish that DLA's requirements are fundamentally different than the basis upon which offerors competed. The IFB advised offerors that there may be fluctuations in the volume and value of items to be sold, and included the following disclaimer:

Prospective bidders should be aware of certain risk factors that could affect a bidder's assessment of this contract and the calculations supporting the resulting bid. Although [DLA] does not represent that it has identified all such risk factors, the following, in addition to those risks identified elsewhere in this IFB, should be considered by a prospective bidder:

**The future volume, quality, condition, market value, types (i.e., distribution of property referrals across Federal Supply Classes (FSCs), and geographic concentrations (i.e., referrals for sale at particular delivery points) of the property cannot be predicted. Applicable statutes, regulations, policies and inter-service agreements govern whether the disposition of particular items of surplus is through DLA DISPOSITION SERVICES or through other disposition modes. The volume and nature of the property referred for sale under this contract could be affected by such changes.**

Described generally, applicable statutes and regulations grant DLA DISPOSITION SERVICES less flexibility to agree to amend a contract after award than prospective bidders may have experienced in other contractual settings.

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As often as necessary, [DLA] will furnish the Contractor a Do-Not-Sell (DNS) List representing items that are or have become controlled and no longer eligible for sale. [T]he Contractor is required to return any item identified on the DNS List that is in the Contractor's current inventory and not physically removed by a resale buy. [DLA] shall reimburse the Contractor's purchase price in addition to the cost associated with the return of the property to DLA.

IFB at 7-8, 24 (emphasis in original); see also IFB at 10 (providing DLA weblink for historical information on recent sales of similar items, and advising offerors that any sales history information is provided for informational purposes and is not a



predictor of future sales). LSI's CV3 contract includes a largely identical disclaimer. See CV3 Contract/IFB No. 08-0001-0001, at 5-6, 21.

Although the protester contends that the latest DNS list represents a current reduction in sales volume of almost 70 percent (measured by acquisition value), the agency points out that the volume and mix of property changes considerably from year to year subject to policy and mission changes. See 2<sup>nd</sup> Supp. AR at 10. For example, DLA asserts that, taking into account recent historical sales data, the "worse case scenario" (i.e., that no tactical vehicles on the current DNS list may be sold) would be a 34 percent in reduction in sales volume given a 2012 surge in surplus tactical vehicles sales. See id. at 7-8. The protester does not substantively address this argument, or otherwise question the agency's historical sales data or assumptions. Protester's 2<sup>nd</sup> Supp. Comments at 4-13. Moreover, DLA asserts--and the protester does not dispute--that the agency has not made a final determination on the salability of [DELETED] vehicles, that it has already [DELETED], and that DLA continues to investigate the type and amount of property that might be affected. See DLA Email to GAO, July 11, 2014. Indeed, the protester concedes that DLA does not yet know the volume of property impacted and that the volume might increase. See Protester's 3<sup>rd</sup> Supp. Comments at 8; Protester's Email to GAO, July 11, 2014, at 2.

In short, the record does not support LSI's argument that the requirements have changed in a way not fundamentally contemplated in the competition. See Consolidated Aeronautics, supra, (protest that description of aircraft scrap residue in a sale IFB was misleading because it did not identify specific aircraft type included is without merit where description was broad enough to encompass scrap from various aircraft and protester could have inspected lot to determine what was included in it).

The protest is denied.

Susan A. Poling  
General Counsel