

**IN THE UNITED STATES COURT OF FEDERAL CLAIMS  
Bid Protest**

NIGHTWING INTELLIGENCE  
SOLUTIONS, LLC,

Plaintiff,

v.

THE UNITED STATES,

Defendant.

No. \_\_\_\_\_

Judge \_\_\_\_\_

**FILED UNDER SEAL**

**PUBLIC VERSION**

**COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

Plaintiff Nightwing Intelligence Solutions, LLC (“Nightwing”), through undersigned counsel, files this post-award bid protest Complaint for declaratory and injunctive relief against Defendant, the United States of America, acting through the Department of Homeland Security (“DHS” or “Agency”). In support of this action, Nightwing states and alleges as follows:

**I. NATURE OF THE ACTION**

1. This is a protest challenging DHS’ award of the seven-year, Agile Cybersecurity Technical Solutions (“ACTS”) Indefinite Delivery Indefinite Quantity (“IDIQ”) contract with a ceiling value of \$2.4 billion to Leidos, Inc. (“Leidos”) under Request for Proposals No. 70QS0123R00000025 (“Solicitation” or “RFP”).

2. DHS’ actions with respect to this procurement were arbitrary, capricious, and without rational basis. DHS’ unreasonable actions have directly harmed Nightwing, an offeror that submitted a proposal in response to the Solicitation. Had DHS conducted the procurement in accordance with applicable law and the Solicitation’s requirements, Nightwing would have been awarded the contract.

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\_\_\_\_\_

3. The DHS ACTS source selection decision to award this contract to Leidos, was riddled with fatal errors that impacted every aspect of the evaluation. Even on the limited information provided to Nightwing in connection with its debriefing, it is apparent that DHS conducted critically flawed Technical, Past Performance, and Cost evaluations; that DHS failed to consider a significant unfair competitive advantage held by Leidos; and that Leidos' proposal was unawardable because of the unavailability of one of its key personnel. The result of these errors is that DHS' best value decision is premised on illusions. Not only are the final ratings unsupported and Leidos' most probable cost unrealistic, but the competition itself is so undermined by the evaluators' failure to follow the stated evaluation criteria and Leidos' unfair competitive advantage that it is utterly impossible to determine the true competitive position of any of the offerors in this procurement.

4. As set forth herein, DHS' award decision was arbitrary, capricious, and contrary to law and regulation, and has caused and will continue to cause Nightwing irreparable harm. Moreover, fairness in the procurement process is fundamental to serving the public interest. *See Asia Pac. Airlines v. United States*, 68 Fed. Cl. 8, 27 (2005) ("[I]t is well-established that the public interest is well-served by ensuring that the government procurement process is fair."). In awarding the contract to Leidos, DHS failed to adhere to essential requirements of fairness. An award resulting from such improper procedures is inherently flawed and contrary to the public interest. *See id.* Accordingly, Nightwing is entitled to declaratory and injunctive relief.

5. Nightwing seeks an order from this Court invalidating DHS' award to Leidos and instructing DHS to award the contract to Nightwing, as the offeror whose proposal provided the best value to DHS. In the alternative, Nightwing requests that the Court instruct DHS to make a

new award decision based on a fair and rational best value analysis in accordance with the terms of the Solicitation. Because of the potential for prejudice to Nightwing if Leidos is permitted to continue performing during the pendency of the protest, Nightwing is requesting that the Agency voluntarily stay performance of the contract in its entirety.

## II. JURISDICTION

6. The Court has jurisdiction over this bid protest pursuant to 28 U.S.C. § 1491(b). This is a post-award bid protest by a party “objecting to . . . the award of a contract . . . in connection with a procurement.” *See id.*

7. Nightwing is an interested party to pursue this protest. 28 U.S.C. § 1491(b)(1). To qualify as an interested party, a protester must demonstrate that it is an “actual or prospective bidder or offeror whose direct economic interest would be affected by the award of the contract or by failure to award the contract.” *Nat’l Air Cargo Grp., Inc. v. United States*, 126 Fed. Cl. 281, 295 (2016) (quoting *Am. Fed’n of Gov’t Emps. v. United States*, 258 F.3d 1294, 1302 (Fed. Cir. 2001)); *see also Diaz v. United States*, 853 F.3d 1355, 1358–59 (Fed. Cir. 2017) (affirming two-part, “actual or prospective offeror” with a “direct economic interest,” test for standing).

8. Nightwing is a complete successor in interest to Raytheon Company (“Raytheon”), an actual offeror in this procurement who submitted a timely, fully responsive proposal.<sup>1</sup> Accordingly, Nightwing stands-in as an actual offeror with a direct economic interest

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<sup>1</sup> [REDACTED]

in the contract award and in the outcome of this protest. *L-3 Commc'ns Integrated Sys., L.P. v. United States*, 84 Fed. Cl. 768, 778–79 (2008) (“[Protester] is the complete successor-in-interest to the actual offeror, Raytheon Company, and embraces the identical business unit which submitted Raytheon Company’s bid in the [protested] procurement. As such, [protester] stands in the shoes of Raytheon Company in the instant case and has standing to pursue this claim.”); *Alabama Aircraft Indus., Inc. v. United States*, 83 Fed. Cl. 666, 682 (2008) (holding that the successor-in-interest to the original offeror, was in effect, the same legal entity which had submitted its proposal and was an interested party under ADRA). Nightwing, therefore, has standing to pursue this protest.

### III. THE PARTIES

9. [REDACTED]

[REDACTED] Nightwing’s central promise is to help its customers stay ahead of the threats that put our nation’s security and way of life at risk.

10. Defendant is the United States of America, acting through the DHS, an executive agency of the federal Government.

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[REDACTED]

[REDACTED]

#### IV. FACTUAL BACKGROUND

##### The ACTS Procurement

11. The Cybersecurity and Infrastructure Security Agency (“CISA”), an operational component overseen by DHS, serves as the nation’s risk advisor, working with partners to defend against complex threats (digital and physical, man-made, technological, and natural), and collaborating to build more secure and resilient infrastructure for the future. Ex. 4, IDIQ PWS at 1. In December 2022, CISA’s Cyber Security Division (“CSD”) issued the ACTS Solicitation to fulfill current CISA National Cybersecurity Protection System (“NCPS”) acquisition program mission needs while also providing flexibility to support plans for transforming the NCPS acquisition program from its current state into a “services organization.” *Id.* at 2. CISA’s vision for the services organization is to provide continuous exploration, integration, deployment, and sustainment of cybersecurity solutions to a broader set of potential customers.

12. The awardee of the ACTS contract will provide information technology (“IT”) services, including support for CSD’s Capabilities Delivery (“CD”) organization with current and future cyber capabilities system development and sustainment efforts using Scaled Agile Framework® (SAFe®) and DevSecOps methodologies while collaborating with CSD stakeholders, business owners, and industry partners. *Id.* Such services will be used to prepare the analysis, design, integration, development, test, implementation, deployment, and sustainment of cybersecurity solutions. *Id.*

13. This procurement contemplated the award of an IDIQ contract with separately priced task orders (“TO”) and a minimum ordering obligation of \$1 million and a ceiling of \$2.4 billion over the life of the contract. Ex. 5, RFP at 5. The ACTS IDIQ specified a

seven-year ordering period—inclusive of a 1-year base period, four 1-year option years, and two 1-year award terms. *Id.* at 14.

### **The Solicitation**

14. The RFP<sup>2</sup> established a multistep down-select approach where DHS was required to evaluate proposals in two phases, with the following evaluation factors being considered in each respective phase:

#### **Phase 1: Advisory Down-Select**

Factor 1: Top-Secret Facility Clearance (Go/No-Go)

Factor 2: Targeted Prior Experience

#### **Phase 2: Technical, Management and Cost/Price Proposals**

Factor 3: Technical Approach

Factor 4: Management Approach

Factor 5: Scenario-Based Evaluation (Orals)

Factor 6: Past Performance

Factor 7: Cost and Price

*Id.* at 98 (bold in original).

15. Factor 3 was to be the RFP's most important evaluation factor, followed by Factor 2 and Factors 4-6 in descending order of importance. *Id.* Factors 2-6, when combined, were to be significantly more important than Cost/Price. The RFP provided that Factors 2-6 would be used to conduct the Agency's best value tradeoff analysis. *Id.*

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<sup>2</sup> The Solicitation was amended nine times, with the final amendment occurring on March 3, 2024. However, aside from a clarification on how to complete the Key Management Personnel List of the Acquisition Risk Questionnaire in Amendment 09, the conformed Amendment 08 possesses the most recent Solicitation provisions for the requirements at issue in this protest. As a result, all citations to the RFP are to the conformed RFP Amendment 08 unless otherwise specified herein.

### Phase 1: Advisory Down-Select Evaluation

16. Under Phase 1, DHS was required to assess whether an offeror possessed a Top-Secret Facility Clearance Level and prior experience demonstrating work of comparable size, scope, and complexity to the ACTS IDIQ requirements.<sup>3</sup> *Id.* at 99. If an offeror possessed the required facility clearances, it would receive a “Go” under Factor 1 and would be subsequently evaluated under Factor 2, where it would receive either a “Low Confidence,” “Some Confidence” or “High Confidence” rating in accordance with the following rating methodology:

**High Confidence:** Based on the relevancy and recency of the Offeror’s prior experience submissions to the PWS requirements, the Government has high confidence that the Offeror will successfully perform the required effort.

**Some Confidence:** Based on the relevancy and recency of the Offeror’s prior experience submissions to the PWS requirements, the Government has some confidence that the Offeror will successfully perform the required effort.

**Low Confidence:** Based on the relevancy and recency of the Offeror’s prior experience submissions to the PWS requirements, the Government has little or no confidence that the Offeror will successfully perform the required effort.

*Id.* Offerors that received a rating of “Go” for Factor 1 and a “Low-Confidence” rating for Targeted Prior Experience would be advised that they were “unlikely to be viable competitors along with the general basis for the Government’s recommendation,” but would not be precluded from participating in Phase 2 if the Offeror chose to do so. *Id.* at 71.

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<sup>3</sup> Nightwing does not independently challenge DHS’ Phase 1 evaluation at this time. Accordingly, Nightwing only provides a brief overview of the requirements and evaluation criteria for these elements.

## **Phase 2: Technical, Management and Cost/Price Proposals Evaluation**

17. Offerors that proceeded to Phase 2 of the procurement were to be evaluated on the basis of written proposals and oral presentations designed to evaluate their understanding of the PWS requirements and the soundness in their provided approaches, as well as the Agency's associated confidence in the offerors' ability to successfully perform the ACTS contract requirements. *Id.* at 98–99.

18. Based on the Agency's evaluation findings under each factor, DHS was to assign the offeror an overall confidence rating under Factors 3-5, respectively, in accordance with the following rating methodology:

**High Confidence:** The Government has high confidence that the Offeror understands the requirement, proposes a sound approach, and will be successful in performing the contract with little or no Government intervention.

**Some Confidence:** The Government has some confidence that the Offeror understands the requirement, proposes a sound approach, and will be successful in performing the contract with some Government intervention

**Low Confidence:** The Government has low confidence that the Offeror understands the requirement, proposes a sound approach, or will be successful in performing the contract even with Government intervention.

*Id.* at 100–01, 103–04.

### ***Factor 3: Technical Approach***

19. Under Factor 3, offerors were to submit a Technical approach that addressed all of the requirements in the Sample TO PWS and Transition Planning TO PWS—though the Sample TO PWS was deemed more important than the Transition Planning PWS. *Id.* at 83–84, 99.



Proposals were to demonstrate a thorough knowledge and understanding of those requirements and their associated risks. *Id.* at 83.

20. Proposals were to include a Technical Approach that addressed the Sample TO PWS requirements needed to perform work associated with five Functional Capability Areas (“FCAs”): (1) CD Engineering, (2) Agile Cross-Functional Teams, (3) Network Operations Center (“NOC”) and Security Operations Center (“SOC”), (4) Technology Insertion, Refreshment, and Asset Management, and (5) Cybersecurity Infrastructure. *Id.* DHS was required to evaluate an offeror’s approach to performing the work associated with the five FCAs, with a focus on whether the offeror appropriately identified risks and mitigations, demonstrated an understanding of the transformed CD program high-level vision and an ability to deliver agile technical services that creatively address cybersecurity challenges, and organize an initial set of cross-functional teams who work together to provide fully integrated cyber solutions on a common infrastructure. *Id.* at 100.

21. In their Technical Approach proposals, offerors were also to address the RFP’s Transition Planning TO PWS requirements, including the offeror’s approach to execute all contractual and operational transition planning, tracking, execution oversight, and reporting mechanism requirements. *Id.* at 83, 100.

#### ***Factor 4: Management Approach***

22. Factor 4 proposals consisted of five separate approaches: (1) Management Overview, (2) Key Personnel, (3) Staffing, (4) Small Business Subcontracting Plan, and (5) Quality Assurance Plan. *Id.* at 103. Importantly, the Solicitation required various key personnel, for the following positions:

- TO Program Manager
- Agile/Iterative Software Development Process Manager
- Chief Solutions Architect
- Quality Control/Test Manager
- Chief Integration Engineer
- Chief Infrastructure Engineer
- Chief Security Engineer
- Chief Cloud Engineer
- System Security Manager
- Network Monitoring/Service Desk Manager
- Security Operations Center (SOC) Manager
- Cyber Infrastructure Team Lead
- Transition Manager

See Ex. 6, ACTS Transition Planning TO PWS at 8 (Table 2).

23. With respect to Key Personnel, offerors were to be evaluated on the degree to which an offeror proposed key personnel with exceptional experience, education, certifications, skills and technical expertise related to the respective key positions for which they were being proposed. Ex. 5, RFP at 101.

24. Based on the Agency's evaluation findings for an offeror under all five Management Approaches, DHS was required to assign the offeror a single overall confidence rating. *Id.* at 103.

#### ***Factor 5: Scenario Based Orals***

25. The Solicitation required offerors to send key personnel and additional staff who would be involved in the performance or oversight of the work after contract award to an on-site "Scenario-Based Evaluation." *Id.* at 88. Under Factor 5, offerors were required to present "Prepared" and "On-the-Fly" presentations that DHS would assess with respect to whether the offeror provided a solution that was relevant to the subject, complete, and at the level of detail required by the RFP. DHS would then assign the offeror an overall confidence rating based on

the offeror's demonstrated likelihood of successfully performing the task order requirements based on its knowledge of the material, understanding of the problem, and the presented solution/approach. *Id.* at 103.

***Factor 6: Past Performance***

26. The RFP provided that offerors' Phase 1: Targeted Prior Experience examples, along with past performance questionnaires and Past Performance Information ("PPI"), would be used to evaluate offerors' Past Performance volumes for recency and relevancy. *Id.* at 104–05.

27. For its recency assessment, DHS was required to consider whether the offeror's PPI pertained to performance that occurred within four years of the Solicitation date and had a minimum of one year of performance. *Id.* at 104. Relevant past performance included efforts that involved work similar in size, scope, and complexity to the requirements described in the PWS. *Id.*

28. Based on the Agency's recency and relevancy determinations, DHS was required to assign each PPI reference an overall performance quality rating in accordance with the following definitions:

OUTSTANDING – Performance meets contractual requirements and exceeds many contractual requirements to the Government's benefit. The element being assessed was accomplished with few minor problems for which corrective actions taken by the contractor were highly effective.

GOOD – Performance meets contractual requirements and exceeds some to the Government's benefit. The element being assessed was accomplished with some minor problems for which corrective actions taken by the contractor were effective.

ACCEPTABLE – Performance meets contractual requirements. The element being assessed was accomplished may contain some minor problems for which corrective actions taken by the contractor appear or were acceptable.

**MARGINAL** – Performance meets some contractual requirements. The element being assessed was accomplished; however, the past performance reflects identified problems for which the contractor has not yet identified corrective actions. The corrective action taken by the contractor was not effective or required significant government intervention.

**UNSATISFACTORY** – Performance does not meet most contractual requirements and recovery is not likely in a timely manner, and/or the element being assessed contains a serious problem(s) for which the contractor's corrective actions appear or were ineffective.

**NOT APPLICABLE** – Unable to provide a rating. Contract did not include performance for this aspect.

*Id.* at 105.

29. Taking the totality of an offeror's PPI ratings, DHS would thereafter assign the offeror an overall Past Performance rating in accordance with the following definitions:

**Highly Satisfactory:** Based upon the Offeror's past performance record it is likely that the Offeror will successfully perform the required effort with little to no risk.

**Satisfactory:** Based upon the Offeror's past performance record, it is likely that the Offeror will successfully perform the required effort with some risk.

**Unsatisfactory:** Based upon the Offeror's past performance record, it is not likely that the Offeror will successfully perform the required effort.

**Neutral:** No relevant past performance record is available upon which to base a meaningful performance rating. This is neither a negative or positive assessment.

*Id.* at 106.

#### ***Factor 7: Cost and Price***

30. Under Factor 7, offerors were required to submit three deliverables: (1) a Cost/Price proposal, (2) a Cost/Price narrative, and (3) a Professional Employee Compensation

Plan. *Id.* at 80. Offerors were required to propose a cost-plus fixed fee contract type for both the Transition Planning PO and the Sample TO. *Id.* at 94.

31. To assist with the Agency’s best value determination, DHS was required to calculate offerors’ Total Evaluated Prices (“TEPs”), which were the sum of the Transition Planning TO base and option periods plus the Sample TO, weighted to reflect the IDIQ period of performance inclusive of options and FAR 52.217-8, Option to Extend Services. *Id.* at 106.

32. Independently, the RFP provided that Cost and Price proposals would be evaluated for reasonableness and cost realism in accordance with FAR 15.305(a)(1) and FAR 15.404-1(d), respectively. *Id.*

**Proposal Submission, Notice of Award, and Debriefing**

33. Nightwing timely submitted its proposal on May 11, 2023, as one of five proposals DHS received in response to the present effort. Ex. 7, Unsuccessful Offeror Notice. On February 6, 2024, DHS notified Nightwing of award to Leidos with a TEP of \$1,271,957,953.38. *Id.* The Agency concluded that “DHS determined that your firm’s proposal did not represent the Best Value to the Government” and assigned the following ratings to both Nightwing and Leidos:

Contractor	Factor 1: Top-Secret Facility Clearance (GO/NO- GO)	Factor 2: Targeted Prior Experience	Factor 3: Technical Approach	Factor 4: Management Approach	Factor 5: Scenario Based Evaluation (Orals)	Factor 6: Past Performance	Total Proposed Price
Raytheon							
Leidos	GO	High Confidence	High Confidence	High Confidence	High Confidence	Satisfactory	\$1,271,957,953.38

*Id.*

34. DHS provided Nightwing a formal debriefing on February 14, 2024. Ex. 8, Debriefing at 1.

35. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]<sup>4</sup>

36. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].

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<sup>4</sup> For the avoidance of confusion, Nightwing, as the complete successor in interest of Raytheon, has been substituted for Raytheon in all quotes herein of the Agency's evaluation findings.

[REDACTED]

37. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].

38. [REDACTED]

[REDACTED]

[REDACTED].

39. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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[REDACTED]

[REDACTED]

[REDACTED]

40. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

41. DHS noted that [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]



42. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].

43. DHS detailed the following adjusted Costs and Prices for Nightwing and Leidos:

OFFEROR	PROPOSED COST AND FEE	MOST PROBABLE COST	DIFFERENCE FROM PROPOSED COST
[REDACTED]			
Leidos	\$1,271,957,953	\$1,300,577,256	\$28,619,303

*Id.* [REDACTED].

44. As part of its tradeoff, DHS provided the following rationale to support its award determination to Leidos:

[REDACTED]

*Id.* at 26.

[REDACTED]

**Nightwing Learns that Leidos Benefitted From Inside Information Provided by a Former DHS Employee**

**Former DHS Employee, [REDACTED] Role at DHS**

45. As noted above, this procurement was conducted by DHS' CISA. One of CISA's key technologies within NCPS is EINSTEIN.<sup>5</sup> The incumbent DOMino contract and the current ACTS procurement are integral components of the EINSTEIN program.

46. DOMino is comprised of multiple Agile Release Trains—teams that work together to develop capabilities. The [REDACTED]

[REDACTED] is one such team. The [REDACTED] team [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

47. Mr. [REDACTED] joined DHS in 2018, working for the CISA as an Information Technology specialist. *See* Ex. 10, [REDACTED] LinkedIn Profile; Ex. 11, OpenPayrolls.com Profile, at 1.

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<sup>5</sup> The EINSTEIN Program is an automated process for collecting, correlating, analyzing, and sharing computer security information across the Federal civilian government. *See* [https://www.dhs.gov/xlibrary/assets/privacy/privacy\\_pia\\_eisntein.pdf](https://www.dhs.gov/xlibrary/assets/privacy/privacy_pia_eisntein.pdf) (last accessed Feb. 19, 2024). EINSTEIN provides CISA with a situational awareness snapshot of the health of the Federal Government's cyber space. The first phase of EINSTEIN, known as EINSTEIN 1 analyzes network flow information from participating federal executive government agencies and provides a high-level perspective from which to observe potential malicious activity in computer network traffic of participating agencies' computer networks. The updated version, EINSTEIN 2, incorporates network intrusion detection technology capable of alerting the United States Computer Emergency Readiness Team (US-CERT) to the presence of malicious or potentially harmful computer network activity in federal executive agencies' network traffic.

[REDACTED]

[REDACTED]

48. As described by his former DHS colleague, the “Department of Homeland Security . . . CISO”:

[REDACTED]

[REDACTED].

49. Mr. [REDACTED] became the [REDACTED] Program Manager in August 2021, and served in this role until his resignation from the Government in February 2022. In his role as [REDACTED] Program Manager, Mr. [REDACTED] bore responsibility for managing all aspects of the [REDACTED] program, providing him with extensive access to non-public information regarding performance of the DOMino contract. Mr. [REDACTED] duties required him to, among other things, design, develop and deploy enterprise infrastructure products and services for NCPS. Mr. [REDACTED] role also required him to participate in decision-making regarding the priorities of development efforts—including those under the DOMino contract—as well as discussions regarding the types of resources and skills needed to execute work under the [REDACTED] program and the DOMino contract.

50. Mr. [REDACTED] was deeply involved with the large organizational structure change within CISA that occurred between June and November 2021. This involvement provided Mr. [REDACTED] with intimate knowledge of numerous aspects of the [REDACTED] program and the

[REDACTED]

DOMino contract. For example, Mr. [REDACTED] role as the [REDACTED] Program Manager required him to be involved in, and knowledgeable of, Nightwing's nonpublic proprietary staffing information under the DOMino contract. *See* DHS Letters Requesting Information Regarding UCA and Nightwing Responses.<sup>6</sup> Indeed, Mr. [REDACTED] role provided him with access to Nightwing's highly proprietary Staffing Spreadsheets, which included information about Nightwing's approach to staffing the incumbent contract.

51. In addition to his access to Nightwing's confidential staffing information under the DOMino contract, Mr. [REDACTED] role as the [REDACTED] Program Manager also provided him with unfettered access to a wealth of nonpublic technical performance information. For example, Mr. [REDACTED] played a role in management of the [REDACTED] architectural roadmap. Any and all architectural changes under the [REDACTED] program—including those made under the DOMino contract—were within his purview. Mr. [REDACTED] also managed the [REDACTED] backlog and assigned tasks to each team under the [REDACTED] umbrella, including the DOMino team.

52. Moreover, as [REDACTED] Program Manager, all Program Incremental Design Reviews ("IDRs") of [REDACTED] including those under the incumbent DOMino contract—were vetted through Mr. [REDACTED]. This required his review of all products and services provided by Nightwing under the incumbent contract. A July 30, 2021 email is but one example of Mr.

[REDACTED] involvement. *See* July 20, 2021 Email re [REDACTED]. The email evidences Mr.

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<sup>6</sup> Because of the sensitive nature of the work performed under DOMino, Nightwing is not attaching the emails and documents referenced herein as exhibits to this email. Examples of relevant documents that were in Nightwing's possession were transmitted to DHS via secure file transfers and therefore should be part of the Administrative Record.

[REDACTED]  
[REDACTED]

██████████'s engagement with IDRs for the ██████████ program, which included nonpublic information regarding the architecture views of the system.

53. Mr. ██████████ role also provided him access to Nightwing's cost burn rate data, which correlates the staffing numbers to the cost by Contract Line Item ("CLIN") and Task Order. The burn rate data also reflected all costs related to Nightwing procurements, which could be analyzed to reveal Nightwing's proprietary vendor pricing. Nightwing provided these types of documents to the Government on a weekly basis and Mr. ██████████ had access to them throughout his time as the ██████████ PM. In addition, Nightwing employees were required to send their New Change Requests ("CRs") to Mr. ██████████ whose responsibility it was to determine whether the CR would be granted and where new work would fall. This was just one example of the ways in which Mr. ██████████ role required him to become intimately familiar with all aspects of Nightwing's Technical Approach, staffing, and pricing under the incumbent DOMino contract. *See, e.g.*, September 1, 2021 Documents Regarding the CR Process.

54. Indeed, even before taking on the Program Manager role under which Mr. ██████████ had access to nonpublic information regarding the incumbent DOMino contract and Nightwing's proprietary information regarding its performance, Mr. ██████████ work at CISA also provided him with nonpublic, competitively useful information. Prior to August 2021, Mr. ██████████

served as the Product Owner of two development teams on ██████████

██ Both positions provided Mr. ██████████ with access to Nightwing's nonpublic proprietary information regarding the development and production environments for these products as well as nonpublic CISA information regarding

Agency preferences and protocols. In his PO roles, Mr. [REDACTED] gained in-depth knowledge of the skills on the Nightwing DOMino teams and played a role in prioritizing tasks on those teams. These roles required Mr. [REDACTED] to develop an understanding of not only Nightwing’s staffing and management approaches, but also its technical solutions. For example, on January 15, 2021, Mr. [REDACTED] received data from his team regarding the [REDACTED] team for the [REDACTED]. This included nonpublic Nightwing and Agency information pertaining to the design, architecture, staffing, objectives, and risks for every Agile Release Train to include all those noted in ACTS (such as [REDACTED] *See generally*, Ex. 14, Mar. 21, 2024 Letter to Nightwing; Ex. 15, Sept. 24, 2024 Letter to Nightwing; Ex. 16, Nightwing Mar. 28, 2024 Response; Ex. 24 Nightwing Sept. 27, 2024 Response; Ex. 25, DHS Email to Nightwing; Ex. 17, Nightwing Response.

**Mr. [REDACTED] Leaves DHS and Joins Leidos To Help With Its ACTS Proposal**

55. Through internet searches after the award announcement, Nightwing learned that Mr. [REDACTED] left CISA in [REDACTED] and joined Leidos as a [REDACTED] [REDACTED] days later. Ex. 10, [REDACTED] LinkedIn Profile.

56. Mr. [REDACTED] primary responsibility at Leidos is to assist the company with “[REDACTED],” which involves strategy, analysis, advice, drafting, reviewing Leidos’ proposals to the Government, including—on information and belief—the ACTS procurement. In this regard, on or about February 14, 2024, Mr. [REDACTED] LinkedIn profile stated that Mr. [REDACTED] is “currently” responsible for “[REDACTED] [REDACTED].” Ex. 10, [REDACTED] LinkedIn Profile, “About” Screenshot.

57. As a Leidos employee responsible for billion-dollar cybersecurity “capture and proposals” for DHS procurements, Mr. [REDACTED] self describes his duties as including

participating in “[REDACTED]  
[REDACTED].”

Ex. 10, [REDACTED] LinkedIn Profile. Mr. [REDACTED] LinkedIn has repeatedly touted his Leidos cybersecurity procurement capture successes, including his successes in securing procurements conducted by his former government employer, DHS. Ex. 12, [REDACTED] LinkedIn Activity at 1 (posting an announcement that DHS had awarded a [REDACTED]

[REDACTED] and also posting about his other business capture successes).

**Nightwing’s Agency-Level Protest: Nightwing Raises Leidos’ Unfair Competitive Advantage to DHS, But DHS Refuses to Address the Merits of the Allegations**

58. On February 21, 2024—mere days after discovering Leidos’ unfair competitive advantage—Nightwing<sup>7</sup> pursued an agency-level protest challenging DHS’ award to Leidos. Ex. 13, Feb. 21, 2024 Agency Protest. Nightwing challenged DHS’ evaluation of Nightwing’s proposal under Factor 3: Technical Approach Factor, Factor 5: Oral Presentations, Factor 6: Past Performance, Factor 7: Cost/Price; Leidos’ ineligibility for award owing to the disqualifying unfair competitive advantage that it gained from Mr. [REDACTED] involvement in the ACTS procurement and its unavailable key personnel; and DHS’ flawed best value determination. *Id.*

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<sup>7</sup> Though Raytheon is listed as the protester in the agency-level protest, Nightwing—as stated above—is Raytheon’s complete successor in interest, as DHS acknowledged in its decision. *See* Ex. 18, DHS Protest Decision at 2.

59. Over the course of the next ten and a half months, DHS asked Nightwing to provide information regarding Mr. [REDACTED] that was already in DHS' possession and which it was in the best position to gather. In a March 21, 2024 letter, DHS asked *Nightwing* to identify the internal CISA nonpublic information to which Mr. [REDACTED] had access. *See* Mar. 21, 2024 Letter to Nightwing. DHS also asked Nightwing to provide emails that Mr. [REDACTED] sent or received from his government email account while he was a government employee. *Id.* In a September 24, 2024 letter, DHS asked Nightwing to identify companies that Mr. [REDACTED] had contacted regarding the ACTS procurement. Ex. 15, Sept. 24, 2024 Letter to Nightwing.

60. Nightwing endeavored to provide DHS with as much information as possible, all while noting that DHS—not Nightwing—was in the best position to access these important files. For example, Nightwing noted in its response to DHS' March 21, 2024 letter:

[T]he imbalance in access to the underlying facts surrounding Mr. [REDACTED] access to information while employed at the Agency also necessitates that the Government perform its own fulsome investigation into [Nightwing]'s allegations. While we have provided some examples of Mr. [REDACTED] access to nonpublic competitively useful information, *only DHS has unfettered access to Mr. [REDACTED] calendar, his email, and the Agency's internal IT system for purposes of assessing the true extent of Mr. [REDACTED] access.* In short, [Nightwing] is at a significant informational disadvantage with respect to the relevant information as [Nightwing] is privy to only a subset of the type of information to which Mr. [REDACTED] had access.

Ex. 16, Nightwing Mar. 28, 2024 Response at 2.

61. In providing copies of emails requested by DHS, Nightwing again stressed that the emails it was providing were “but one example of the numerous sources of nonpublic competitively useful information to which Mr. [REDACTED] had access. . .” *Id.* at 12 (emphasizing that “the citation of particular documents in [Nightwing]'s protest served as examples, not



exhaustive listings, of the nonpublic competitively useful information Mr. [REDACTED] possessed).

In Nightwing’s October 3, 2024 response to DHS’ additional follow up questions, Nightwing noted that the information Nightwing had provided—by itself—presented sufficient hard facts to demonstrate that Leidos benefitted from an unfair competitive advantage by virtue of Mr.

██████ involvement. Ex. 17, Nightwing Oct. 3, 2024 Response. Nightwing also highlighted that it was the Contracting Officer’s nondelegable responsibility to conduct a fulsome investigation, which should have included identifying relevant Government officials who should be interviewed and collaborating with the Government’s IT administrators “to determine which DOMino and ACTS documents Mr. ██████ had access to by virtue of his IT permissions and network access.” *Id.* at 2.

62. After more than ten and a half months, on January 6, 2025, DHS issued a decision denying, in part, and dismissing, in part, Nightwing's challenges. Ex. 18, DHS Protest Decision.

63. Specifically, despite dozens of pages of hard evidence demonstrating the presence of an unfair competitive advantage, DHS summarily dismissed Nightwing’s unfair competitive advantage allegations. Rather than addressing any of the allegations on the merits, DHS’ decision instead relied on a GAO protest decision finding an unfair competitive advantage allegation untimely in circumstances completely different than those here. *See* Ex. 18, DHS Protest Decision at 24.<sup>8</sup> After several paragraphs discussing DHS’ conclusion that the unfair

<sup>8</sup> DHS’ protest decision relied primarily upon GAO’s decision in *General Dynamics Info. Tech. Inc.*, B-417616.4, March 31, 2020, 2020 CPD ¶ 132, where ***prior to the solicitation closing date***, the protester notified the agency of its concerns regarding Leidos’ hiring of a former government employee who possessed inside information. However, despite knowing all the facts giving rise to an unfair competitive advantage allegation, the protester failed to include

competitive advantage allegations were untimely, the decision included a single sentence asserting—without any explanation and without addressing the numerous hard facts demonstrating the existence of an unfair competitive advantage—that DHS had not identified an unfair competitive advantage:

[T]he Contracting Officer has conducted an investigation of the allegation and has concluded in a separate determination and findings memorandum that Leidos did not have an unfair competitive advantage.

*Id.* at 25.

64. This protest follows.

## V. CAUSES OF ACTION

### **COUNT I: DHS Acted in an Arbitrary and Capricious Manner by Failing to Disqualify Leidos Based Upon the Unfair Competitive Advantage It Gained By Employing Former DHS CISA IT Specialist, [REDACTED]**

65. Nightwing realleges and incorporates by reference the allegations contained in all of the preceding paragraphs.

66. DHS' award to Leidos was arbitrary and capricious because Leidos' proposal was tainted by an impermissible unfair competitive advantage conflict. In particular, the conflict stems from the involvement of DHS' former CISA IT Specialist, [REDACTED], following his departure from DHS to support the Leidos capture and proposal team for the same program he oversaw while at DHS.

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those allegations in its post-award protest, and instead waited to raise its allegations in a supplemental protest. However, the facts in *General Dynamics Info. Tech.* bear no similarity whatsoever to the situation here, where Nightwing did not discover the facts giving rise to its unfair competitive advantage allegations until after award. Indeed, all of the cases DHS cites in support of its dismissal are irrelevant and inapplicable here.

67. As discussed above, Mr. [REDACTED] had, by virtue of his government position, extensive access to, and knowledge of non-public, competitively useful information regarding the ACTS procurement, the incumbent DOMino procurement, and Nightwing's performance of the incumbent DOMino contract.

68. Mr. [REDACTED] left DHS and became an employee with Leidos, where he assisted Leidos with its proposal and business capture of the ACTS procurement. Mr. [REDACTED] involvement provided Leidos with an unfair competitive advantage in this procurement.

69. A guiding principle of procurement law, as reflected in the decisions of both the Courts and GAO, is the obligation of contracting agencies to avoid even the appearance of impropriety in government procurements. *See* FAR 3.101-1; *NKF Eng'g v. United States*, 805 F.2d 372, 377 (Fed. Cir. 1986); *Health Net Fed. Servs., LLC*, B-401652.3, B-401652.5, 2009 CPD ¶ 220. In this regard, where an offeror may have gained an unfair competitive advantage through its hiring of a former government official, the offeror can be disqualified from a competition based on it obtaining an "unfair competitive advantage." *NKF Eng'g*, 805 F.2d at 377; *Health Net Fed. Servs.*, B-401652.3, *supra*. Indeed, the Federal Circuit has emphasized that even just the "appearance of impropriety" alone is sufficient to disqualify an offeror. *NKF Eng'g*, 805 F.2d at 377.

70. The Court has noted that, "it is generally recognized that 'the unfair competitive advantage analysis stemming from a firm's use of a former government employee is virtually indistinguishable from the concerns and considerations that arise in protests where there is an allegation that a firm has gained an unfair competitive advantage arising from its unequal access to information as a result of an organizational conflict of interest [OCI].'" *A Squared Joint*

*Venture v. United States*, 136 Fed. Cl. 321, 330 n.6 (2018) (quoting *Health Net Fed. Servs.*, B-401652.3, *supra* and citing FAR 9.505).

71. To resolve an allegation of an unfair competitive advantage under these circumstances, the Court considers whether the former government employee had access to competitively useful, nonpublic information and the opportunity to use that information to benefit its new employer. *See CACI, Inc. v. United States*, No. 23-324C, 2023 WL 4624485, at \*1 (Fed. Cl. July 20, 2023) (citing *Serco, Inc.*, B-419617.2, B-419617.3, Dec. 6, 2021, 2021 CPD ¶ 382). In situations where the former government employee had access to such information and the opportunity to use it, the Court “assume[s] that the offeror benefited from the information . . . disqualification is appropriate based on the appearance of an unfair competitive advantage alone.” *Id.* (quoting *Serco*, B-419617.2, *supra*) (cleaned up).

72. To show a Contracting Officer’s OCI determination lacked a rational basis under the APA’s arbitrary and capricious standard, mere suspicion and innuendo are not enough. Rather, “hard facts” are required. *Michael Stapleton Assocs.*, 163 Fed. Cl. 297, 315–16. However, “[h]ard facts do not need to show an actual conflict—a potential conflict can be sufficient.” *Id.*

73. The Court has stressed that “hard facts can (and . . . do) include evidence of information access and participation in prior competitions.” *CACI*, 2023 WL 4624485, at \*1; *Trace Sys. Inc. v. United States*, 165 Fed. Cl. 44, 59 (2023) (finding “hard facts” based on evidence of information access by former official hired by contractor, even without specific evidence the former official provided that information to contractor); *Michael Stapleton Assocs.*, 163 Fed. Cl. at 322–23 (relying on documentation of an individual’s prior access to information

and participation in competition as hard facts); *NetStar-I Gov't Consulting v. United States*, 101 Fed. Cl. 511, 520 (2011) (finding “hard facts” based on documented access by contractor’s employees to information), *aff’d*, 473 F. App’x 902 (Fed. Cir. 2012); *see also NKF Eng’g*, 805 F.2d at 372 (overturning lower court’s holding that appearance of impropriety, alone, is not a sufficient basis to disqualify an offeror, and finding that agency reasonably decided to disqualify offeror based on the appearance of impropriety where the offeror had hired a former government employee with knowledge of contractor proprietary information and source selection sensitive information).

74. Moreover, only an ***opportunity*** to influence the proposal is required to establish the predicates of an unfair competitive advantage cause of action. The Court will presume the existence of an unfair competitive advantage where an offeror possesses competitively useful non-public information that would assist that offeror in obtaining a contract, without the need for further inquiry into whether that information was actually used by the offeror in preparing its proposal. *See NetStar-I*, 101 Fed. Cl. at 511 (enjoining DHS procurement where awardee had significant potential OCI from unequal access to information and finding that the contracting officer’s delayed identification of the potential OCI was unacceptable); *Point Blank Enters., Inc. v. United States*, No. 23-913, 2023 WL 8785820, at \*9 (Fed. Cl. Aug. 29, 2023); *see also Threat Mgmt. Grp.*, B-407766.5, Mar. 28, 2013, 2013 CPD ¶ 84; *Health Net Fed. Servs.*, B-401652.3, *supra*.

75. In this regard, the Court has specifically stated that “a protestor need not show that the persons who drafted an offeror’s proposal were actually in possession of proprietary information as a result of their employees’ work for the agency, but merely must show that the

information was accessible to those employees and that the potential OCI created by that access has not been avoided or adequately mitigated.” *NetStar-1*, 101 Fed. Cl. at 529.

76. The Court noted in *NetStar-1* that a protester also need not “show that the information possessed by its competitor specifically benefited the latter’s proposal” as “[t]hat too is presumed.” *Id.* (citing *ARINC Eng’g Servs., LLC v. United States*, 77 Fed. Cl. 196, 203 (2007)); *Ktech Corp.*, B-285330, B-285330.2, Aug. 17, 2002, 2002 CPD ¶ 77 (finding OCI present where contractor had access to confidential information of the protestor and “may have used that information to enhance its capabilities”).

77. Hard facts demonstrate that Leidos benefitted from an unfair competitive advantage here. As discussed above, by virtue of his positions at DHS, Mr. [REDACTED] had extensive access to a wide range of nonpublic, competitively useful information that was relevant to, and beneficial in, Leidos’ pursuit of the ACTS procurement. That information included, but was not limited to:

- Numerous types of information about Nightwing’s proprietary approach to performing the DOMino contract, including nonpublic proprietary staffing information and Nightwing’s highly proprietary Staffing Spreadsheets, which included information about Nightwing’s approach to staffing the incumbent contract;
- Nightwing’s highly proprietary cost burn rate data [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] Nightwing provided these types of documents to the Government on a weekly basis and Mr. [REDACTED] had access to them throughout his time as the [REDACTED] PM;
- Information in Nightwing’s CRs, which were sent to Mr. [REDACTED] for review and approval, and collectively provided

Mr. [REDACTED] with proprietary information about Nightwing's Technical Approach, staffing, and pricing under the incumbent DOMino contract;

- Extensive information gained through Mr. [REDACTED] participation in DOMino Incremental Design Reviews, which included a review of all products and services provided by Nightwing under the incumbent contract. *See* July 30, 2021, email (demonstrating Mr. [REDACTED] engagement with Incremental Design Review, which included nonpublic information regarding the architecture views of the system);
- A wealth of nonpublic technical performance information about the DOMino contract. For example, Mr. [REDACTED] management of the [REDACTED] meant that any and all architectural changes under the [REDACTED] program—including those made under the DOMino contract – were within his purview. Mr. [REDACTED] also managed the [REDACTED] and assigned tasks to each team under the [REDACTED] umbrella—including the DOMino team. This provided Mr. [REDACTED] with nonpublic insight into the details of the program that were not available to, or known by, the public;
- Information about the Agency's priorities of development efforts (including those under the DOMino and ACTS contracts), as well as nonpublic discussions regarding the types of resources and skills needed to execute work under [REDACTED] program and the DOMino contract;
- Information about nonpublic aspects of the [REDACTED] program and the DOMino contract, including Agency priorities and preferences for the performance of these contracts;
- Nightwing's nonpublic proprietary information regarding the development and production environments for the [REDACTED] programs, as well as nonpublic CISA information regarding agency preferences and protocols gained in his role as Product Owner of development teams for these two [REDACTED]. This role provided Mr. [REDACTED] in-depth knowledge of the skills of specific individuals on the Nightwing DOMino teams (with insight into not just Nightwing's capabilities, but also the particular individuals that Nightwing was likely to propose under the ACTS procurement); and

- Mr. [REDACTED] work in prioritizing tasks on the [REDACTED] [REDACTED] gave him insight into proprietary information about Nightwing's staffing and management approaches and its technical solutions. (For example, as Nightwing noted to DHS, there is email evidence showing that Mr. [REDACTED] received data from his team regarding the [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] including nonpublic Nightwing and Agency information pertaining to the design, architecture, staffing, objectives, and risks for [REDACTED] [REDACTED] See generally, Ex. 14, Mar. 21, 2024 Letter to Nightwing; Ex. 15, Sept. 24, 2024 Letter to Nightwing; Ex. 16, Nightwing Mar. 28, 2024 Response; Ex. 24 Nightwing Sept. 27, 2024 Response; Ex. 25, DHS Email to Nightwing; Ex. 17 Nightwing Response (collectively discussing examples of Mr. [REDACTED] involvement with the incumbent DOMino contract and his access to nonpublic, competitively useful information in connection with this government role).

These are but representative examples of Mr. [REDACTED] ongoing, extensive, and all-encompassing access to competitively useful, nonpublic information. The records evidencing the extent of this access are within the possession of DHS and are not accessible by Nightwing.

78. All of this information would have been useful to Leidos in competing for the ACTS procurement. Significantly, the ACTS procurement is the follow-on to the DOMino contract. Thus, information about DOMino was extremely relevant to the ACTS procurement. Information about Agency needs, preferences, and priorities under DOMino and with respect to [REDACTED] generally, would have provided an offeror with a significant advantage in competing for ACTS. And information about the proprietary details of Nightwing's performance of the DOMINO contract would have been some of the most useful information available in competing for the follow-on contract.

79. Mr. [REDACTED] leveraged his access to this extremely relevant, competitively useful nonpublic information to benefit his new employer, Leidos, in the ACTS competition. In



this regard, Mr. [REDACTED] self-describes his role for Leidos as involving cybersecurity “[REDACTED] [REDACTED] work for DHS procurements. *See* Ex. 10, [REDACTED] LinkedIn Profile, “About” Screenshot. Moreover, there is no indication that Leidos proactively walled off Mr. [REDACTED] from the ACTS procurement to guard against the significant unfair competitive advantage he would afford to Leidos.

80. Mr. [REDACTED] role in the ACTS capture effort, which would have begun well in advance of the RFP release date in December 2022, and culminated with proposal submission in April and May 2023 provided Leidos with invaluable competitively useful nonpublic information that created an unfair competitive advantage. DHS should have disqualified Leidos from the ACTS competition based upon this pervasive unfair competitive advantage. *See NKF Eng’g*, 805 F.2d at 377; *CACI*, 2023 WL 4624485, at \*1.

81. Mr. [REDACTED] own words make clear that he had the opportunity to influence the Leidos proposal through his role “[REDACTED].” Through his role as a DHS cybersecurity proposal capture employee, Mr. [REDACTED] had extensive opportunity to utilize his wealth of inside knowledge about Nightwing to improve the Leidos proposal in countless ways, both in technical substance and cost competitiveness. Indeed, Mr. [REDACTED] contribution of directly relevant nonpublic, competitively useful information was able to provide Leidos with [REDACTED] [REDACTED]. The impact of Mr. [REDACTED] direct personal involvement in Leidos’ proposal capture effort for the ACTS procurement cannot be overstated.

82. Yet, DHS did nothing to avoid, neutralize, or mitigate Leidos' unfair competitive advantage. Indeed, even after Nightwing raised the unfair competitive advantage in its agency-level protest and provided extensive documentation regarding Mr. [REDACTED] access to nonpublic, competitively useful information, DHS still failed to properly address this problem, instead dismissing Nightwing's protest ground as purportedly untimely and summarily stating there was no unfair competitive advantage, contrary to the extensive evidence to the contrary.

83. DHS' failure to reasonably investigate and address the unfair competitive advantage gained by Leidos was arbitrary and capricious. *See Am. K-9 Detection Servs., LLC v. United States*, 155 Fed. Cl. 248 (2021); *Michael Stapleton*, 163 Fed. Cl. at 297.

**COUNT II: DHS' Evaluation of Nightwing's Technical Proposal Was Arbitrary and Capricious**

84. Nightwing realleges and incorporates by reference the allegations contained in all of the preceding paragraphs.

85. The Court reviews agency evaluations under the "arbitrary and capricious" standard prescribed by the Administrative Procedure Act. While this standard is deferential, the Court will set aside an evaluation where 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." *Goodwill Indus. of S. Fla., Inc. v. United States*, 162 Fed. CL 160, 187 (2022) (quoting *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 658 (2007)).

86. "[A]n agency must evaluate an offeror's proposal based on the criteria set out in the solicitation." *Tetra Tech., Inc. v. United States*, 137 Fed. Cl. 367, 383 (2017); *Gentex Corp.*

*v. United States*, 58 Fed. Cl. 634, 652 (2003) (“as this Court has recognized, ‘making offerors aware of the rules of the game in which they seek to participate is fundamental to fairness and open competition’”) (quoting *Dubinsky v. United States*, 43 Fed. Cl. 243, 259 (1999)). In doing so, the Government has a duty to read proposals reasonably, and not to exalt form over substance in the evaluation. *Safeguard Base Operations, LLC v. United States*, 144 Fed. Cl. 304, 351 (2019), *aff’d*, 989 F.3d 1326 (Fed. Cir. 2021).

87. DHS’ evaluation of Nightwing under the Technical Approach factor was arbitrary and capricious because [REDACTED]

[REDACTED].

88. These errors prejudiced Nightwing. But for them, Nightwing would have had a substantial chance of receiving the award.

[REDACTED]

89. The RFP did not require [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]  
[REDACTED]  
[REDACTED] [REDACTED] [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED]  
[REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED]  
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[REDACTED]

[REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED]  
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[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

[REDACTED]  
[REDACTED]

[REDACTED]

Ex. 9, Technical Consensus Report at 6–8, 12–15 (emphases added).

90. The central focus of [REDACTED] was [REDACTED]

[REDACTED]

91. Offerors are not expected or required to parrot back language from the solicitation. *See Sci. Applications Int’l Corp. v. United States*, 108 Fed. Cl. 235, 259 (2012) (finding that a proposal which merely copied the contract requirements failed to adequately describe a process for meeting cost controls). Even the Government cannot just parrot back its findings. *See Serco Inc. v. United States*, 81 Fed. Cl. 463, 497 (2008) (“[T]he decisional law demonstrates, obliges the agency to do more than simply parrot back the strengths and weaknesses of the competing proposals”). Nothing in the Solicitation required offerors to repeat back to the Agency [REDACTED]. But DHS [REDACTED].

[REDACTED]

92. In each of the [REDACTED], the Agency acknowledged that Nightwing’s proposal set forth its approach to meeting the RFP requirement—the Agency’s only complaint was that the proposal failed to parrot back [REDACTED].

93. The assignment of [REDACTED] was arbitrary and capricious for several reasons. First, the RFP did not require [REDACTED]

[REDACTED]

[REDACTED] Therefore, [REDACTED] constitutes an unstated evaluation criterion. *See Samsara Inc. v. United States*, 169 Fed. Cl. 311, 319 (2024) (finding evaluation arbitrary and capricious where agency applied unstated evaluation criteria [REDACTED]); *eSimplicity, Inc. v. United States*, 162 Fed. Cl. 372, 379 (2022) (finding elimination of proposal arbitrary and capricious where agency applied criterion not identified in the solicitation).

94. Second, *even if* the RFP could be reasonably interpreted as requiring offerors to [REDACTED] DHS should have assigned, *at most*, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] constitutes an explanation for Nightwing’s technical evaluation rating that “runs counter to the evidence before the Agency.” *See Goodwill Indus. of S. Fla.*, 162 Fed. Cl. at 187; *Lab. Corp. of Am. Holdings v. United States*, 116 Fed. Cl. 643, 650 (2014); *see also Computer Scis. Corp., et al.*, B-408694.7 *et al.*, Nov. 3, 2014, 2014 CPD ¶ 331 n.11 (finding

[REDACTED]

[REDACTED]

evaluation unreasonable where agency “improperly double-counted, and greatly exaggerated the importance of subcriteria areas in the evaluation”); *J.A. Jones Mgmt. Servs., Inc.*, B-254941.2, Mar. 16, 1994, 94-1 CPD ¶ 244 (noting that “an agency may not double count, triple count, or otherwise greatly exaggerate the importance of any one listed factor,” [REDACTED]).

95. The Court has recognized that a plaintiff can demonstrate that a technical evaluation is arbitrary and capricious by establishing, for example, that the administrative record contradicts the agency’s decision in some objective way. *Barbaricum LLC v. United States*, 172 Fed. Cl. 186, 197 (2024) (citing *DZSP 21, LLC v. United States*, 139 Fed. Cl. 110, 118 n.9 (2018); *Allicent Tech., LLC v. United States*, 166 Fed. Cl. 77, 115 (2023)). Indeed, “[n]o matter how technical the field, if an agency rests its decision on finding that a proposal fails to mention ‘Item X,’ and if the proposal does in fact mention Item X, the agency has acted arbitrarily and capriciously because its conclusion is irrational.” *Id.* (citing *DZSP 21*, 139 Fed. Cl. at 118 n.9; *Allicent*, 166 Fed. Cl. at 115). In such situations, “[a] court can then set aside the agency action on that basis, even if it has absolutely no idea what Item X is, what it does, or why it is important. Courts evaluating agency action on technical subjects therefore look to whether the record contradicts the agency’s reasoning in ways that cannot be ascribed to the agency’s judgment or expertise.” *Id.*

96. That was the case with respect to [REDACTED]



[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Ex. 9, Technical Consensus Report at 15 (emphases added).

[REDACTED]

97. Regarding the [REDACTED] DHS concluded that [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

98. [REDACTED]

[REDACTED]

[REDACTED] For example, [REDACTED]

[REDACTED]

[REDACTED].

99. Nightwing also [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]  
[REDACTED] [REDACTED] [REDACTED]  
[REDACTED]

[REDACTED]  
[REDACTED]  
[REDACTED]

[REDACTED]  
[REDACTED]

*Id.*

100. In addition, Nightwing explained that, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

*Id.*

101. Nightwing further discussed [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

*Id.*

102. Nightwing also addressed [REDACTED]

[REDACTED]

[REDACTED]

*Id.* at 20 (emphasis added).

103. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].

104. In short, Nightwing’s proposal specifically discussed [REDACTED]

[REDACTED].

Therefore, [REDACTED] was arbitrary and capricious because it was inconsistent with the contents of Nightwing’s proposal. *See Barbaricum*, 172 Fed. Cl. at 197

[REDACTED]

105. Similarly, regarding the [REDACTED], DHS concluded [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].

106. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

107. Nightwing’s proposal provided [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

- [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]
- [REDACTED]  
[REDACTED]
- [REDACTED]  
[REDACTED]  
[REDACTED]

*Id.* at 21.

- Nightwing also provided [REDACTED]  
[REDACTED]  
[REDACTED]
  - [REDACTED]  
[REDACTED]
  - [REDACTED]
    - [REDACTED]  
[REDACTED]
  - [REDACTED]  
[REDACTED]  
[REDACTED]
- [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]
- [REDACTED]  
[REDACTED]  
[REDACTED]

[REDACTED]

108. In short, contrary to DHS’ finding, Nightwing’s proposal [REDACTED]

[REDACTED]

[REDACTED] Thus, DHS’ conclusion that Nightwing [REDACTED]

[REDACTED] Ex. 9, Technical Consensus Report at 15, is contradicted by the contemporaneous record, which demonstrates that [REDACTED]. As a result, this [REDACTED] was arbitrary and capricious. *See Barbaricum*, 172 Fed. Cl. at 197.

**COUNT III: DHS’ Evaluation of Cost Proposal Was Arbitrary and Capricious**

109. Nightwing realleges and incorporates by reference the allegations contained in all of the preceding paragraphs.

110. While agencies have discretion in selecting the methodology they will use to evaluate cost realism, the Court has stressed that “whatever methodology the agency chooses to employ must be reasonable.” *DigiFlight, Inc. v. United States*, 165 Fed. Cl. 588, 598–99 (2023) (citing *Westech Int’l, Inc. v. United States*, 79 Fed. Cl. 272, 286 (2007) (“While an agency’s cost realism analysis need not have been performed with ‘impeccable rigor’ to be rational, the analysis must reflect that the agency considered the information available and did not make ‘irrational assumptions or critical miscalculations’”)); *OMV Med., Inc. v. United States*, 219 F.3d 1337, 1344 (Fed. Cir. 2000) (same). DHS’ cost evaluation fails to meet that standard; rather, the cost realism evaluations of both Nightwing and Leidos were irrational and unsupported. As a result, DHS’ cost evaluations were unreasonable and cannot support the award decision.

[REDACTED]

**DHS' [REDACTED] Was Irrational**

111. Despite the unambiguous requirement that cost realism evaluations be rationally based, the debriefing revealed that the [REDACTED] were unsupported and irrational. As the incumbent, Nightwing had the most accurate knowledge among all of the offerors of what it would take to successfully perform the contract requirements. Nightwing relied upon this knowledge, along with an in-depth consideration of its own unique methods of performance, to submit an accurate and reliable cost proposal. However, the debriefing revealed that DHS [REDACTED].

112. In this regard, DHS' agency-level protest decision revealed further that, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

113. Significantly, there is no indication that DHS' cost realism analysis [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]



[REDACTED] Nor is there any indication that [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

114. DHS’ cost realism analysis entirely failed to consider an important aspect of the problem and is based upon an explanation for its decision that runs counter to the evidence before the Agency.

115. [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

**DHS’ Cost Realism Evaluation of Leidos’ Proposal was Irrational and Internally Contradictory**

116. The cost realism evaluation of Leidos’ proposal was also arbitrary and capricious.

117. In conducting an evaluation of realism, an agency’s analysis must consider the unique technical approaches proposed by each offeror. *See* FAR 15.404-1(d)(1) (“Cost realism analysis is the process of independently reviewing and evaluating specific elements of each offeror’s proposed cost estimate to determine whether the estimated proposed cost elements are .

[REDACTED]  
[REDACTED]

. . . consistent with the unique methods of performance and materials described in the offeror’s technical proposal”); *McConnell Jones Lanier & Murphy LLP v. United States*, 128 Fed. Cl. 218, 239 (2016) (noting that realism evaluations should “take into consideration the specific methods [the offeror] proposed to perform the contract” (quoting *Alcazar Trades, Inc.*, B-410001.4 *et al.*, Apr. 1, 2015, 2015 CPD ¶ 123)).

118. Here, DHS [REDACTED]. Yet the cost realism evaluation contradicts this conclusion—specifically, [REDACTED] the Agency’s most probable cost calculation [REDACTED] to Leidos’ cost proposal, and arriving at a [REDACTED]. These actions were internally contradictory and unreasonable: if the Agency believed that Leidos [REDACTED]. Yet under the Agency’s confounding cost realism [REDACTED]. This result is doubly irrational given that [REDACTED]. As a result, the cost evaluators plainly disregarded the requirement to ensure that the cost realism analysis for each offeror is “consistent with the unique methods of performance and materials described in the offeror’s technical proposal.” FAR 15.404-1(d)(1).

119. Although Nightwing raised these inconsistencies [REDACTED] in its agency-level protest, DHS declined to consider the merits of the

arguments, instead summarily dismissing the allegations ten and a half months after the protest was filed. Ex. 18, DHS Protest Decision at 22–23.

120. Nightwing was prejudiced by the cost realism errors because a flawed cost/price evaluation is prejudicial error. *See DigiFlight*, 165 Fed. Cl. at 604 (“[T]he agency was required to perform a price realism analysis under the terms of the RFQ and failed to do so in a manner that was rational (at least as can be observed by the documentation in the administrative record). Thus, under the above line of cases, this failure alone would be sufficient to show prejudice”).

**COUNT IV: Leidos’ Proposal Is Unawardable Due to the Unavailability of Its Key Personnel**

121. Nightwing realleges and incorporates by reference the allegations contained in all of the preceding paragraphs.

122. Under this Court’s jurisprudence, “when an offeror is obliged to make a change in the key personnel included in its proposal, the agency has a choice between evaluating the original proposal as submitted, or opening discussions to allow for modified proposals.” *Chenega Healthcare Servs., LLC v. United States*, 138 Fed. Cl. 644, 652 (2018). And if the agency evaluates the proposal as submitted—as DHS did here—it should be “rejected as technically unacceptable for failing to meet a material requirement[.]” *Id.* GAO likewise will sustain a protest where an awardee failed to advise the agency after final proposal submission that certain proposed key personnel were no longer available to staff the contract. *Gen. Revenue Corp., et al.*, B-414220.2 *et al.*, Mar. 27, 2017, 2017 CPD ¶ 106; *Greenleaf Constr. Co., Inc.*, B-293105.18, B-293105.19, Jan. 17, 2006, 2006 CPD ¶ 19 (same). At bottom, an agency cannot make an award to an offeror whose proposed key personnel are no longer available. *Ashlin*

*Mgmt. Grp.*, B-419472.3, B-419472.4, Nov. 4, 2021, 2021 CPD ¶ 357 (sustaining protest where awardee failed to notify agency that its key personnel became unavailable before award).

123. Here, the Solicitation required offerors to propose key personnel for thirteen positions, including, as relevant here, Chief Security Engineer. Ex. 6, ACTS Transition Planning TO PWS at 8 (Table 2); *see also* Ex. 20, Sample TO PWS at 40–41. The experience, education, certifications, skills, and technical expertise required for each key personnel position was described in the ACTS IDIQ PWS Attachment 2, LCATs.

124. The Solicitation required offerors to submit resumes for each key person identified in their proposals and signed letters of intent were required for each proposed key person who was not a current employee of the offeror or its subcontractors. *See* Ex. 5, RFP at 92. The RFP further provided that DHS would evaluate key personnel under Factor 4, Management Approach. *Id.* at 108.

125. DHS should have rejected Leidos’ proposal as unawardable because its Chief Security Engineer was unavailable, as evidenced by the fact that Leidos posted a job announcement nearly contemporaneously with the notice of award seeking to fill this key position:



Leidos Chief Cybersecurity Engineer Vacancy Announcement, Feb. 8, 2024.

126. Offerors were notified of the award to Leidos on or about February 6, 2024. *See* Ex. 7, Unsuccessful Offeror Notice. Within 48 hours of receiving this notice, Leidos posted its vacancy announcement in hopes of filling the key Chief Security Engineer position.

Original Posting Date:

2024-02-08

While subject to change based on business needs, Leidos reasonably anticipates that this job requisition will remain open for at least 3 days with an anticipated close date of no earlier than 3 days after the original posting date as listed above.

*Id.*

127. Although Leidos’ vacancy announcement did not specifically name the DHS ACTS program, the substance of the vacancy announcement demonstrates that this job posting is an attempt to fill the key personnel position of Chief Cybersecurity Engineer under the ACTS contract. For example, the announcement confirms that the position would be on Leidos’ “Federal Civil IT team” (*i.e.*, not DoD), and would be “supporting the cybersecurity program of

a federal agency.” *Id.* Moreover, consistent with the ACTS Solicitation requirement, Leidos required that applicants to this open position must have a Top-Secret Clearance, and the posting identified the place of performance as Arlington, Virginia—the primary location of performance for the ACTS contract. *See* Ex. 6, ACTS Transition Planning TO PWS at 8.

128. Because the individual that Leidos initially proposed to fill the Chief Security Engineer key position was no longer available prior to award of the ACTS contract, its proposal was unawardable. *Chenega*, 138 Fed. Cl. at 652; *see M.C. Dean, Inc.*, B-418553, June 15, 2020, 2020 CPD ¶ 206 (noting that where an offeror’s key personnel are unavailable, the agency must either reject the offeror’s proposal as technically unacceptable for failing to meet a material requirement or open discussions to permit the offeror to amend its proposal). Under these circumstances, DHS should have rejected Leidos’ proposal as technically unacceptable for failing to meet a material requirement of the ACTS Solicitation.<sup>9</sup>

#### **COUNT V: DHS’ Evaluation of Past Performance Was Arbitrary and Capricious**

129. Nightwing realleges and incorporates by reference the allegations contained in all of the preceding paragraphs.

130. Although agency past performance evaluations are entitled to deference, the Court will overturn them where they are irrational, inconsistent with the solicitation, or insufficiently documented in the contemporaneous record. *See Mgmt. & Training Corp. v. United States*, 161 Fed. Cl. 578, 595–99 (2022) (finding past performance evaluation was arbitrary and

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<sup>9</sup> Notably, the agency-level protest decision avoided addressing the merits of this allegation by claiming that this argument was untimely on the basis that Nightwing purportedly did not allege sufficient facts demonstrating that it only learned of the job posting within 10 days of the protest filing on February 21, 2024. Ex. 18, DHS Protest Decision at 25–26.

capricious where the agency reached irrational conclusions, failed to sufficiently document its analysis, and its evaluation was not consistent with the solicitation).

131. The RFP required that offerors identify recent and relevant contracts and request that the Point of Contact for each contract reference complete a PPQ evaluating the offerors' performance of that contract. *See* Ex. 5, RFP at 92. The RFP noted that, in addition to PPQs, “[t]he Government retains the right to further investigate Offeror’s past performance beyond the evaluation and experience forms submitted by the Prime or references by reviewing available sources such as the CPARS system.” *Id.* at 92.

132. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

*Id.* at 11–12 (emphasis added).

133. In accordance with the RFP’s instructions, Nightwing [REDACTED]

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

134. Significantly, [REDACTED]

[REDACTED]  
[REDACTED]  
[REDACTED]

135. However, the debriefing revealed that, [REDACTED]

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

136. [REDACTED]

[REDACTED].

[REDACTED]  
[REDACTED]



137. As an initial matter, there is no indication that DHS [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

138. In resolving Nightwing’s agency-level protest, DHS’ decision supplies additional details and information that did not appear to be included in the contemporaneous evaluation record. *See* DHS Protest Decision at 16–17. But as the Court has noted, it generally will not credit post-award explanations over the contemporaneous record. *See Rig Masters, Inc. v. United States*, 70 Fed. Cl. 413, 424 (2006) (“[M]aterials [that] do not relate to events that transpired *during the procurement process*” but instead “occurred only after the parties received notification that the [Government] had chosen a contractor,” are “post hoc rationalizations” that this Court will not review (emphasis in original)); *Fort Carson Support Servs. v. United States*, 71 Fed. Cl. 571, 591–92 (2006); *USfalcon*, 92 Fed. Cl. at 464; *Braseth Trucking, LLC v. United States*, 124 Fed. Cl. 498, 509 (2015). To the extent these explanations were not documented in the contemporaneous record, they cannot be supplied now to support DHS’ evaluation.

[REDACTED]

[REDACTED]

139. Moreover, *even if* DHS' [REDACTED] included in the contemporaneous evaluation record, [REDACTED] was nevertheless irrational because [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] rendered the Past Performance evaluation arbitrary and capricious.

140. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] For all of these reasons, DHS' evaluation of Nightwing's past performance was unreasonable.

[REDACTED]

[REDACTED]

**COUNT VI: DHS' Award Decision Was Irrational Because It Incorporated the Errors Above**

141. Nightwing realleges and incorporates by reference the allegations contained in all of the preceding paragraphs.

142. As the Court has noted, where “the ratings that provided the basis for the Agency’s tradeoff analysis and best value award were fundamentally flawed and arbitrary, the best value award itself [i]s arbitrary and capricious.” *Bayfirst Sols., LLC v. United States*, 102 Fed. Cl. 677, 695 (2012); *Huntsville Times Co. v. United States*, 98 Fed. Cl. 100, 119 (2011) (finding that errors in the evaluation were “enough to significantly compromise the award decision produced by the SSA”). That was the case here.

143. As discussed in the preceding Counts, DHS’ evaluation of Nightwing’s proposal was arbitrary and capricious. The cumulative effect of these errors irreparably taints the final award decision. Indeed, in light of the numerous errors, it was infeasible for the Agency to reach a rational best value decision, and DHS’ award to Leidos cannot stand. *Samsara*, 169 Fed. Cl. at 330 (finding that the cumulative effect of the agency’s material evaluation improprieties resulted in a similarly flawed and prejudicial best value determination).

144. Nightwing was clearly prejudiced by these evaluation errors. To establish prejudice, a plaintiff must show that “but for the alleged error, there was a substantial chance that [it] would receive an award—that it was within the zone of active consideration.” *Samsara*, 169 Fed. Cl. at 330 (quoting *Allied Tech. Grp., Inc. v. United States*, 649 F.3d 1320, 1326 (Fed. Cir. 2011)); *Statistica, Inc. v. Christopher*, 102 F.3d 1577, 1581 (Fed. Cir. 1996). Nightwing meets that burden.

145. Here, not only are the final evaluation ratings unsupported and Leidos' most probable cost is unrealistic, but DHS' pervasive failure to follow the stated evaluation criteria so seriously undermines the evaluation outcome such that it is impossible to predict the competitive position of *any* of the offerors in this procurement had the errors not occurred. But for these errors, the entire course of this procurement would have changed. *See FFL Pro LLC v. United States*, 124 Fed. Cl. 536, 561–62 (2015) (“Thus, a different evaluation under this factor might affect the results of the contracting officer’s best value tradeoff analysis and, therefore, the award of the contract. . . . this error is prejudicial to plaintiff.”); *Centerra Grp., LLC v. United States*, 139 Fed. Cl. 407, 421 (2018) (finding that if proposals were properly evaluated, “a new, and necessarily revised, best value determination would have resulted[,]” thereby demonstrating prejudice). Under these circumstances, Nightwing has unquestionably been prejudiced. *See Bayfirst*, 102 Fed. Cl. at 965 (finding that protester demonstrated prejudice where revision of a flawed technical evaluation “could easily have [made the tradeoff between proposals] much closer than those erroneously produced by the TEP and endorsed by the SSA.”); *FFL Pro*, 124 Fed. Cl. at 561–62 (explaining that where the agency’s past performance evaluation was improper, its impact on the agency’s best value tradeoff was essentially unknown; thus, the protester demonstrated a substantial chance of award).

146. Moreover, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

But for the numerous errors in this procurement, Nightwing’s

proposal would have [REDACTED]

147. Conversely, Leidos' [REDACTED]

148. Moreover, if DHS had conducted a proper evaluation of Nightwing under the Past Performance Factor, it would have concluded that [REDACTED]

149. Finally, had DHS meaningfully considered the substantive UCA concerns pervading Leidos' proposal and the unavailability of one of its key personnel, Leidos would have been removed from this competition.

150. Accordingly, Nightwing has demonstrated that, but for DHS' evaluation errors, Nightwing had a substantial chance of being selected as the best value proposal in this procurement and was thus competitively prejudiced. Because the SSA did not correct these errors, but relied on them to make the award, that decision was unreasonable. *See Bayfirst*, 102 Fed. Cl. at 695; *Lab'y Corp. of Am. Holdings*, 116 Fed. Cl. at 653.

## VI. BASIS FOR INJUNCTIVE RELIEF

151. Nightwing realleges and incorporates by reference the allegations contained in all of the preceding paragraphs.

152. Given the fundamental flaws in DHS' procurement process and the irrationality of the award decision, permanent injunctive relief enjoining DHS from allowing Leidos to perform the contract is appropriate.

153. Injunctive relief is appropriate where (1) the moving party has demonstrated success on the merits of its claim; (2) the moving party will suffer irreparable harm in the absence of such relief; (3) the balance of harms weighs in favor of an injunction; and (4) an injunction is in the public interest. *See Centech Grp., Inc. v. United States*, 554 F.3d 1029, 1037 (Fed. Cir. 2009) (setting out multi-factor test for injunctive relief); *see also Kiewit Infrastructure W. Co. v. United States*, 147 Fed. Cl. 700, 712 (2020) (granting injunctive relief where plaintiff meets all four factors).

154. For all of the reasons detailed above, Nightwing will prevail on the merits of its protest. And as explained below, the remaining factors of the four-factor test all weigh in granting injunctive relief in favor of Nightwing.

### **Nightwing Will Be Irreparably Harmed in the Absence of an Injunction**

155. As this Court has consistently instructed, "a protester suffers irreparable harm if it is deprived of the opportunity to compete fairly for a contract" as the result of an arbitrary and unreasonable procurement process. *See Palantir USG, Inc. v. United States*, 129 Fed. Cl. 218, 291 (2016), *aff'd*, 904 F.3d 980 (Fed. Cir. 2018) (collecting cases). Here, absent an injunction, Nightwing will be irreparably harmed because it will forever lose the ability to fairly compete for

this seven-year multi-billion contract based on a fair and equal evaluation of proposals that was rational and consistent with the Solicitation's evaluation terms and procurement law.

### **The Balance of Harms Favors Injunctive Relief**

156. The balance of harms also favors Nightwing. Absent injunctive relief, Nightwing will be deprived of a fair opportunity to compete and gain valuable experience working with DHS. By contrast, DHS will still be permitted to obtain the required services through a fair procurement process, and any minimal harm it may suffer from delay is the consequence of its own arbitrary, capricious, and unlawful actions and are overcome by its own long-term interest in ensuring that the awarded contract represents the best overall value to the Government. *See, e.g., ANHAM FZCO v. United States*, 144 Fed. Cl. 697, 724 (2019). Moreover, any potential harms the DHS may allege were brought about by its own arbitrary, capricious, and unlawful actions and are overcome by its own long-term interest in ensuring that the awarded contract represents the best overall value to the Government. Similarly, Leidos will not be harmed by the imposition of an injunction because it has no right to perform an invalid and irrationally awarded contract.

### **The Public Interest Favors Injunctive Relief**

157. Finally, the public interest favors the granting of injunctive relief. The “public interest always favors the correct application of law, and more particularly, in the context of procurement statutes, the public interest always favors open and fair competition, and to that end, agency compliance with applicable regulations.” *Seventh Dimension LLC v. United States*, 160 Fed. Cl. 1, 35 (2022) (cleaned up); *see also AGMA Sec. Serv., Inc. v. United States*, 152 Fed. Cl. 706, 741 (2021) (“An important public interest is served for the government to conduct an ‘honest, open, and fair competition’ under the FAR, because such competition improves the

overall value delivered to the government in the long term.”). Government procurements should be administered in a fair and rational process, resulting in award decisions consistent with solicitation requirements and procurement law and regulations. *See, e.g., Bilfinger Berger AG Sede Secondaria Italiana v. United States*, 94 Fed. Cl. 389, 393 (2010). DHS’ improper award to Leidos was none of these things, rendering it arbitrary and capricious.

158. Here, the public interest self-evidently favors an open and fair competition. However, DHS undermined that public interest by awarding to Leidos, who is tainted by an unfair competitive advantage, and evaluating proposals in an irrational manner and contrary to the RFP’s terms. Because federal procurement law is intended to promote competition, “[t]he public interest in honest, open, and fair competition in the procurement process is compromised whenever an agency abuses its discretion in evaluating a contractor’s bid.” *CW Gov’t Travel, Inc. v. United States*, 110 Fed. Cl. 462, 496 (2013) (citation omitted). For this reason as well, the Court should issue an injunction.

## VII. PRAYER FOR RELIEF

159. For each and all of the foregoing reasons, Nightwing requests that the Court enter judgment in its favor and provide the following relief:

1. Declare DHS’ award to Leidos to be arbitrary, capricious, or otherwise an abuse of discretion and not in accordance with procurement law and policy;
2. Enjoin DHS from allowing Leidos to perform on the contract;
3. Declare Leidos ineligible for award due to its unfair competitive advantage and key personnel unavailability, and direct DHS to reasonably evaluate the remaining offerors’ proposals, and render a best value decision based on an evaluation conducted in accordance with the Solicitation; and
4. Grant any other such other relief as the Court may deem just and appropriate.



January 21, 2025

Respectfully submitted,

/s/ Daniel R. Forman \_\_\_\_\_

Daniel R. Forman  
(Counsel of Record)

Cherie J. Owen  
Issac D. Schabes  
Emily P. Golchini  
(Of Counsel)

CROWELL & MORING LLP  
1001 Pennsylvania Avenue, N.W.  
Washington, D.C. 20004  
Tel. (202) 624-2500  
Fax (202) 628-5116  
DForman@crowell.com

*Counsel for Nightwing Intelligence Solutions,  
LLC*